

1 LIFE LEGAL DEFENSE FOUNDATION
DANA CODY, CA SBN 173652
2 7653 Away Way
Citrus Heights, CA 95610
3 Telephone: (916) 727-4396

4 CATHERINE W. SHORT, CA SBN 117442
P.O. Box 1313
Ojai, CA 93024
5 Telephone: (805) 640-1940

6 LAW OFFICE OF ROBERT M. TAYLOR
ROBERT M. TAYLOR, CA SBN 33043
7 30942 Via Mirador
San Juan Capistrano, CA 92675
8 Telephone: (949) 481-6230

9 LAW OFFICES OF TERRY L. THOMPSON
TERRY L. THOMPSON, CA SBN 199870
10 P.O. Box 1346
Alamo, CA 94507
11 Telephone: (925) 855-1507
Facsimile: (925) 820-6034

12 Attorneys for Plaintiffs

13
14 SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ALAMEDA

15
16 PEOPLE'S ADVOCATE and NATIONAL
TAX LIMITATION FOUNDATION,

17 Plaintiffs,

18 v.

19 INDEPENDENT CITIZENS'
20 OVERSIGHT COMMITTEE, et al.,

21
22 Defendants.

CASE NO. HG05206766

PLAINTIFFS PEOPLE'S ADVOCATE
AND NATIONAL TAX LIMITATION
FOUNDATION'S REPLY TO
DEFENDANTS' POST TRIAL BRIEF

Action Filed: April 6, 2005
Trial Date: February 27, 2006
Department: 512
Judge: Bonnie Lewman Sabraw

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1 **I. INTRODUCTON**

2 To the bitter end, Defendants insist that the issue presented in this suit is “a pure question
3 of law.” Defendants Post Trial Brief (“DPB”) at 3:25-26. However, the case cited by Defendants
4 in support of its position merely states, “The construction and interpretation of the legislative
5 initiative *involved here* presents a pure question of law.” (*Honsickle v. Superior Court* (1999) 69
6 Cal.App.4th 756, 760, n. 6 (emphasis added).)

7 The issue of the constitutionality of the initiative statute **involved here** involves both
8 questions of law and fact, just as in the oft-cited case of *California Assn. Retail Tobacconists v.*
9 *State* (2003) 109 Cal.App.4th 792 (“*CART*”). As the Court stated in that case, “Whether an entity
10 is under the exclusive management and control of the state is determined through a case-specific
11 evaluation of the applicable legislative and executive controls.”

12 Throughout Defendants’ Post Trial Brief they focus on the CIRM, an agency created by
13 constitutional amendment that controls only three percent of the Proposition 71 bond funds and
14 which was not named by Plaintiffs People’s Advocate as a defendant They carefully sidestep the
15 real defendant in this case, the ICOC, which was created by statute, controls 97 percent of the
16 Proposition 71 funds and is outside of state management and control. Defendants repeatedly
17 attempt to divert the court’s attention to the peripheral administrative agency, the CIRM. (Act
18 requires CIRM to issue annual report and audit (DPB 6:28), the CIRM records are subject to the
19 Public Records Act, the CIRM is subject to the competitive bidding provisions of the Public
20 Contract Code, the CIRM is subject to the Political Reform Act (DPB 7:8-11), CIRM is a state
21 agency, CIRM is subject to external fiscal and political controls (DPB 13:5-8).)

22 Defendants continued the CIRM focus by referencing Walter Barnes’s testimony that
23 CIRM is subject to audit and that CIRM adopted a contracting policy consistent with state law.
24 (DPB 20:17-27) In introducing their argument defendants establish their theme by stating “Thus
25 before addressing whether the CIRM is under state control.....” (DPB 11:16). Defendants’
26 conclusion, however, baldly asserts that “In summary the evidence shows that the CIRM **and the**
27 **ICOC** are accountable to the public.....” (DPB 21:6-7) In so doing, the defendants ignore Mr.
28 Barnes’ deposition testimony as the most qualified person that the various contacts with state

1 agencies were in connection with the administrative structure of the CIRM, and not with the
2 ICOC or its grants. (Barnes depo, pp. 8-13, 17-18, 19-22, 24, 25, 30-32, 36-38) This testimony is
3 binding on the defendants.

4 The CIRM and the ICOC are two separate entities. The ICOC is outside the exclusive
5 management and control of the state. Whatever audit, oversight or laws the CIRM complies with
6 or whatever state government services the CIRM utilizes is immaterial to the case at bar. As noted
7 in Plaintiffs' Post Trial Brief "defendants wish the court to keep its eye on the hole and ignore
8 the donut."

9 **II. THE FACT THAT FUNDS ARE APPROPRIATED FOR A PUBLIC PURPOSE**
10 **DOES NOT NEGATE THE CONSTITUTIONAL REQUIREMENT THAT**
11 **THEY MAY ONLY BE DISBURSED BY AN ENTITY UNDER THE**
12 **EXCLUSIVE MANAGEMENT AND CONTROL OF THE STATE**

12 Defendants assert, contrary to case law stretching back a hundred years, that California
13 Constitution Article XVI, Section 3 "prohibits the appropriation of funds **only** when such funds
14 are for the benefit or purpose of the uncontrolled entity, rather than for the benefit or purpose of
15 the state." DPB at 11:10-12. Under defendants' construction of Article XVI, section 3, the state
16 can freely appropriate money directly to private schools, charities, and other institutions, as long
17 as such appropriations are to serve a public purpose. This is clearly not the law.

18 In *CART*, the court stated, "Whether an entity is under the exclusive management and
19 control of the state is determined through a case-specific evaluation of the applicable legislative
20 and executive controls." The appellate court then devoted ten pages of its decision to discussing
21 the specific legislative and executive controls applicable to the California Children and Families
22 Commission. Id at 818 – 828. Clearly, the court's inquiry was not limited to the purpose for
23 which the money was appropriated; indeed, the court did not even discuss the purpose in the
24 context of Article XVI, section 3. See also, *Board of Directors v. Nye* (1908) 8 Cal.App. 527,
25 532-533 (discussing applicable controls); *People v San Joaquin etc. Assoc.* (1907) 151 Cal. 797,
26 802-805 (same).

27 Defendants' contention that most cases addressing Article XVI, section 3 "rise or fall on
28 whether the funds are appropriated for a public purpose" (DPB at 11, n. 5) is simply false. The

1 primary reason the cases cited by defendants did not discuss the issue of state management and
2 control was that the entity to which the funds were appropriated was clearly a state agency or no
3 challenge was made to its status as a state agency. (See, e.g., *Daggett v. Colgan* (1891) 92 Cal.
4 53, 56 (“it appears from the act itself that the appropriation is to be expended by the state itself,
5 disbursed by its own agents or officers”); *California Housing Finance Agency v. Elliott* (1976) 17
6 Cal.3d 575 (bond money appropriated to California Housing Finance Agency).)

7 The issue remains, as it has since the beginning of the litigation, whether “even if a
8 legitimate public purpose existed for the expenditure of taxpayer funds,” those funds are
9 expended only “on programs and services for which the state retain[s] the ability to manage and
10 control the delivery of those programs and services.” *CART*, 109 Cal.App.4th at 816.¹

11 **III. THE ICOC IS NOT UNDER THE EXCLUSIVE MANAGEMENT AND** 12 **CONTROL OF THE STATE**

13 **A. All ICOC Members Are Not Appointed By Elected Officials**

14 In keeping with its practice throughout this litigation, defendants are attempting to divert
15 Plaintiffs’ claims and arguments into channels leading away from the issues in this case. Thus,
16 Defendants assert, “The evidence showed that ICOC members are all appointed by public
17 officials and are themselves public officials.” (DPB at 14, l. 1-2) However, the applicable
18 standard is not appointment only by *public* officials, but appointment only by *elected* officials.
19 “Only elected officials can appoint the members of the commission, and membership of the
20 commissions must include public officials. Consequently, the commissioners are either directly or
21 indirectly accountable to the people.” *CART*, 109 Cal.App.4th 822 (citing *Howard Jarvis*

22
23 ¹ Defendants argue, one more time, that even if there were a conflict between Proposition 71 and
24 Article XVI, section 3, Proposition 71 would prevail because of its addition of Article XXXV to
25 the state constitution. (DPB at 21, n. 9) As Plaintiffs have pointed out before, Article XXXV
26 created only the CIRM, not the ICOC. Article XXXV did not repeal Article XVI, section 3, either
27 in whole or in part. The law shuns repeal by implication. *Board of Supervisors v. Lonergan*
28 (1980) 27 Cal.3d 855, 868. “So strong is the presumption against implied repeals that when a new
29 enactment conflicts with an existing provision, ‘In order for the second law to repeal or supersede
30 the first, the former must constitute a revision of the entire subject, so that the court may say that
31 it was intended to be a substitute for the first.’” *Id.* (Citation omitted).

1 *Taxpayers' Assn v. Fresno Metropolitan Projects Authority* (1995) 40 Cal. App.4th 1359, 1388)
2 *See also, Daggett, supra*, 92 Cal. at 54 (members of commission all appointed by governor); *Nye,*
3 *supra*, 8 Cal.App. at 532 (directors all appointed by governor); *San Joaquin, supra*, 151 Cal.App.
4 at 802 (members all appointed by governor). It is this direct link to elected officials that provides
5 the necessary public accountability for bodies exercising governmental powers by delegation.²

6 As for the ICOC membership including public officials, defendants repeat their same
7 tautology that the members of the ICOC, as well as their delegates, are all “public officials” by
8 virtue of being on the ICOC, taking the oath of office, and filing a Form 700. This is not what the
9 court in *CART* meant when it said that “membership of the commission must include public
10 officials.” (109 Cal.App.4th at 822.) In expanding on the appointment criteria and accountability
11 of the members of the CFFC, the court stated, “Of the seven members of the CFFC, the Governor
12 appoints three (including the chairperson), the Speaker of the Assembly appoints two, and the
13 Senate Rules Committee appoints the remaining two. . . . One of the Governor’s appointees to the
14 CFFC must be either a county health officer or a county executive, and the Secretary of the
15 Health and Human Services Agency, and the Secretary for Education, or their designees, serve as
16 ex officio nonvoting members. . . . County commissions must include a member of the board of
17 supervisors and two county officers who work in health or human services.” (Id. at 822 – 23)
18 (citations omitted).

19 From this detailed listing of the public employees and officials whose membership was

20
21 ² Striking out wildly, defendants contend that “ultimately, plaintiffs made clear that this is not
22 really an Article XVI, section 3 challenge at all,” because plaintiffs cited *Jarvis* and *Bayside*
23 *Timber Co. v. Board of Supervisors* (1971) 20 Cal.App.3d 1. These cases involve, respectively,
24 Article XI, section 11 and unconstitutional delegation of legislative power. (DPB at 13 n. 6) The
25 common legal principle between all these constitutional provisions, recognized by the appellate
26 court in *CART* in its citations to *Jarvis*, is that the constitution limits the extent to which
27 traditional governmental functions may be delegated, and delegations are circumscribed by the
28 requirements of public accountability in various formulations. The authority to make rules with
29 the force and effect of laws may be delegated only after the “truly fundamental issues” have been
30 resolved by the legislature and only if accompanied by “safeguards adequate to prevent its
31 abuse.” *Bayside Timber*, 20 Cal.App.3d at 11. The authority to levy taxes may not be delegated
to a “private body.” Article XI, section 11; *Jarvis*. The broadest restriction on delegation of a
traditional governmental function is found in Article XVI, section 3, which prohibits more than
appropriations to “private bodies” and requires more than “adequate safeguards.” Rather, it
prohibits appropriations to any entity “not under the **exclusive** management and control of the
state.”

1 required on the commissions, it is clear that when the court in *CART* said that the commissions
2 “must include public officials,” it was referring to individuals who were already acting as public
3 officials in some capacity. It was not engaging in the circular reasoning urged by defendants of
4 considering the requirement of membership by public officials to be met simply by deeming all
5 members to be public officials because they take the oath of office to serve on the commission.

6 **B. ICOC Alternates Are Beyond The Reach Of Public Accountability Because The**
7 **Public Has Neither The Power To Choose Them Not The Power To Remove Them**

8 Defendants further reveal their lack of understanding of the concept of public
9 accountability when they say that, because the alternates take the oath of office and file Form
10 700, they “are therefore public officials and publicly accountable to the same extent as ICOC
11 members themselves.” (DPB at 16, l. 15-16.) Public accountability is not created out of thin air by
12 the oath of office and a form. Rather, public accountability arises from the ability of the people to
13 choose, and remove, those who govern them: “the people choose who occupies positions of
14 public trust or the people choose those who choose individuals to occupy positions of trust. Either
15 way there is accountability to the people. . . . Likewise, the essence of that accountability includes
16 the right to remove.” *Jarvis*, 40 Cal.App.4th at 1388. The assertion that appointees of appointees
17 of appointees, on indefinitely, are all equally accountable to the people is simply wrong.

18 Defendants also engage in poor math and worse logic in asserting that, because no
19 meeting of the ICOC has been attended by more than five alternates and no meeting has been
20 attended by fewer than 19 members and alternates, “participation of alternates was never
21 determinative in any meeting of the ICOC.” (DPB at 16:16-19.) First of all, the mere presence of
22 the alternates has maintained a quorum for purposes of conducting ICOC business. Second, one
23 would have to look at every vote taken by the ICOC to determine whether the votes of alternates
24 ever were determinative. Most importantly, however, as defendants have unceasingly reminded
25 the court, this lawsuit is not challenging the validity of any particular action of the ICOC. Rather,
26 it is challenging the constitutionality of the ICOC itself, as a body outside the exclusive
27 management and control of the state. The fact that seventeen members may choose alternates to
28 serve in their place, the fact that nine members have done so, the fact that five members have

1 done so frequently – these are the facts that demonstrate the lack of public accountability and
2 exclusive state management and control.

3 As discussed in Plaintiffs’ Trial Brief, the lack of controls over who serves on the ICOC,
4 for how long, and under what restrictions is unique in California history. There is no other board,
5 agency, or commission like it. Indeed, Defendant Westly himself told the ICOC, “Again, we’re
6 creating history here. We’re doing something fundamentally different.” (DX 149 at p. 86.)
7 Defendants cannot paper over, literally, the novel lack of public accountability found in the ICOC
8 structure with a sheaf of Form 700’s.

9 **C. Twenty-Seven Of The Twenty-Nine Members Of The ICOC Are Appointed To**
10 **Act As Representatives Of Institutions Or Special Interests, Not On The Basis Of Their**
11 **Personal Qualifications**

12 Defendants dismissively wave away the fact that Proposition 71 refers to the ICOC
13 members as **representatives** of institutions and groups, saying that this “has no legal
14 significance.” (DPB at 14:10-11.) On the contrary, in construing the intent of the voters in
15 approving an initiative, “the court turns first to the words themselves for the answer.” *People v.*
16 *Jones* (1993) 5 Cal.4th 1142, 1146, citing *Brown v. Kelly Broadcasting Co.* (1989) 48 Cal.3d 711,
17 724. Defendants state that the members’ “legal status and duties are precisely what the Act
18 decrees, no more and no less.” (DPB at 14:12-13.) Precisely. The Act decrees that they are
19 representatives, and indeed, refers to “the **duties** of the ICOC member **as a representative** or
20 employee of” a disease advocacy organization, nonprofit academic research institution, or a life
21 science commercial entity.” (Section 125290.30(g)(2).) The fact that they are appointed by public
22 officials, even elected public officials, cannot cure the constitutional defect of appropriating
23 public funds to an entity composed of individuals representing other institutions and interests.

24 Defendants finally concede that members are appointed on the basis of “a type of
25 affiliation or an affiliation with a specified type of institution.” (DPB at 15:8-9.) As pointed out in
26 Plaintiffs’ Post Trial Brief, these are indeed “specified” types of institutions. In fact, the
27 institutional types are so narrowly “specified” that, e.g., there were just enough non-UC
28 California universities with medical schools and hospitals meeting all the criteria to fill the two
29 seats allotted, and barely more than that to fill the other two seats allotted to universities with

1 specified criteria. This concession on defendants' part is a far cry from its oft-repeated and
2 completely unfounded contention that the members are appointed "on the basis of their
3 qualifications as they relate to . . . stem cell research, administration of scientific and medical
4 research grants, management of multi-million dollar research grants, development of innovative
5 medical therapies, and disease advocacy." (DPB at 6:12-16) Had Proposition 71 intended the
6 appointments to be made on the basis of the individual qualifications of the appointees, it could
7 certainly have so provided, as it did for the criteria for chairperson.³ The criteria for chairperson,
8 with their emphasis on individual experience and expertise, provides a stark contrast to the
9 criteria for regular ICOC members. The latter are, as defendants now concede, based solely on
10 affiliation, not individual qualifications.

11 Citing Mr. Klein's testimony, defendants assert, "The evidence showed that the statutory
12 criteria for appointment to the ICOC do not limit the accountability of its members." (DPB at
13 15:15-16) Three sentences later, that assertion was modified to something considerably more
14 modest: "There was no evidence that the criteria stated in the Act . . . limit in any way their public
15 accountability." (DPB at 15:22-23)

16 In fact, Mr. Klein's testimony drove home the representative nature of the members'
17 position on the ICOC. When asked about the importance of having executive officers of UC
18 campuses on the ICOC, Mr. Klein responded that those five campuses were specifically chosen
19 because they house the five medical schools in the UC system, and they have tremendous
20 repository of medical and scientific expertise, and are very highly competitive with each other so

21 ³ Section 125290.20(6)(A): Mandatory Chairperson Criteria

22 (i) Documented history in successful stem cell research advocacy.

23 (ii) Experience with state and federal legislative processes that must include some experience
24 with medical legislative approvals of standards and/or funding.

24 (iii) Qualified for appointment pursuant to Section 125281.03 (a) (3), (4) or (5).

24 (iv) Cannot be concurrently employed by or on leave from any prospective grant or loan recipient
25 institutions in California.

25 (B) Additional Criteria for Consideration:

26 (i) Experience with governmental agencies or institutions (either executive or board position).

26 (ii) Experience with the process of establishing government standards and procedures.

27 (iii) Legal experience with the legal review of proper governmental authority for the exercise of
28 government agency or government institutional powers.

28 (iv) Direct knowledge and experience in bond financing.

1 that they each have something individual to bring to the table.

2 When asked a similar question about other institutional members, Mr. Klein again stressed
3 their institutional qualities and perspectives -- research hospitals versus medical hospitals that are
4 part of a university versus research institutions like Salk or Burnham or Scripps that have
5 different individual perspectives.

6 Thus Mr. Klein himself acknowledged that what the Act does is bring together
7 **institutions**, which bring their individual **institutional** perspectives to the ICOC table. The
8 members merely serve as conduits for those institutional perspectives.⁴

9 **D. It Is The Scientific Members Of The Grants Working Group, A Group**
10 **Completely Outside State Management And Control, That Effectively Decides Who Gets**
11 **The Grants**

12 Defendants state, correctly, that the parties stipulated that the ICOC disapproved for
13 funding one of the seventeen training grants recommended for funding by the Grants Working
14 Group. The parties also stipulated that the ICOC disapproved all nine training grants not
15 recommended for funding by the working groups. In other words, the Grants Working Groups is
16 batting .962.

17 In trial testimony, however, Mr. Klein claimed that the ICOC had changed 20 percent of
18 the recommendations of the Working Group. He noted, correctly, that the ICOC had eliminated
19 one application recommended for funding. He also claimed the ICOC had added an institution
20 that had not been recommended for immediate funding – a claim contrary to the facts stipulated
21 to by defendants and to the evidence in the record. (DX 315; DX 364 at 7:16 - 8:18
22 [summarizing working groups recommendations and ICOC awards]). Finally, Mr. Klein asserted
23 that, in a third case, “an entire category of quality, predoctoral fellowships were eliminated and
24 the numbers of postdoctoral fellowships was increased.” He then used those 3 alleged cases as the

24 ⁴ Defendants also reference the brief of the Cal Tech *amici*, (to which we continue to object)
25 describing the similarities between the National Institutes of Health peer review process and
26 Proposition 71. DPB at 15, n.7. Neither defendants nor the *amici* mention the critical difference
27 between the two structures. At the NIH, the advisory council, analogized to the ICOC here, is not
28 the final decision maker on grants. The final decision maker is the Secretary of Health and
29 Human Services, acting through the individual institute directors, who are public employees,
30 appointed by and able to be removed by the Secretary or President. 42 U.S.C. 284. The ICOC and
31 the Working Groups are, in fact, a decapitated form of the NIH structure, a body with the
accountable head missing.

1 numerator, the 16 grants awarded (rather than the total number of applications) as the
2 denominator, and by rounding up came to his 20 percent figure.

3 Not only are Mr. Klein's math and memory faulty, but he neglected to mention the reason
4 why the ICOC made the modifications in the one case he cited. At the ICOC meeting, CIRM staff
5 informed the ICOC that, after the Working Group meeting at which the recommendations on
6 training grants had been made, it was discovered that one institution did not actually have the
7 predoctoral program for which part of the grant had been awarded. Rather than reconvene the
8 Working Group, CIRM staff itself decided to recommend that the funding for the predoctoral
9 fellowships be eliminated, and that funding for an additional postdoctoral fellowship be added.
10 (DX 315 at 190:10 – 195:12) The ICOC adopted those recommendations. (DX 315 at 212:14 –
11 215:4)

12 Thus, contrary to the impression Mr. Klein attempted to create of the ICOC in this
13 instance exercising its independent judgment to modify a recommendation of the Working
14 Group, the episode boiled down to the ICOC following the recommendation of the CIRM staff as
15 to how to deal with newly-discovered information that had not been available to the Working
16 Group.⁵

17 Defendants also contend that members have access to the complete grant applications.
18 This is contrary to repeated statements at ICOC meetings that members could not see the
19 applications, because they would then have to be made public. (See, e.g., PX 1117, pp. 120-21)⁶
20 Defendants now suggest that the ICOC may get access to the grant applications by going into
21 closed session. What defendants propose is quite simply a violation of the Act. Section
22 125290.50(f) states, "All records of the working groups submitted as part of the working groups'

23 ⁵ Mr. Klein's testimony about the ICOC's independence from the Working Groups on standards
24 is also unreliable. He testified, "There were a number of changes [to the standards] made at the
25 ICOC meeting." (2/28/06 transcript at 78:16-17) This is simply false. The ICOC made no changes
in the medical and ethical standards. (See DX 348 at pp. 78-95 and 409 at pp. 159-202.)

26 ⁶ Defendants cite four deposition excerpts as corroborative of their position that members have
27 access to the actual grant applications. In fact, three of the four (Penhoet, Pomeroy, and
28 Friedman) said nothing of the kind. Indeed, Dr. Friedman testified that members could **not** see the
grant applications, as did several other members. (Friedman 15:18-20; Baltimore 29:21-25;
Bryant 22: 21-25; Love 32:9-15.)

1 recommendation to the ICOC for approval shall be subject to the Public Records Act.” The
2 purpose is to ensure that the public has access to the same materials that the ICOC does in
3 considering grant applications. Defendants propose to evade the intent of the Act by invoking the
4 provisions for exceptions to the public meeting and public records acts requirements provided in
5 limited, specified circumstances regarding confidential information. (Section 125290.30 (d)(3)
6 and (e).) Nothing in these sections suggests that the ICOC can convene a closed session at will,
7 just to provide the opportunity for a member to look at a grant application. The rule is that
8 anything the members have available to them must be made available to the public.

9 Dr. Hall’s suggestion of how the ICOC can deftly evade the requirements of the Act is yet
10 more troubling evidence of the very “independent” nature of the ICOC.

11 **IV. NEITHER THE LEGISLATIVE NOR THE EXECUTIVE BRANCH OF THE**
12 **STATE GOVERNMENT HAS ANY POWER TO CONTROL THE GRANT**
13 **FUNDING DECISIONS OF THE ICOC**

14 Defendants’ second mischaracterization of plaintiffs’ argument is that no other state
15 authority can award grants or make standards. Plaintiffs’ true argument is that no other state
16 agency or entity has any control over the actions of the ICOC in the exercise of its grant making
17 function.

18 Defendants assert that control by the Legislature has been exerted through political
19 pressure which the ICOC responded to in order to fend off the possibility of a constitutional
20 amendment. However, **as a matter of law**, there is no legislative control over the ICOC. “The
21 legislative power includes the power to appropriate funds and to establish spending priorities.”
22 (*CART*, 109 Cal.App.4th at 817.) The funds provided to the ICOC are continuously appropriated
23 and not subject to any restrictions, conditions, or diminution by the Legislature. The legislative
24 branch has no control over the ICOC’s grant making function.

25 As for the authority purportedly vested in the Controller to refuse to issue warrants, it is a
26 matter of law that the Controller’s authority is ministerial, not discretionary, “when the amount of
27 an expenditure is set by law or entrusted to the discretion of another agency or branch of
28 government.” (*Tirapelle v. Davis* (1993) 20 Cal.App.4th 1317, 1329) “[T]he greater part of the
29 duties devolved upon [the Controller] by the law are of a ministerial character.” (*McCauley v.*

1 *Brooks* (1860) 16 Cal. 11, 55) The Controller’s duty “does not include the power to review and
2 approve or reject decisions of a department vested by the Legislature with authority over
3 expenditures.” (*Tirapelle*, 20 Cal.App.4th at 1335.) In the instant case, it was an initiative statute
4 rather than the Legislature that vested authority in the ICOC over the expenditures, but the
5 principle still holds: The Controller has no power to review and approve or reject funding
6 decisions to the extent the authority to expend funds is under the “fundamental jurisdiction” and
7 within the discretion of the ICOC. *Id.*

8 Finally, the “control” of the Finance Committee is a thing of the past. The function of the
9 Finance Committee is to authorize the issuance of bonds, and it has already authorized the
10 issuance of \$3 billion dollars in bonds. (Defendants’ Stipulated Fact No. 19) Moreover, this
11 “control” relates to money going into the treasury. As Plaintiffs have repeatedly stated, we do not
12 contest the sale of the bonds or the deposit of those bonds into the state treasury for the use of the
13 CIRM. What plaintiffs contest is the appropriation to and expenditure of those funds by the
14 ICOC, an entity not under the management and control of the state.

15 **V. UNCHECKED VIOLATIONS OF THE ACT ILLUSTRATE THAT THE**
16 **EXECUTIVE AND LEGISLATIVE BRANCHES ARE POWERLESS TO**
CONTROL THE ICOC

17 **A. Alternates Have Been Appointed As Scientific Members Of The Grants Working**
18 **Group In Clear Contravention Of The Act**

19 Defendants contend, “Plaintiffs have not stated a basis for their argument, or introduced
20 any evidence that the appointment of alternate scientists to the Grants Working Groups violates
21 the Act.” (DPB at 24:8-9) The evidence is that, in fact, fifteen alternate members and four ad hoc
22 members have been appointed, by-laws have been drafted and approved allowing them to serve
23 “at the discretion of staff,” and the alternates have in fact served, being present and voting at the
24 meetings. Rather than citing any statutory authority for the action, defendants rely only on the fact
25 that, more than six months ago, they consulted with counsel about the practice. There is no
26 evidence in the record of any counsel opinion on the question.

27 Defendants argue that an agency’s interpretation of its authorizing statute is entitled to
28

1 great weight and respect, citing *Yamaha Corp. v. State Bd. of Equalization* (1998) 19 Cal.4th 1.⁷
2 The Court in *Yamaha* stated that the weight a court should give to an agency’s interpretation is
3 “fundamentally **situational.**” (Id. at 12) (original emphasis), and falls into two categories: 1)
4 factors relating to the agency’s comparative interpretive advantage over the court, due to the
5 specialized or technical nature of the text, and 2) whether the interpretation is likely to be correct,
6 based on factors such as the careful consideration of the interpretation by senior agency officials.
7 (Id. at 12-13.)

8 The decision to provide for the appointment of alternates, rather than being the result of a
9 careful consideration by senior officials or the parsing of a difficult text, was in fact the product
10 of an evolutionary process that had its genesis in the twin goals of convenience and not causing
11 hurt feelings. (DX 110, 63:17 – 69:5) The Grants Working Group Search subcommittee had to
12 come up with a list of potential members of the Grants Working Group. They were instructed to
13 provide more than enough names, in case of unavailability. It was decided that those extra names
14 should be formalized into a list of alternates, a list that would always be being “enriched” by the
15 addition of new names. (DX 210, 110:13-15) As for the members’ actual terms of office, that is
16 “negotiable.” (DX 162, 32:14-15)

17 There is no provision for working group alternates in the Act. The ICOC is playing fast
18 and loose with the very clear requirements of the Act, embellishing some parts, ignoring others,
19 as it sees fit. No state agency or entity has any control over it.

20 **B. Training Grants Are Not Research Grants**

21 Dr Hall’s attempts to fit a square peg in a round hole notwithstanding, the training grants
22 do not meet the requirements of Proposition 71. As Dr. Penhoet stated, “They are training grants
23 and not research grants.” (DX 342, 154:7-8)

24 Dr. Hall testified that the criteria regarding the demonstrated record of achievement in
25 pluripotent stem cell and progenitor cell biology was met by the training grant criteria with
26 respect to mentoring. However, at the September 9, 2005, meeting this exchange took place

27 ⁷ Defendants’ earlier citation to *Yamaha Corp.* for the proposition that court look to evidence of
28 agency interpretation of law only if ballot materials do not resolve ambiguity, is completely off
29 base. (DPB at 4:4-6) The *Yamaha* case had nothing to do with initiatives or ballot materials.

1 between Dr. Levey and Dr. Chiu:

2 Dr. Levey: Could I ask just one other question. So when the working group was
3 concerned with the outcome of previous training programs, are they training
4 programs in adult stem cell research, or is this all training programs that were in
5 the sciences?

6 Dr. Chiu: All training programs, just to see if they have experience in having
7 good, strong, robust training programs, producing good trainees in careers in
8 academia, etc. (DX 315, 149:4-12)

9 Dr. Hall later reiterated, in response to a question from Dr. Steward:

10 Let me say that in the RFA, and I apologize, we have one here, but we emphasize
11 that we thought it was inappropriate to restrict the training program to human
12 embryonic stem cells. That is, we want a broad education in stem cell biology
13 with the idea that a lot of people now who might be working in other systems will
14 do work that's either relevant to or will move into. So it wasn't specifically cast in
15 that way. I think that will be much more of an issue with research funding, but
16 just to say that our intent through this was to have a broadly based stem cell and
17 we said in different animals and at different stages, including adult and
18 embryonic, just so you know that. (DX 315, 155:12-24)

19 See also PX 1168, page 1: "Stem cell research is interpreted broadly to include research
20 that is closely related to adult and embryonic stem cells in or from all relevant organisms."

21 Thus, the mentoring criteria for the training grants did not encompass a demonstrated
22 record of achievement in pluripotent and progenitor cell biology. Indeed, they did not even
23 encompass a record of success in training programs related to stem cell biology at all.
24 What Dr. Hall's testimony established is the creativity which the ICOC can bring to bear on
25 interpreting its mandate to fund research and research facilities. Dr. Hall dropped any pretence
26 that the funds would have to be used for research at all. Instead, apparently they can be used for
27 any purpose related to stem cell biology about which the words "significant results" and
28 "innovative" could be used. For example, the ICOC could endow chairs in stem cell biology at
29 major universities. The "significant results" would be having the first endowed chairs in stem cell
30 biology, which in turn could also satisfy the requirement for innovation. The ICOC could award
31 grants for writing histories of stem cell research; the grants would be awarded to those who had a
32 record of achievement in stem cell biology, and the "significant," "innovative" results would be
33 the books themselves. The possibilities for institutional nest-feathering are limited only by
34 imagination.

1 The ICOC's action and Dr. Hall's creative justification of its action illustrate not only the
2 lack of state control over the ICOC, but also the lack of specificity in the Act concerning how
3 public money can be spent. If money designated specifically for "developing cures, from
4 laboratory research through successful clinic trials" (Article XXXV, section 2(b)) can be spent
5 instead on ethics courses and journal clubs, then the Act is insufficiently specific about how
6 public funds should be expended.

7 **C. Outside Counsel Have Been Retained For Purposes Unintended By The Act**

8 Defendants' defense of the hiring of outside counsel is marred by a glaring omission: any
9 reference to the particular section of the Act which governs the hiring of outside counsel. Section
10 125290.45(a)(3) lays out the requirements for the hiring of outside counsel by the ICOC. The
11 ICOC did not follow those, and does not even argue that it did. Rather, it simply pretends that the
12 section does not exist.

13 Once again, we want to emphasize that the various excursions beyond the boundaries set
14 by the Act described above are not significant in and of themselves to the breach of Art. XVI,
15 Sec. 3 of the Constitution. They are, however, evidence above and beyond the language of the
16 Act itself, and the composition of the ICOC, that there is no exclusive state management and
17 control by the state over the ICOC, and that none is possible.

18 **VI. CONCLUSION**

19 Defendants state, "[T]he evidence showed that as a state agency CIRM is subject to
20 external fiscal and political controls of other state agencies, including the Legislature, the Finance
21 Committee, the Treasurer, the Controller and the Governor, all of whom are poised to correct
22 CIRM's course if they perceive that the need arises." (DPB at 13, l. 8 – 11) This is nothing more
23 than a classic red herring. The defendants do not, and can not, assert that any of these entities and
24 personages are poised to correct the ICOC's course, or that they do or can have any say in what
25 is important under the Act – the disbursement of huge sums of the taxpayers' money for grants,
26 grants that are in the sole discretion of the ICOC, the members of which are answerable to no
27 public authority. As a consequence of this untrammled power of the ICOC, the Act is in clear
28 violation of Art. XVI, Sec. 3, and should be declared invalid and unconstitutional.

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Respectfully submitted,
DANA CODY
CATHERINE W. SHORT
Life Legal Defense Foundation

TERRY L. THOMPSON
Law Office of Terry L. Thompson

/s/ Robert M. Taylor, Jr.
ROBERT M. TAYLOR, JR.
Law Offices of Robert M. Taylor, Jr.

Attorneys for Plaintiff People's Advocate