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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 CITIZEN'S
20 OVERSIGHT COMMITTEE, et al.,

21
22 Defendants.

CASE NO. HG05206766

POST-TRIAL BRIEF OF PLAINTIFFS
PEOPLE'S ADVOCATE AND
NATIONAL TAX LIMITATION
FOUNDATION

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

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1 **I. INTRODUCTON**

2 Proposition 71 won voter approval in the November 2004 election, with over 59 percent
3 of the votes cast. (Defendants’ Stipulated Fact, No. 1.) However,

4 “...neither government nor the people operate free from the strictures of
5 our Constitution. In other words, sometimes the majority cannot impose its
6 view because the Constitution restrains that action. This is because the
7 Constitution is the ultimate social and legal contract. It allows the majority
8 to promote its view so long as it does not interfere with the constitutional
9 provisions guaranteed to the minority. Thus, the Constitution expresses a
10 larger policy view that sometimes interferes with an immediate goal of the
11 then majority.

12
13 In effect, a constitutional challenge to a law or an act of the Legislature or
14 the people does not challenge the intentions of the participants as good or
15 bad. . . . It simply challenges whether the power exists under the
16 Constitution to do that which was done or is proposed to be done. . . .
17 [O]ur role is not to question whether or determine whether the
18 implementation of the act would or would not be for the greater good or
19 whether it is favored by the majority.” *Howard Jarvis Taxpayers’ Assn. v.*
20 *Fresno Metro. Project Authority* (1995) 40 Cal.App.4th 1359, 1362-63.

21 Thus Defendants’ first stipulated fact, along with much of the other evidence defendants moved
22 into the trial record, is irrelevant to the issue before this court. The issue is whether the
23 Independent Citizen’s Oversight Committee (ICOC), which has been given absolute authority to
24 disburse three billion dollars in grants and loans, is under the exclusive management and control
25 of the state, as required by California Constitution, Article XVI, Section 3, or whether it is
26 precisely what its name says: **independent**.

27 **II. THE ICOC IS A CREATURE OF STATUTE, SEPARATE AND DISTINCT FROM**
28 **THE CIRM**

29 **A. The CIRM And The ICOC Were Created Separately.**

30 Proposition 71 changed the law in two ways: one constitutional, one statutory. First,
31 Proposition 71 added Article XXXV to the California Constitution, and thereby established the
32 California Institute of Regenerative Medicine (“CIRM”) and, among other things, authorized the
33 CIRM to utilize state bonds “to fund its operations, medical and scientific research, including
34 therapy development through clinical trials, and facilities.” The constitutional amendment made
35 no mention of how the CIRM was to be governed, or how the spending of the funds raised from
36 the bonds should be managed or controlled.

1 That was left to the statutory portion of Proposition 71, Sections 125290.10 *et seq.* of the
2 Health and Safety Code.¹ This statute (“the Act”) created the Independent Citizen’s Oversight
3 Committee (“ICOC”) to govern the CIRM and vested it with “full power, authority and
4 jurisdiction” over the CIRM. The foundational document thus establishes a critical distinction
5 between the CIRM, a creature of the Constitution and established in state government, and the
6 ICOC, a creature of statute. It is the nature and operation of this creature of statute that we attack
7 as unconstitutional as outside the exclusive management and control of the state; Plaintiffs
8 People’s Advocate make no challenge to the constitutional legitimacy of the CIRM, nor its power
9 to use bonds to fund its operations.²

10 **B. The CIRM And The ICOC Are Organizationally Separate And Distinct.**

11 The distinction between the ICOC and the CIRM is well recognized by the two entities
12 themselves. Defendant Hall prepared several organizational charts, each of which distinguished
13 between the ICOC and the CIRM, and noted that the ICOC was made up of three groups:
14 Academic & Nonprofit Research Institute Representatives (13); Patient Advocacy
15 Representatives (10) and Biotech Representatives (4). (PX 1009, PX 1113, pages 9 to 11; PX
16 1016, page ICOC013315 and DX 414). The organizational charts went through several iterations
17 before the final chart (DX 414) was adopted. The discussions were focused on making clear the
18 differences between the ICOC and the CIRM, first at the April meeting (PX 1016; PX 1096, pp.
19 29-31, 39-55), and then at the September meeting (PX 1113, pp. 9-14).

20 During the April meeting, Dr. Love proposed that the ICOC should be taken off the chart.
21 (PX 1096, p. 52). Dr. Pizzo concurred:

22 I’d like to make a friendly modifier to Dr. Love. And that is I think it’s
23 okay to have more than one chart. I think it’s clear that the kind of chart that
24 you’re describing is of the CIRM, and that should be freestanding. But there does
25 need to be in the organizational chart, I believe, something that shows the
26 relationship of the ICOC to the institute, and clearly delineates the order, which is
27 the way other board of trustees are shown in relationship to the organization that
28 they have oversight. (PX 1096, p. 52-53).

29 ¹ All citations herein to code section will be to the Health and Safety Code unless otherwise
30 specifically identified.

31 ² The CIRM was not named as a defendant by People’s Advocate Plaintiffs.

1 As a result of these comments, the organizational chart was changed to show the CIRM
2 administrative structure on a separate page. (PX 1009, 1010). This came under some criticism at
3 the September meeting, in particular from Dr. Pizzo who recommended that: “the portion that
4 says chairman and vice chairman simply be eliminated, and the organizational structure be, in
5 essence, the ICOC, which is the board of directors, of which the chair and vice chair have special
6 responsibility and authority, and they collectively with the ICOC oversee the CIRM.” (PX 1113,
7 p. 14).

8 **C. The CIRM And The ICOC Are Operationally Separate And Distinct.**

9 The organizational distinction between the ICOC and the CIRM is made manifest in the
10 operations of the two. The CIRM is governed by the ICOC, and its president was chosen by the
11 ICOC. The conflict of interest code imposed by the ICOC on CIRM employees is stricter than
12 that which applies to the ICOC members themselves. The ICOC conflict of interest code, which
13 was created by the ICOC itself and can be amended by it at any time, was watered to down from
14 the original proposal to allow for ICOC members to participate in grants, as long as they did not
15 receive a salary from the grant or serve as principal investigator. The ICOC conflict of interest
16 code was not, and could not have been, imposed on the ICOC by either the legislative or
17 executive branches of the state government.

18 The most significant operational distinction between the CIRM and the ICOC, however,
19 relates to the reason for which the CIRM and the ICOC both exist: to award grants and loans for
20 research and research facilities. The ICOC has complete authority to award 97 percent of the net
21 proceeds from the sale of bonds to grantees. (Section 125290.70(a)(1)). The CIRM has
22 absolutely no control over this disbursement of taxpayers’ funds, nor do the state agencies that
23 purportedly have some limited jurisdiction over the CIRM. At best, the CIRM and those state
24 agencies have control over only 3 percent of the bond revenues.

25 This organic difference between the ICOC and the CIRM is a critical factor in considering
26 the issue of exclusive management and control by the state. The defendants point to a few
27 interactions between the CIRM and various state agencies. While we do not think that these
28 interactions amount to exclusive state management and control over CIRM, even if established,

1 they have no significance to the constitutional question raised here. The defendants wish the
2 Court to keep its eye upon the hole and ignore the donut. It is not the CIRM, but the ICOC and
3 its absolute control over 97 percent of bond proceeds with which the Court must concern itself.

4 Whatever controls may exist on the tiny fraction of public money spent on the peripheral
5 administrative functions performed by the CIRM, they in no way affect, much less control, the
6 disbursal of funds by the ICOC in grants and loans. Neither the State Auditor, nor the State
7 Controller, nor the Treasurer, nor the head of the Department of Finance, nor anyone else in state
8 government can modify or rescind any grant awarded by the ICOC. If the ICOC awards a grant,
9 the grantee gets the money.

10 **III. THERE IS NO STATE MANAGEMENT OR CONTROL OVER THE ICOC** 11 **FUNCTIONS**

12 Defendants have argued that the ICOC is subject both to explicit state controls in the Act
13 and implicit state controls found in other statutes. However, none of these controls touch the
14 central function of the ICOC – to award grants and loans. Nor do they touch the functions of the
15 ICOC that are ancillary to that central function, such as the adoption of policies regarding
16 intellectual property or conflicts of interest.³

17 Defendants confuse oversight with control. While the Act provides for audits, open
18 meetings, public records, annual reports, and a Financial Accountability Committee, none of
19 these requirements in any way provides for legislative or executive *control* over the ICOC. The
20 ICOC may operate in a fishbowl, but it is a sealed fish bowl. To carry the analogy further, the
21 State Aquarium executive may watch the fish, talk to the fish, record their actions, audit their fish
22 food consumption and write detailed reports on their activities but he is powerless the change
23 their behavior or the amount of fish food they are given. He may not even unseal the fish bowl to

24 ³ The Act provides that the ICOC enter into intellectual property agreements with its
25 grantees that “balance the opportunity of the State of California to benefit from the patents,
26 royalties, and licenses that result from basic research, therapy development, and clinical trial with
27 the need to assure that essential medical research is not unreasonably hindered by the intellectual
28 property agreements.” (Section 125290.30(h). However, whatever policy the ICOC adopts, it is
29 its policy and no one else’s. There is no legislative or executive control over what that policy
30 should be, or whether it strikes the proper balance.

1 remove a misbehaving or underperforming fish, until its 6 or 8 year term has expired. Only after
2 the lapse of several years and the expenditure of billions of dollars will the executive power of
3 appointment be able to be exercised to effect any change in the management and control of the
4 ICOC. And other than that limited appointment power, no executive or legislative *controls* exist.⁴

5 In *Jarvis v. Fresno, supra*, 40 Cal.App.4th 1359, the court held that a law creating a 13-
6 member board and vesting it with the power to levy taxes was in violation of Article XI, section
7 11 of the California Constitution, in that the board constituted a “private body” to which such
8 power could not be delegated. The board argued, as defendants do here, that it possessed many of
9 the attributes of public agencies. For example, its members were required to file disclosure
10 statements and reside within the jurisdiction of the board; it was required to hold public meetings,
11 comply with the Brown Act, undergo an annual audit, and handle claims pursuant to the Tort
12 Claims Act. However, none of these provisions cured the constitutional infirmity of the statute;
13 the court looked past the trappings of state agencyhood to who was on the board, how they were
14 chosen, and what power they exercised.

15 Simply accessorizing to look like a state agency and taking advantage of governmental
16 support services do not make an entity a state agency for purposes of the constitutional
17 prerogatives relating to taxing **or** spending. In both instances, the most important, indeed the **only**
18 important question is: are the board members accountable to the public?

19 **IV. THE MEMBERSHIP OF THE ICOC LACKS PUBLIC ACCOUNTABILITY**

20 The very first type of executive branch control cited by the court in *California Assn of*
21 *Retail Tobacconists v. State (“CART”)* (2003) 109 Cal.App.4th 792, was the appointment of the
22 members of the commission in a manner to ensure public accountability: “Unlike a private entity,
23 only **elected** public officials can appoint the members of the commission and membership of the
24 commissions **must include** public officials. Consequently the commissioners are either directly
25 or indirectly accountable to the public.” 109 Cal.App.4th at 822 (emphasis added). The court cited

26 ⁴ Although Section 8 of Proposition 71 provides for amendment of the Act by vote of 70% of
27 both houses of the Legislature and concurrence of Governor three years after adoption, this
28 amendment power is limited to measures “to enhance the ability of the institute to further the
29 purposes of the grant and loan programs created by the measure. . . .” Thus, the Legislature may
30 only amend to increase the power of the ICOC, not to diminish it in any way.

1 *Jarvis v. Fresno, supra*, 40 Cal. App.4th at 1388, on the bedrock significance of the appointment
2 and removal power:

3 Foremost of the principles of democracy is that the governed select those
4 who govern. Further, those who act on behalf of the governed have
5 accountability to the governed. In other words, the people choose who
6 occupies positions of public trust or the people choose those who choose
7 individuals to occupy positions of public trust. Either way there is
8 accountability to the people.

9 In effect, one who is a public officer receives a delegation of sovereign
10 power but it is not a delegation without restraint. Necessarily, those who
11 grant the power retain some control. **Thus, we perceive the significant
12 characteristic of public office includes the right to choose and the
13 right to remove.** This is not to say that it is necessary that the electors
14 individually choose those who occupy a public position. However, those
15 making the selection have public accountability. Thus, while the
16 electorate may not have an expressive voice in an appointment of an
17 individual, the electorate does have a voice in the appointing authority.
18 In other words, there is some public accountability. **Likewise, the
19 essence of that accountability includes the power to remove.
20 Although its genesis is in revolution, it is hardly a revolutionary
21 concept in democratic society that the governed can by removal
22 express their dissatisfaction with those who govern.** (Emphasis
23 added.)

24 The California Stem Cell Research and Cures Act (“Act”) contravenes both *CART* and
25 *Jarvis* by permitting persons who are not elected public officials and thus not accountable to the
26 people to appoint members of the ICOC. Similarly, the Act violates the parallel principle of
27 public accountability by deliberately excluding any provision by which those in public office can
28 remove appointees.⁵

29 The President Pro Tem of the Senate appointed a member on the last day of his term in the
30 Senate. He is obviously safe from the dissatisfaction of the public and was so at the time he made
31 his appointment; his appointee’s term, however, does not expire until 2012. The terms of two of
32 the constitutional officers, each of whom appointed five members, are already set to expire within
33 a year, making it equally futile for the public to express their dissatisfaction with those officers.
34 Their appointees will serve for at least another five to seven years. Combined with the five
35 members of the ICOC not appointed by elected officials at all, all of whom have eight year terms,

36 ⁵ “The single fact that the power of the removal of director is placed by the act with the executive
37 of the state is itself plainly indicative of the intention of the legislature to make it a state
38 institution under the exclusive management and control of the state.” *Board of Directors v. Nye*
39 (1908) 8 Cal.App. 527, 533.

1 there is already a majority of the ICOC completely cut off for the next five years from the direct
2 or indirect public accountability necessary for state management and control. To paraphrase the
3 Court in *Jarvis*: “The electorate cannot remove those who are chosen as [members of the ICOC]
4 and the electorate cannot remove those who choose. But the electorate must bear the
5 consequences of the decisions of those who compose the [ICOC]. And part of that consequence is
6 public taxation and distribution of public taxes as determined by the [ICOC] – unaccountable
7 except to entities which [no longer] have [] public accountability.” *Id.* at 1388.

8 Or, as the old management saying goes, “If I can’t fire you, you don’t work for me.” And
9 the members of the ICOC not only can’t be fired by the public, but, for the most part, neither can
10 the persons who appointed them.

11 This situation was created not by any bizarre, unanticipated confluence of events. Rather,
12 it is built into the terms of the Act. The Act provides for lengthy terms for ICOC members, who
13 are appointed either by unelected officials or by elected officials who are more likely than not
14 going to be out of office well before their appointees’ terms expire. By the time the next round of
15 appointments or reappointments comes up, in December 2010, the ICOC may already have spent
16 more than half the money provided for under the Act. And even then, fewer than half the
17 members can be replaced. Not until December 2012 will the appointment power affect a majority
18 of the members.

19 Ignoring the crux of public accountability through the process of appointment by **elected**
20 public officials, defendants contend that the ICOC is under state control because the members are
21 all public officials in that, by virtue of sitting on the ICOC, the members became “public
22 officials.” This tautology was rejected by the court in *Jarvis*:

23 The Authority appears to argue that because taxation is a public function,
24 whenever the Legislature delegates to a person or body the power to tax to a
25 person or body, that person or body must necessarily be public. But if that were
26 so, the constitutional provision would never be violated. Anyone to whom the
27 Legislature delegated the power to tax would automatically cease being a "private
28 person or body." 40 Cal.App.4th at 1387.

29 See also, *County of Riverside v. Superior Court* (2003) 30 Cal.4th 278, 294 (“the act of delegation
30 does not change a private body into a public body and thereby validate the very delegation the
31

1 section prohibits”). Similarly if any entity to whom public money was appropriated for
2 expenditure on public purposes was, simply by virtue of being in receipt of that money, a public
3 entity, then Article XVI, section 3 of the California Constitution would be meaningless. The
4 Legislature could appropriate money to private charities, schools, and institutions, and the
5 recipients would be deemed public entities under state control simply because they received the
6 money from the legislature.

7 Not only is this argument logically flawed, but, as will be discussed infra in Section V.,
8 the evidence shows that the members serve as representatives of their constituent entities and
9 view their service on the ICOC as an extension of or an adjunct to their regular employment, not
10 as a distinct office they hold.

11 The provision in the Act permitting representatives of academic, research, and commercial
12 entities to appoint delegates in their stead, and their liberal use, also demonstrates the falsity of
13 defendants’ “public official” contention. (Section 125290.20(a)(2)(D).) All a delegate has to do is
14 take the oath and file a Form 700. The latter can be done up to one month after a meeting, that is,
15 after the delegated member has already voted, perhaps on matters of great moment such as a large
16 grant! (DX 385; ICOC003988). These delegates are not proxies, who appear merely to cast a vote
17 on behalf of the absent member. Rather, they operate independently of the member who
18 appointed them, voting on ICOC matters as they personally see fit. (Baltimore depo. p. 18;
19 Birgeneau, depo. pp. 30-32; Black, depo. pp 41-42; Henderson depo., pp. 20-22; Holmes, depo. p.
20 35; Levey, depo. pp. 30-31; Love, depo. pp. 34-35; Pizzo depo., pp. 64-65; Reed. depo. p.36).

21 Some delegates attend meetings so frequently they are effectively co-holders of the seat
22 with the ICOC member himself. Beth Burnside attended one ICOC meeting as Robert
23 Birgeneau’s delegate, and Robert Price attended seven other ICOC meetings in 2005 as his
24 delegate. (Plaintiffs’ Stipulated Fact No. 9.) Paul Jennings attended five ICOC meetings in 2005
25 as David Baltimore’s delegate. (Plaintiffs’ Stipulated Fact No. 10) David Meyer attended four
26 ICOC meetings in 2005, including the meeting at which grants were awarded, as Keith Black’s
27 delegate. (Plaintiffs’ Stipulated Fact No. 11.) Dr. Black was not even aware he was on any
28 subcommittees other than the grants working groups search subcommittee; Dr. Meyer

1 volunteered for the two subcommittees and attended four meetings in Dr. Black's place.⁶ (Black
2 depo p. 37; DX 276, 278, 310, 374) Francis Markland attended three ICOC meetings in 2005, as
3 the delegate of Brian Henderson, including the meeting at which training grants were awarded.
4 (Plaintiffs' Stipulated Fact No. 13.) Jeanne Fontana attended five full ICOC meetings and three
5 subcommittee meetings in 2005 as John Reed's delegate. (Plaintiffs' Stipulated Fact No. 15; DX
6 310, 342, 360[363]).

7 On the other hand, what is the status of the delegates who appear only once, particularly
8 those whose members subsequently used other delegates? Are Beth Burnside, who appeared for
9 Dr. Birgeneau on March 1, 2005, (DX 149) and Roberto Peccei, who appeared for Dr. Levey on
10 April 7, 2005, (DX 169) still "public officials"? After all, they took the oath of office and filed a
11 Form 700. What is or was their term of office? Defendants' argument that the oath of office
12 shows that the members are under state management and control is undercut, not bolstered, by the
13 fact that the oath was also taken by all of the delegates. What is the office these delegates hold?
14 To whom are they accountable?

15 Dr. Pizzo's delegate, Dr. Berg, whatever his other impeccable qualifications, is not an
16 executive officer or dean of the medical school of Stanford and is not eligible to be a delegate
17 under the Act.⁷ (Pizzo depo. p. 64) Dr. Reed testified that his delegate, Dr. Fontana, is not an
18 officer of the Burnham Institute, and she also is not eligible to be a delegate under the Act. (Reed
19 Depo, p. 36) We cite this use of obviously unqualified delegates not to denigrate them or the
20 members who appointed them, nor attack the validity of any actions that were taken with their
21 participation, but simply to show that the members and their delegates have no public
22 accountability. No one in the executive or legislative branches has any control over who
23 represents the institutions at ICOC meetings, or over any actions the ICOC takes when

24 _____
25 ⁶ When Mr. Klein called for volunteers for a subcommittee, he asked Dr. Meyer if he was
26 volunteering on behalf of Dr. Black. Dr. Meyer answered "Whoever shows up." Dr. Fontana,
Dr. Reed's delegate, made the same answer. (PX 1105, p. 135).

27 ⁷ "The executive officer of a California university, a non-profit research institution, or life science
28 commercial entity who is appointed as a member, may from time to time delegate those duties to
29 an executive officer of the entity or to the dean of the medical school, if applicable." Section
30 125290.20(a)(2)(D)

1 unqualified delegates are given a voice in determining its actions.

2 All of the delegates are at least two steps removed from the appointing elected official.
3 The ICOC members appointed by UC chancellors are themselves three steps removed from that
4 degree of public accountability: they are appointed by persons who were appointed by the
5 Regents, over two-thirds of whom are appointed by the Governor. (Calif. Const. Art. IX, section
6 9) The delegates of these UC members are then four steps removed from accountability: their
7 authority comes from appointees of chancellors appointed by regents appointed by the governor.
8 If two and three and four steps removal from accountability is an acceptable extension of *CART*
9 and *Jarvis*, why not five, six or seven steps?

10 “We have no quarrel with the Authority's view that in general the Legislature may create
11 new public offices and determine the manner in which those offices will be filled. But no case
12 holds that the Legislature may create an office, determine that the office will be filled by an
13 officer **not selected by the public or by a person or body elected by the public**, and then give
14 that office the power to levy a tax.” *Jarvis*, 40 Cal.App.4th at 1389. Similarly, no case holds that
15 the Legislature **or** the voters may create an office, determine that the office will be filled by
16 persons not selected by the public or by a person or body elected by the public, and then
17 appropriate to that office money from the state treasury.

18 **V. THE ICOC MEMBERS REPRESENT INSTITUTIONS AND SPECIAL INTERESTS**

19 **A. The Evidence Is Overwhelming That The Members Are Representatives Of The** 20 **Institutions From Which They Are Appointed.**

21 **1. By The Terms Of Proposition 71 And The Act, ICOC Members Are** 22 **Representatives Of Their Constituent Organizations And Special Interests.**

23 The purposes and intent of Proposition 71 are set out in Section 3 of the proposition,
24 among which were to “[c]reate an Independent Citizen’s Oversight Committee composed of
25 **representatives** of the University of California campuses with medical schools; other California
26 universities and California medical research institutions; California disease advocacy groups; and
27 California experts in the development of medical therapies.” (Emphasis added.)

28 The Act provides that the ICOC be composed of members from the five UC campuses
29 with medical schools, other California universities, California nonprofit academic and research

1 institutions, California commercial life sciences entities, and various disease advocacy groups.
2 (§125290.20). The members from the five specifically named UC campuses are appointed by
3 their chancellors; those from the other entities and disease advocacy groups are appointed by the
4 constitutional officers and legislative leaders.

5 In the section of the Act setting out the criteria for appointment, those members selected
6 from disease advocacy groups are, consistent with Proposition 71, specifically identified as
7 representatives of those groups (§125290.20(a)(3).) It is manifest from the Act that the other
8 members are also representatives of their institutions. Thus, in reference to conflicts of interest,
9 the Act provides that: “Service as a member of the ICOC by a **representative** or employee of a
10 disease advocacy organization a nonprofit academic and research institution, or a life science
11 commercial entity shall not be deemed to be inconsistent, incompatible, in conflict with, or
12 inimical to the duties of the ICOC member as a **representative** or employee of that organization,
13 institution, or entity.” (Emphasis added) (§125290.30(g)(2)).

14 The Act goes on to say that Section 1090 of the Government Code⁸ will apply only if two
15 conditions are met. The first is that: “The grant, loan or contract directly relates to services to be
16 provided by any member of the ICOC or the entity he or she **represents** or financially benefits
17 the member of the entity he or she **represents.**” (Emphasis added) (§125290.30(g)(3)(A)).

18 “One basic rule of statutory construction is that courts must look first to the usual,
19 ordinary meaning of the statutory language in interpreting a statute.” *Florio v. Peck Lau* (1998)
20 68 Cal.App.4th 637, 647-48. “Every word and clause is given effect so that no part or provision is
21 useless, deprived of meaning, or contradictory. If more than one interpretation is reasonable, the
22 language is interpreted consistent with the purpose of the statute and the statutory framework as a
23 whole, using rules of construction or legislative history in determining legislative intent.” *Green*
24 *v. Workers’ Comp Appeals Bd.* (2005) 127 Cal.App.4th 1426, 1435.

25 The ordinary meaning of “represent” is “to act for” or “to stand in the place of.” (See
26

27 ⁸ Govt. Code 1090 states that “Members of the Legislature, state, county, district, judicial district,
28 and city officers or employees shall not be financially interested in any contract made by them in
29 their official capacity, or by any body or board of which they are members.....”

1 *Sunset Milling and Grain v. Anderson* (1952) 39 Cal.2nd 773 at 778; “one who acts for another in
2 a special capacity”) A “representative” is one who represents another. This meaning is consistent
3 with the other provisions of the Act which dictate with great specificity the entities from which
4 members must be chosen. It is not inconsistent with any portion of the act.

5 Defendants would like to read these references to “representatives” and “represent” out of
6 the Act, to pretend they are not there or do not mean what they say. Defendants have provided no
7 reasoning or argument to justify ignoring the plain language of the Act.

8 **2. Copious Testimony And Documentary Evidence Confirms That The ICOC** 9 **Members Serve As Representatives Of Their Constituent Institutions And Interest Groups.**

10 In his trial testimony, Mr. Klein asserted that the ICOC members did not represent their
11 institutions, but rather the state of California. His zeal to make his case is understandable, but his
12 testimony is contradicted by an extensive record, including his own previous statements. The
13 defendants’ many admissions that the members do indeed represent their institutions and disease
14 advocacy groups, as the Act says they do, is irrefutable and conclusive proof that they do, and
15 cannot be belied by Mr. Klein’s own bald assertion to the contrary. Mr. Klein can speak for
16 himself or, when appropriate, for the ICOC as a whole, but not for individual members.

17 The defendants in this action have all publicly recognized and acknowledged that the
18 members of the ICOC are representatives of the various institutions and groups from which they
19 are drawn. In an early CIRM official website posting, the CIRM stated that: “the ICOC members
20 represent California’s leading public universities, non-profit academic and research institutions,
21 patient advocacy groups, and the biotechnology industry.” (PX 1003). In another website posting
22 in February 2005, the ICOC and CIRM listed the name, affiliation and ICOC position of all of its
23 members. As to their ICOC position, each member from a UC campus, other California
24 Universities, California Research Institute and Commercial Life Science Entity was identified as
25 a representative of their respective institution. For example, Dr. Baltimore’s ICOC position was
26 identified as “Representative of a California University (1 of 4)”; Dr. Black was identified as a
27 “Representative of a California Research Institute (1 of 4)”; Dr. Bryant was identified as a
28 “Representative from a UC with a med school (1 of 5)”; and Mr. Goldberg was identified as a

1 “Representative of a Commercial Life Science Entity (1 of 4).” Each of the members of the
2 disease advocacy groups were listed as advocates for the specific group they represented; for
3 example, Ms. Lansing was identified as a “Patient Advocate (1 of 10) Cancer.” (PX 1136).

4 In other website postings, the CIRM identified the patient advocate of the ICOC on the
5 various working groups, and specified the particular group for which each of them was the
6 advocate. (PX 1004, 1005, 1006).

7 Defendant Angelides sent out a news release in December 2004 in which he announced
8 his appointments to the ICOC. (PX 1013). The news release described the ICOC thusly:

9 The ICOC includes representatives of the five University of California campuses
10 with medical schools and members appointed by the Governor, Lt. Governor,
11 Treasurer, Controller, Senate President pro Tempore and Speaker of the Assembly.
12 Those appointments include four representatives of California universities, four
13 representatives of non-profit research institutions, four representatives of
14 commercial life science entities, and 10 representatives of disease advocacy
15 groups.”

16 The news release then went on to note that defendant Angelides had the:

17 responsibility to appoint five of these members: a representative of a California
18 university; a representative of a non-profit research institution; a representative of
19 a California commercial life science entity, and representatives of disease
20 advocacy groups in the areas of type I diabetes and heart disease.

21 On its second page, the news release went on to list the five persons the Treasurer had
22 appointed as “representatives” of various entities.

23 Defendant Westly also recognized that what he was doing was appointing members of the
24 ICOC who would be representatives of various entities. Thus Controller Westly wrote to Ms.
25 Lansing to congratulate her on her appointment as “a representative of the Cancer Disease
26 Advocacy Group.” (PX 1045). Mr. Chivaro, Chief Counsel to Mr. Westly, wrote to Mr. Love to
27 congratulate him on his appointment to the ICOC as a “representative of a California life science
28 entity.” (PX 1048). Mr. Chivaro also wrote to Ms. Samuelson to congratulate her on her
29 appointment as a “representative of the Parkinson’s Disease group.” (PX 1049).

30 The ICOC continues to this day to properly treat its members as representatives of the
31 various entities from which they are drawn. Thus, the recently adopted Conflict of Interest Policy
for Members of the Independent Citizen’s Oversight Committee (PX 1007) provides:

1 “3. Members of the ICOC shall not make, participate in making or in any way
2 attempt to use their official position to influence a decision regarding a grant, loan,
3 or contract that financially benefits the member or the entity he or she
4 **represents.**” (Emphasis added)

5 As we have noted, defendant Hall prepared several organizational charts, each of which
6 noted that the ICOC was made up of three groups: Academic & Nonprofit Research Institute
7 Representatives (13); Patient Advocacy Representatives (10) and Biotech Representatives (4).
8 (PX 1009, PX 1113, pages 9 to 11); PX 1016, page ICOC013315; DX 414). The organizational
9 charts went through several iterations before the final chart (DX 414) was adopted. During these
10 discussions, no one suggested that the identification of the groups of representatives was in error.

11 In conducting ICOC meetings, defendant Klein made clear his recognition that
12 institutional members of the ICOC were representatives of those institutions. In preparation for
13 the votes on training grants, Mr. Klein reminded everyone that “any member of the board who
14 represents an institution that may be a candidate will not be able to participate in the discussion,
15 nor will that board member be able to vote on the item, (PX 1114, p. 21-22) and shortly thereafter
16 asked the board to “confirm that any board member representing an institution has received their
17 instructions?” (PX 1114, p. 23).

18 A number of the members of the ICOC themselves recognized that they were the
19 representatives identified in Dr. Hall’s chart. (Feit depo., p. 12; Friedman depo., p. 17; Goldberg
20 depo., p. 27; Prieto depo., p. 29 Serrano Sewell depo., pp. 13, 14-15, PX 1043; Wright depo., p.
21 34;). ICOC members have made it clear that they are advocates or representatives of their
22 organizations in other settings. Mr. Serrano Sewell has been particularly vociferous in making it
23 clear that his representation of his groups is a zealous one. He was concerned that no one “who
24 can speak to MS” was included in the Grants Working Group. (PX 1071). In a discussion about
25 the strategic planning committee during the December 2005 ICOC meeting, he declared that:
26 “and my conversations with my appointing officer there was a real commitment that we do a
27 good job to represent our constituencies. And for me, that’s MS and ALS.” (PX 1128, p. 73).
28 Mr. Shestack agreed, saying:

29 I’m not sure, but I came prepared to support it, and I still support it [the strategic
30 planning committee], and I also think there is a danger when all the positions,

1 academic advocacy, industry are not talking to each other, talking only to a central
2 person who then filters their needs. I think actually you need to have an active
discussion between these constituencies. (PX 1129 pp. 75-76).

3 There could hardly be a more definite statement that each ICOC member represented a
4 particular constituency with different positions, and had its needs foremost in mind. Mr. Klein
5 certainly thought so. In response to Mr. Shestack, Mr. Klein said:

6 ...the concept has been to have a major subcommittee that represented all
7 the constituencies to provide the assurance of participation and full participation
8 by all of the constituencies with bringing back to the board for full discussion, but
not having the entire board in all of these....

9 The only issue is how do we institutionally assure that there is a full
10 participation by all the constituencies. What you and others have objected to quite
11 clearly is that if there's only a process without any structure, where there is no
12 outreach, no one knows whether each constituency will have an ability in a public
13 session to have a debate on its issues without taking the whole board through the
14 process. (PX 1129, p. 76).

15 What clearer evidence could there be that the members of the ICOC not only represent
16 their particular entity with its particular issues and positions, but are expected to do so with vigor?

17 The need for the ICOC members to represent and consult with their entity came up again
18 in the December 2005 ICOC meeting in regard to adoption of an intellectual property policy. Dr.
19 Murphy emphatically made this point:

20 Ed, I think that I too agree you've done a good job here. I really do hope
21 we have the time, though, to bring these points back to experts in our organizations
22 for full discussion before we have a chance to vote on the guidelines with the
23 board.

24 * * * * *

25 I guess I'm also getting a little bit uncomfortable that we're beginning to
26 reach into our constituent organizations with guidelines of how they – how we or
27 they should be handling this. And I think we're getting into some dangerous
28 grounds there as well.

29 And finally, some of our constituent organizations have standing IP
30 [intellectual property] relationships with certain pharmaceutical companies. And I
31 wonder how these kinds of guidelines might interfere with those standing
relationships. And I think we have to be aware of that. (PX 1171, DX 376, pp.
140-141).

32 The vice-chair of the ICOC readily agreed that "it's perfectly appropriate for people to go
33 back and discuss this with whomever they wish to discuss it." *Id.*

34 So on one of the most important issues facing the ICOC, the promulgation of an IP policy
35 without which it could not award any grants, the ICOC recognized that each of its institutional

1 members needs to consult with his or her institution to get input into what the policy should be.
2 There are other instances where ICOC members consulted with their institution with regard to
3 matters coming before the ICOC.

4 The most striking example, of course, concerns the activities of the many representatives
5 of the University of California (“UC”). Dr. Birgeneau understood that he was one of six
6 representatives of UC on the ICOC. He had taken part in discussions and had received
7 communications from the Provost of UC, MRC Greenwood. He remembered that one of the
8 subjects discussed in one of the discussions held by the UC ICOC members was intellectual
9 property issues. He identified Ellen Auriti as the coordinator of these activities at the time.
10 (Birgeneau depo. pp. 35-40). Dr. Bryant, another of the UC six, testified that there were
11 discussions among the five UC campuses as a way of sharing information about topics that would
12 be critical to setting up the ICOC, including who was going to be on it and “stuff like that.” She
13 also testified that the expertise of the UC system was used to generate lists of people who might
14 be recommended to the constitutional officers who were making appointments. These were sent
15 to “Ellen”, no doubt Ellen Auriti. (Bryant depo. p. 45-46, 51).

16 Dr. Holmes confirmed that there was a working group within UC that dealt with ICOC
17 matters, such as who might be appointed to the ICOC from Stanford. (Holmes depo. p. 16-17).
18 Dr. Holmes identified Dr. Levey, Dr. Kessler, Dr. Pomeroy and Dr. Bryant as other members of
19 the working or planning group at UC (in other words, all of UC’s six representatives were
20 involved), and that they had a number of conference calls to discuss the ICOC. (Holmes depo.,
21 pp. 20-22). Dr. Thal simply stonewalled. He testified that he had deleted the last six to nine
22 months of his e-mails in December (Thal depo. p. 10), and denied he had ever communicated
23 with other ICOC members via e-mail, or that he had ever received communications from anyone
24 else UC affiliated about ICOC matters. (Thal, depo., pp 12-13). This seems a dubious claim at
25 best.

26 We recognize that there is not a great deal of evidence in the record relating to what it was
27 exactly that the UC six were communicating about among themselves. We believe, however, that
28 there is clearly enough to establish that the UC six are, and recognize themselves to be,

1 representatives of their campuses and UC. Moreover, any lack of evidence is largely due to the
2 members destroying evidence bearing on the point, and the defendants' failure to search for and
3 produce the evidence that remained. (Birgeneau Depo., pp. 8, 13-14; Holmes depo., pp. 9-10;
4 Kessler depo., pp. 15-16; Thal depo., pp. 10, 11-11). We submit that an inference can and should
5 be drawn from the evidence in the record that the UC members definitely considered themselves
6 to be representatives of their respective campuses and the university as a whole. Evidence Code §
7 413; *Breland v. Traylor Eng. Etc., Co.*, (1942) 52 CalApp2d 415, 426.

8 That the members sit as representatives of their respective institutions is further
9 demonstrated by Mr. Klein's explanation of why the twelve disease advocacy representatives
10 cannot appoint delegates, while the seventeen members from academic, research and life science
11 entities can. He said that the disease advocacy members cannot because they don't represent any
12 organization, they represent a specific area of disease – they are not part of any entity from whom
13 they are appointed, so there is no way for them to have a delegate. They don't represent an
14 organization that has other executive officers. (Klein depo., Vol. I, pp. 161-162). That puts it in a
15 nutshell – institutions are represented on the ICOC by their executive officers while disease
16 advocacy group members represent amorphous groups. This is another confirmation that
17 defendant Klein, and the ICOC of which he is chair, admit that the ICOC members are
18 representatives of entities, not just “public officials” who serve no external interests.

19 A further indication that the members of the ICOC do not relinquish their “day jobs” to
20 become public officials for a day is that their time spent at ICOC meetings is not considered time
21 off from their work. (Black depo., p 38; Henderson depo., p. 18; Holmes depo., p. 33). Dr.
22 Henderson testified that he thinks time spent at ICOC meetings “would be seen as part of [his]
23 responsibilities as the academic administrator” at the University of Southern California.

24 Finally, beyond what is on the face of the Act is the reality of the selection criteria set out
25 in the Act. The terms of section 125290.20(a)(2)(A) absolutely dictated two of the universities
26 from which members would be chosen (Stanford and USC) and virtually dictated the choice of
27 two other universities (UC Berkeley and California Institute of Technology). The selection
28 criteria of section 125290.20(a)(2)(B) constricted the choice of members from nonprofit academic

1 and research institutions to those from a handful of such institutions, again virtually guaranteeing
2 seats to specific entities. (PX 1139).

3 Between the explicit identification of institutions in section 125290.20(a)(1) and the
4 implicit identification in section 125290.20(a)(2), the intent of the Act is clear: the members of
5 the Committee are there as representatives of their constituent institutions. Nothing in the Act sets
6 out any personal qualifications that a person must possess. Notwithstanding the exemplary
7 qualifications of many ICOC members, the statutory requirement for membership is affiliation
8 not qualification. The sole criterion is being an executive officer of a particular institution,
9 guaranteeing that institution a seat at the table.

10 **B. A Board Made Up Of Industry And Other Special Interest Representatives Is Not**
11 **Under The Exclusive Management And Control Of The State No Matter If Selected By**
12 **Elected Officials Or By Private Entities.**

13 In analyzing the board at issue in *Jarvis v. Fresno*, the court asked rhetorically, “But may
14 the Legislature create a body, declare who its members will be (or declare what private entities or
15 individuals may appoint the members of the legislatively created body), and delegate to that body
16 the power to tax?” 40 Cal.App.4th at 1383. The court saw no distinction between a body whose
17 private members were directly selected by the legislature and a body whose members were
18 chosen by legislatively selected private entities, as was the case of the board at issue. Just as the
19 Legislature may not delegate the power to tax to “Mr. Fred Smith,” neither may it create the
20 “Fred Smith Authority” governed by Mr. Smith or by anyone chosen by Mr. Smith. *Id.*

21 This is the crux of the issue. Should a board be considered “public” simply because its
22 membership is chosen by elected officials? The *Jarvis* court said no; there is no difference
23 between the legislature itself appointing private individuals to run a board, and the legislature
24 declaring that some private entities or individuals may appoint such individuals. The result is the
25 same: a private board given authority that belongs only to the state.

26 Similarly, the fact that constitutional officers and other elected officials appoint many of
27 the members of the ICOC cannot change the fact that these members are chosen as
28 representatives of particular institutions and interests. The evidence presented at trial conclusively

1 shows that they are as much representatives as if they were chosen by the entities themselves.
2 Indeed, in many cases, it was in fact the entity that was chosen first, then the individual. (See,
3 e.g., Henderson depo, page 15-16.)

4 As noted above, the restrictive criteria of the Act guaranteed that executive officers of
5 Stanford and USC would be appointed as surely as if the institutions had been explicitly named.
6 The criteria dictated that another two seats would be distributed among Cal Tech, UC Berkeley,
7 and UC Santa Barbara, just as surely as if they had been explicitly named. Just as there is no
8 constitutionally relevant distinction between the Legislature, on the one hand, appointing
9 individuals and, on the other, naming private entities to appoint individuals, so there is no
10 constitutionally relevant distinction between an act naming institutions, including private
11 institutions, from which the constitutional officers must choose executive officers to serve as
12 representatives and the act allowing those institutions to appoint the members themselves.

13 The constitutional provision at issue in *Jarvis* forbade the delegation of the power to levy
14 taxes to a “private” body. Article XVI, section 3 is much broader; it forbids appropriating public
15 money, not just to any “private” body, but to any institution not under the **exclusive** management
16 and control of the state. The representative nature of the ICOC members and their continuing
17 accountability to their constituencies is inherently incompatible with exclusive management and
18 control by the state.

19 **VI. THE ICOC LACKS THE PUBLIC ACCOUNTABILITY CONTROLS TYPICALLY** 20 **FOUND IN PUBLIC AGENCIES AND COMMISSIONS**

21 In prior briefs, the parties have discussed various types and indicia of executive and
22 legislative control over the ICOC. Defendants have argued that the absence of any particular
23 aspect of executive or legislative control is not determinative of the constitutionality of the ICOC,
24 citing other commissions or boards similarly lacking that aspect.

25 However, following the trial in this matter, the court can now assess the totality of the
26 controls on the ICOC, both on the face of the Act and as implemented, to determine whether,
27 taken as a whole, the ICOC is under the exclusive management and control of the state.

28 Comparison with other boards and commissions strikingly illustrates how the ICOC is uniquely

1 free of the controls applicable to genuine state agencies.

2 The vast majority of boards and commissions whose members sit by appointment are
3 controlled by the most fundamental type of state power: the power of the purse. The Department
4 of Finance, an agency under the Governor, prepares the Governor’s budget each year; each state
5 agency is required to submit a proposed complete and detailed budget to the Department of
6 Finance. (Gov’t Code section 13320; Calif. Const. Article IV, section 12(b).) The Department of
7 Finance has the authority to “revise, alter, or amend any fiscal year budget” of a typical
8 governmental agency. (Gov’t Code section 13322.) The Governor then submits his proposed
9 budget to the Legislature for consideration. Specific appropriations and identification of spending
10 decisions in the budget require a two-thirds vote of the Legislature. (Cal. Const. Article IV,
11 section 12(d).) After the Legislature has approved the final budget bill, the Governor has the
12 power to veto, eliminate, or reduce any item of appropriation for any program or service. (Calif.
13 Const. Art. IV, section 10(e); *Tirapelle v. Davis* (1993) 20 Cal.App.4th 1317, 1320-21.)

14 Even where the Legislature has exempted a particular board or commission from the
15 rigors of the annual budget process through enactment of a continuing appropriation, these
16 commissions, being creatures of the legislative process, can be defunded by the Legislature at any
17 time.⁹ Only a handful of commissions, those created by the initiative process, are free from this
18 most basic control of the legislative and executive branches.

19 Plaintiffs are able to identify only six such commissions, including the ICOC: On those
20 commissions -- other than the ICOC -- all members are either elected public officials or
21 appointees of elected officials. All these commissions -- other than the ICOC and the California
22 Children and Families Commission-- have provisions for removal of members. All have terms of
23 office shorter than the six and eight-year terms of the ICOC members. None -- other than the
24 ICOC -- allows members to delegate their duties, including their voting rights, to someone else.

25 In addition to being without these common forms of control, the ICOC also has its own
26 peculiarities that further diminish executive or legislative control. No commission – other than the

27 ⁹ One example cited in *CART*, *supra* 109 Cal.App.4th at 820, of a commission funded by a
28 continuing appropriation was the Export Finance Fund (section 15395.2 Gov’t). The statute was
29 repealed in 2003.

1 ICOC – has such stringent selection criteria that dictate or practically dictate the particular
2 institutions members must be appointed from. None – other than the ICOC—has an “advisory
3 body” equivalent to the Grants Working Group which effectively decides who will receive the
4 money disbursed and has more information about the recipients than the board members
5 themselves have.

6 In short, the ICOC is a “perfect storm” of lack of state control. While defendants may
7 point to one or more boards which share one or more of these characteristics, such as not all
8 members being appointed by elected officials, or not having a removal provision, there is no
9 commission, and particularly no commission exempted from the budget process and specifically
10 charged with disbursing state largesse to others, which comes anywhere near the ICOC in terms
11 of the lack of all these relevant controls.

12 **VII. THE SCIENTIFIC AND MEDICAL RESEARCH FUNDING WORKING GROUP** 13 **IS THE GATEKEEPER FOR ALL GRANTS**

14 The defendants have pointed to § 125290.50(e)(3) to denigrate the importance of the
15 working groups, and particularly the importance of the Scientific and Medical Research Funding
16 Working Group (“Grants Working Group”). That section¹⁰, however, properly viewed, instead
17 confirms that the Grants Working Group is not made up of public officials and is beyond any
18 state management and control. The purpose of § 125290.50(e)(3) is to avoid conflict of interest
19 problems with the Political Reform Act. That is not important to the constitutional issue that we
20 raise. What is important to that issue is that § 125290.50(e)(3) provides that the members of the
21 working groups are not “public officials, employees, or consultants” of the state. By the very
22 terms of the Act, the state has no control over them.¹¹ Yet their role in the grant awarding process
23 is critical.

24
25
26 ¹⁰ Section 125290.50 (e) (3) states that “Because working groups are purely advisory and have no
27 final decision making authority, members of the working groups shall not be considered public
28 officials, employees, or consultants for purposes of the Political Reform Act....”

29 ¹¹ The lack of state control is further buttressed by the ICOC’s rule that the 15 scientist members
30 of the Grants Working Group must be from outside California.

1 be awarded. The scientific scoring of the grant applications is done by the 15 scientist members
2 of the Grants Working Group. § 125290.60(c)(1). Each application is assigned for initial review
3 to a primary reviewer and two secondary reviewers. According to Mr. Klein, the primary
4 reviewer may spend as much as 3 or 4 days reviewing the application, and the secondary
5 reviewers also spend a good amount of time. (Robert N. Klein trial testimony¹²) Dr. Hall
6 explained that all of the scientist members, who have also reviewed the application, then conduct
7 a peer review and vote to give the application a scientific score. After that, the entire Grants
8 Working Group votes on whether the application should be rated as recommended for funding,
9 recommended for funding if funds are available, or not recommended at all. Summaries of the
10 applications are then prepared by the CIRM staff and forwarded to the ICOC for consideration.
11 In the case of the training grants, the only grant applications thus far considered, applications
12 having a score of less than 60 did not have the actual score set forth, only that it was below 60.
13 (Zach Hall trial testimony. See FN 12)

14 As a group, the ICOC does not have the scientific acumen in stem cell technology, and
15 does not conduct a peer review of the scientific merits of the grant applications. (Zach Hall trial
16 testimony. See FN 12) The ICOC gets only the summary that is prepared by the CIRM staff that
17 is very brief and does not identify the applicant. The only grant application summaries that are
18 now available are the two page summaries relating to the training grants. (PX 1142-1167).

19 In reviewing the training grant applications, many of the ICOC members complained that
20 they were not being given enough information to make an informed judgment. Dr. Baltimore
21 deplored the lack of information and said that “we have to take [the working group’s] word for it
22 because we’re not here rehearsing the whole process of evaluation here.” And: “We’re not
23 substituting our own knowledge of those institutions for the knowledge that was presented to the
24 working group and which they used for their evaluation.” He added:

25 And we really need to understand that. The public needs to understand that
26 because otherwise we’d have to re-spend the time that was spent, and we would
27 need to have much broader knowledge of what was in the applications than we
28 have.

28 ¹² The trial transcript has not yet been completed. Thus a specific page and line number reference
29 to the transcript is not currently available.

1 Dr. Pizzo agreed:

2 I just want to affirm the points being made by Dr. Baltimore. I think our primary
3 responsibility was to appropriately charge and have oversight over the selection of
4 the individuals who are on the review committee. And if we were going to,
5 indeed, be able to make judgments about all of the areas of substance of any grant,
6 we would have to, if we're really doing appropriate due diligence, review each of
7 those grants ourselves in addition. And that is a process that makes no sense. I
8 don't know of any other organization that would do it.

9 So in a way, although I don't think it is rubber stamping, we have delegated the
10 intensity of scientific review to a group of nationally renown, internationally
11 renown experts, and now we are going to utilize their recommendation to
12 formulate our decisions. It's an iterative process. And I think the critical
13 oversight that we'll make is about the overall quality, the nature of the proposals.
14 This will come up, not just with regard to training grants, but it will clearly come
15 up when we get into investigator-driven or multi-institutional-driven grants and the
16 like, and we won't have all of that information. (PX 1116, pp. 68-70).

17 Dr. Thal commented that a lot of pertinent information had been removed, and that they
18 were reliant on the statement of the Working Group without being able to make an independent
19 judgment. (PX 1117, pp. 119-120). Dr. Love was so troubled by the lack of information that
20 "really allows us to make the assessment I think many of us really want to make, which is are we
21 funding stuff that we should feel good about funding," that he asked Dr. Hall for his personal
22 blessings on the applications. Dr. Hall responded that: "I'm certainly comfortable with the
23 working group, the recommendations that the working group made, and I don't think we would in
24 any way embarrass ourselves by funding these grants." (PX 1119, pp. 156-158).

25 Dr. Meyer, the delegate sitting in for Dr. Black, commented that: the working group had
26 thought long and hard about the applications and "so for us to sit here and redraw their line on
27 some basis of quality would be not in our purview really because they are the judges of scientific
28 quality. We didn't go into it like they did." (PX 1120. p. 161.)¹³

29 Dr. Bryant was in full accord:

30 I was just going to say something along those lines. I think having heard who the
31 members of the review group were, I think we had an excellent group of people
32 reviewing them, and I think I would have to see a lot more than what we're seeing
33 here in terms of negatives in order to say, well, we know better than they do
34 because I think these are the people who are the experts and they know what
35 they're looking for. And they could see more of the details than we do about
36 what's in the proposal. So I'm willing to go with the review group's

37 ¹³ Dr. Black himself testified that for the ICOC to award a grant not recommended by the Grants
38 Working Group would be "extraordinarily unusual." (Black depo at 45-46.)

1 recommendations. (PX 1121, pp. 163-164).¹⁴

2 In agreeing with Dr. Bryant, Dr. Pizzo made it explicit that it was the working group that
3 was really making the decisions: “And by way of delegated authority, we’re asking them to make
4 recommendations which are really decisions because we don’t have all the data.” In response to
5 an attempt by Mr. Klein to put a better face on his remarks, Dr. Pizzo said:

6 What I mean by delegate is – poor choice of words – but what I mean is that we
7 are asking for their advisory input to us, but the reality is that we’re going to now
8 come up against this conundrum where we get into what always happens at grant
9 review processes when you fall into the group that is in the gray zone between the
10 very fundable and those that are unfundable. There’s never much discussion about
11 the extremes. All of us have participated in this, and the effort goes into this
12 central activity and center group, and the problem is that we don’t have sufficient
13 data to be able to make that kind of judgment. In a sense **we have to be honest
14 that we are relying, just as Dr. Bryant said, we are relying upon the
15 recommendations that came from the review group in order to make that
16 decision.** And in a sense that is putting us in the position of having to use that
17 information under guidance to make the conclusions that we’re now being asked to
18 make.

19 The only alternative is for the gray area projects to have them completely reviewed
20 by this group. And I would argue that that would not be the most responsible
21 thing to do because I don’t think we have the expertise to necessarily do that
22 completely across the board in this room despite the knowledge that we possess.
23 So I think this is now one of the challenges that we’re going to face. (PX 1122, pp.
24 164-165, emphasis added).

25 There you have it. An honest appraisal of the situation requires recognition that the Grant
26 Working Group’s recommendations will, and should, carry the day. This only makes sense. After
27 experts have spent days reviewing and evaluating each application, how could a group that is
28 called upon to review 26 applications in one day ignore the experts’ conclusions?¹⁵ And if this is
29 true of the scientists on the ICOC, how much more true must it be for the non-scientist disease
30 advocacy representatives? And so it turned out with the training grant applications. No grants
31 were awarded that had not been recommended for funding by the Grants Working Group.

32 ¹⁴ Dr. Bryant confirmed her view in her deposition where she testified that the working group was
33 very carefully chosen to be the best experts in the country and that the credibility of the working
34 group is “very – very high and is very respected by members of ICOC. She felt that while it
35 would be technically possible to award a grant not recommended by the working group, it would
36 be very unlikely, very rare, and there would have to be very unusual circumstances. She could
37 not imagine what that would be. (Bryant depo., pp 24-25)

38 ¹⁵ As the vice chair of the ICOC, Dr. Penhoet, put it: “the ICOC has never contemplated in my
39 experience becoming the review group itself, the primary review group itself.” (Penhoet depo., p.
40 41). Dr. Reed agreed that he relied on the working group for scientific review of the grants.
41 (Reed depo., p. 48).

1 Before leaving the question of how much information the ICOC can get about the
2 applications, we must comment on Dr. Hall's trial testimony that the members can see it all if
3 they really want to. That testimony is directly contrary to what Dr. Hall told the ICOC when it
4 was considering the training grants. After commenting about the lack of information, Dr. Thal
5 said that in the NIH process: "If we want to drill down further, we can actually obtain the entire
6 grant." Dr. Hall and Mr. Harrison responded that that was not possible for the ICOC:

7 Dr. Hall: You understand the distinction. If you see it, it's a public document.

8 Dr. Thal: I guess the question to Mr. Harrison is is there any way that ICOC
9 members can see additional data without making those documents public?

10 Mr. Harrison: Under Proposition 71 all the materials that are forwarded to the
11 ICOC as part of the working group's recommendations are subject to the Public
12 Records Act and, therefore, become public records. So anything that's provided to
13 you along with the working group's recommendations is subject to public access.
(PX 1117, pp. 120-121).

12 **C. The Fate Of The Training Grant Applications Confirms That Only Applications** 13 **That Are Recommended For Funding By The Grants Working Group Will Be** 14 **Approved**

14 Of the twenty-six training grant applications considered by the ICOC, only the
15 applications that were recommended for funding by the Grants Working Group were awarded
16 grants by the ICOC. One recommended application was not awarded a grant. After the
17 recommended applications had been voted on, Dr. Baltimore asked if they could dispense with
18 reading the non-recommended ones and get on with the vote: "Otherwise we're here for hours for
19 no reason." Dr. Love then asked if he could make a motion to not fund any of the not
20 recommended applications. In what seems a rather transparent attempt to establish some basis for
21 defendants' argument that the ICOC will fund an application that was rejected by the Grants
22 Working Group, Mr. Klein picked out an application that had scored close to the funding line and
23 pushed for its approval. Dr. Pizzo commented that it was not recommended by the working
24 group and therefore "So if we have the advisory committee that's made the recommendation, in
25 all fairness, its seems to me if we're going to follow what we've said we're doing, we should
26 listen to this." (PX 1125, pp. 239-241.) Mr. Klein responded:

27 Well, it's very important that this board is going to make independent decisions as
28 a matter of law, as a matter of process. And as a member of the board, I'd like to
29 make comments because I believe that this grant should be funded. (PX 1125, p.
30 241.)

1 He then went on to try to make a case for the application. Among the negative comments made
2 in reply by various ICOC members, there was this one by Dr. Murphy:

3 Bob, I agree with your desire, but I think we're getting into a dangerous ground if
4 we engineer our decisions based on what we want. I think we've got a
5 distinguished committee here that looked at this and said this just doesn't make the
6 mark despite the fact that it has an ultimate goal that we all support. I think this
7 group should be encouraged to come back with a much tighter proposal. This
8 allows us to get what we want, but it also allows us to respect the wish of the
9 committee. (PX 1125, p. 249.)

7 Dr. Dixon seconded Dr. Murphy's comment.

8 The application was voted down, 16 to 6 with one abstention. Of the 18 members with
9 doctorates or medical degrees at the meeting, only one member, Dr. Nova, voted for approval.
10 (PX 1125, DX 315, pp. 238-261). The remaining eight applications that were not recommended
11 for funding by the Grants Working Group were then voted down by the ICOC, unanimously
12 without any discussion. (Plaintiffs' Stipulated Fact No. 6 and PX 1126).

13 **D. The ICOC's Reliance on the Grants Working Group's Recommendations Is**
14 **Another Barrier to State Control.**

15 As is clear from the above evidence, the ICOC relies on the Working Group to separate
16 the wheat from the chaff, and they have no interest in second-guessing the Working Group's
17 judgment that something is chaff. The Working Group is made up of scientists who are pre-
18 eminent in the field of stem cell research. Though some ICOC members might be qualified to
19 review those judgments -- *if* they had all the information the Working Groups have -- most
20 members are not so equipped. As one member testified, "I do not pretend to be able to, as a
21 patient advocate, understand the complexities of the grant. . . . And I would have to say that it
22 would be hard for me to scientifically evaluate a grant. So I would have to say that I would most
23 of the time, as a patient advocate, defer to the scientific expertise in that room and on the ICOC
24 board." (Lansing depo 23-24.)

25 Defendant Klein's one unavailing effort notwithstanding, the practical reality is that the
26 Working Group's recommendations, particularly as to *not* funding individual grant applications,
27 were the final word on the training grants. When they are later faced with the complexities of
28

1 grants concerning actual research proposals, the members' ability to exercise any independent
2 judgment as to the merits of particular proposals will be exponentially reduced. The committee
3 members have neither the information, the expertise, nor the inclination to review, much less
4 overrule the Working Group's recommendations against funding. Even if they wanted to do so,
5 there are no criteria that they could use as guide to making a rational decision. How could the
6 scientifically challenged disease advocates make such a decision without being totally arbitrary?

7 For purposes of demonstrating lack of state control, it is not necessary for plaintiffs to
8 prove that the ICOC has and will always follow every one of the Grants Working Group's
9 recommendations to the letter. The constitutional issue here is whether the ICOC is under the
10 exclusive management and control of the state. By the very structure of the Act, as well as the
11 rules and practices put in place by the ICOC, the ICOC, despite being the nominal "final decision
12 maker," indisputably relies very heavily on the recommendations of the Grants Working Group.
13 Extrapolating from the experience with the training grants as well as the comments of the
14 members, one could hypothesize that the ICOC will rely on and adopt the working groups'
15 recommendations around 95 percent of the time. More importantly, it appears virtually
16 impossible that the ICOC will fund any application not recommended for funding by the grants
17 working group. This group of out-of-state scientists, not appointed by any elected official, not
18 bound by California's laws,¹⁶ thus plays an enormous role in deciding how to award billions of
19 dollars in public money. This in and of itself is enough to find a lack of "exclusive management
20 and control" of the ICOC by the state.

21 **VIII. NEITHER THE EXECUTIVE NOR THE LEGISLATIVE BRANCH OF THE**
22 **STATE CAN ADDRESS THE VIOLATIONS OF THE ACT ALREADY PERPETRATED**
23 **BY THE ICOC**

24 The lack of control by the legislative and executive branches of the state government can
25 already be seen in the ICOC operations. The ICOC has departed from the requirements of the Act
26 in several ways, yet there is no avenue by which any legislative or executive power can address
27 these matters.

28 ¹⁶ The Act specifically exempts the Working Group members from the conflict of interest
29 provisions of the Political Reform Act, the Public Contract Code, and the Government Code.
30 Instead, they are subject only to the conflict of interest code imposed by the ICOC itself.

1 **B. The Very Existence of The Training Grants Is an Indication That The ICOC Is**
2 **Not Under The Management And Control Of The State**

3 The first purpose and intent of Proposition 71 set forth in Section 3 is to use bonds to fund
4 stem cell research and dedicated facilities for scientists ...” The next is to “maximize the use of
5 research funds by giving priority to stem cell research that has the greatest potential for therapies
6 and cures, specifically focused on pluripotent stem cell and progenitor cell research among other
7 vital research opportunities...”

8 The Constitutional Amendment incorporated into Proposition 71 provided that the first
9 two purposes of the institute were:

- 10 (a) To make grants and loans for stem cell research, for research facilities, and for
11 other vital research opportunities to realize therapies, protocols, and/or medical
12 procedures that will result in, as speedily as possible, the cure for, and/or
13 substantial mitigation of major diseases, injuries, and orphan diseases.
14 (b) To support all stages of the process of developing cures, from laboratory
15 research through successful clinical trials.

16 Section 125290.70(a) specifies that at least 90 percent of the fund allocated for grants
17 must be used for research grants, and the remainder, up to 10 percent, for research facilities.

18 Under the Act, the Grants Working Group is to make recommendations to the ICOC for
19 the award of research, therapy development, and clinical trial grants and loans. Section
20 125290.60(b)(4). The applications are to be scored based on scientific merit in three separate
21 classifications – research, therapy development, and clinical trials on criteria including (a) a
22 demonstrated record of achievement in the areas of pluripotent stem cell and progenitor cell
23 biology and medicine, and (b) the quality of the research proposal, the potential for achieving
24 significant research, or clinical results, the timetable for realizing such significant results, the
25 importance of the research objectives, and the innovativeness of the proposed research. Section
26 125290.60(c).

27 Despite Dr. Hall’s yeoman efforts at the trial, there is no way to square the requirements
28 of the Act with the objectives of the training grants. This perhaps is best illustrated by comparing
29 the criteria that Dr. Hall proposed for research grants with those he proposed for the training
30

1 grants. They are set forth in his President's Report for the July 2005 meeting of the ICOC. (PX
2 1019). The criteria for research grants, found at page 13563, go right down the line with those
3 specified by the Act. The criteria for training grants, found at page 13562, bear no resemblance
4 to the criteria set forth in the Act. It may well be, as Dr. Hall testified, that there is a scarcity of
5 scientists who are skilled in stem cell research. But neither Proposition 71 nor the Act speak to
6 training scientists.¹⁸ The bonds are to be sold to realize therapies, protocols and medical
7 procedures, and to support all stages of the process of developing cures, **from laboratory**
8 **research through successful clinical trials**. There are the alpha and the omega. The Act only
9 authorizes the scoring of grant applications in three categories: research, therapy development,
10 and clinical trials.

11 The request for applications for training grants, and the training grants themselves (as best
12 can be gleaned from the summaries) have precious little to do with anything between laboratory
13 research and clinical trials. On the contrary, they are primarily concerned with education. Thus,
14 the Request for Applications explains that:

15 To accomplish its training goals, CIRM will offer grants to non-profit academic
16 and research institutions to foster training at the level of pre-doctoral students,
17 post-doctoral students and clinical fellows. Not every institution will be able to
18 offer training at all levels; moreover the number of faculty, students and fellows
19 engaged in stem cell research differs widely among institutions. Training grants
20 are thus offered at several levels of support to accommodate the capabilities of
21 different institutions. All training programs must offer one or more classes in stem
22 cell biology and medicine, and a required course in the social, legal and ethical
23 implications of stem cell research, along with other training activities....

24 Curiously, all of the training grant summaries prepared by the CIRM staff have the
25 identical paragraph regarding the benefit of the program to the people of California:

26 This program will benefit the people and the state of California by providing high-
27 quality training in the scientific, clinical, social, and ethical aspects of stem cell
28 research to the scientists and clinicians who will develop and apply future
29 therapies in this rapidly emerging field.

30 This is a speculative benefit at best. As Dr. Hall testified, the trainees have no obligation to stay

31 ¹⁸ There is undoubtedly also a scarcity of affordable housing for stem cell scientists in California,
which scarcity may deter some scientists from relocating to California. Using Dr. Hall's
reasoning, the ICOC and its facilities working groups would be justified in diverting funds from
building research facilities to building facilities to house researchers if they believed that would
ultimately be conducive to stem cell research.

1 in the state of California after the taxpayers have funded their education. They are just as likely,
2 if not more so, to go to other states and compete with California for whatever speculative pots of
3 gold that may be at the end of the rainbow.

4 It is understandable that the universities and research institutions represented on the ICOC
5 would like to obtain funds to expand their educational capabilities. That they did so (if funds ever
6 become available) is evident from the list of the training grants awarded. (PX 1021). Eleven of
7 the sixteen went to institutions with representatives on the ICOC. (Plaintiffs' Stipulated Fact No.
8 5). Two others grants went to institutions affiliated with those represented by ICOC members –
9 the J. Gladstone Institutes at UCSF and Children's Hospital Los Angeles, affiliated with USC.
10 (Henderson depo., p. 27.) All of the universities with representatives on the ICOC got a grant.

11 Proposition 71 did not propose to spend the taxpayers' money on educating students, pre-
12 doctoral or otherwise, or give them courses in the social, legal and ethical implications of stem
13 cell research. The Act gives the ICOC no authority to do so.

14 And that is the point. The ICOC can do what it wants without any restraining hand from
15 the executive or legislative branches of the state government.

16 **C. The ICOC Has Approved The Hiring Of Outside Counsel Not Provided For In**
17 **The Act.**

18 The Act provides that, unlike other state agencies, "the institute is authorized to retain
19 outside counsel when the ICOC determines that the institute requires specialized services not
20 provided by the Attorney General's office." Section 125290.45(a)(3). The ICOC has authorized
21 the retaining of outside counsel for assistance in this litigation, hardly a service not provided by
22 the Attorney General. Indeed, the ICOC has never specifically made any determination as to
23 whether the services provided by outside counsel are not provided by the Attorney General's
24 office. While the outside counsel may provide some other services, the bulk of the expense
25 incurred was, and was expected to be, for this litigation. (PX 1112, 1131, 1132.) None of the
26 services provided so far have been related to the specialized "scientific, medical, and technical
27 nature of the issues facing the ICOC." Section 125290.45(a)(3).

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Respectfully submitted,
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