PETITION FOR EXTRAORDINARY RELIEF: IF THE LaROUCHE AIDS INITIATIVE HAD PASSED IN CALIFORNIA

JAY M. KOHORN*

On November 4, 1986, the voters of the State of California rejected a ballot initiative, fostered and promoted by Lyndon LaRouche, that would have required all persons with Human Immunodeficiency Virus ("HIV") to report their condition to the state Department of Health, regardless of whether or not they had symptoms of Acquired Immune Deficiency Syndrome ("AIDS"). The initiative's proponents stressed that the initiative, known as Proposition 64, was created with the explicit purpose of protecting the public from the dreaded disease.[1] Who could disagree with such a noble goal?

The means proposed to accomplish this purported goal, however, were not as lofty as the goal itself. The initiative would have activated a number of existing provisions of California's health code and mandated their application to persons carrying the AIDS virus, HIV.[2] As a result, persons carrying HIV stood to lose their anonymity, confidentiality, privacy, educational opportunities, and, in some cases, their jobs, through the application of health provisions that presuppose the air-borne, food-borne, or casual transmissibility of HIV.[3]

According to the ballot argument, the initiative was designed to "keep AIDS out of our schools [and] out of commercial food establishments."[4] In truth, the initiative was designed as a tool for discrimination. It merely provided a legal justification for irrational decisions based on fear and intolerance.[5] It was, in reality, a poorly disguised anti-homosexual measure.

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1. *See* Exhibit A, Proposed California Voter Initiative 64, Acquired Immune Deficiency Syndrome (AIDS) Initiative Statute, at 510.

2. *See* Exhibit A, *supra* note 1, at 510.

3. *Id.*

4. *See id.* at 511.

5. In 1986, a United States Justice Department memorandum approved employment discrimination against persons whom an employer fears or suspects may transmit the AIDS virus in the workplace, *whether or not that fear or suspicion is rational.* U.S. Justice Dep't, Office of Legal Counsel, Memorandum for Ronald E. Robertson, General Counsel, Dep't Health & Human Services, Re: Application of Sect. 504 of the Rehabilitation Act to Persons with AIDS, AIDS Related Complex or Infected with the AIDS Virus. Other court decisions and administrative actions have — either explicitly or by analogy — held to the contrary, see for example, Department of Fair Employment and Housing v. Raytheon Co., Cal. Fair Empl. & Hous. Comm'n. No. 87-04, Daily Lab. L. Rep. (BNA) No. 29, at E-1 (Feb. 13, 1987) (currently on appeal); School Board of Nassau County v. Arline, 107 S. Ct. 1123 (1987), *petition for reh'g*

Proposition 64 was defeated. It did not lose, however, because of its blatant discriminatory nature any more than a judicial challenge to the statute, had it been enacted, would have been successful for that reason. The key to the initiative's defeat was the irreconcilability of the scientific, medical and public health evidence with the operative provisions of the proposed law. In other words, in the context of medical fact and California law, the initiative was irrational; the voters recognized that its provisions were counter-productive to its stated purpose.

Had the voters passed the initiative, the planned judicial challenge would also have been based primarily upon the proposition's inherent irrationality. The fact that the initiative was internally inconsistent as well as inconsistent with the established body of existing substantive and procedural law, provided a powerful indicator of just how irrational the proposition was. The initiative was unconstitutional as a violation of substantive due process even under the lowest standard of judicial scrutiny. Arguably, however, the measure demanded more rigorous judicial review. The impact of the proposed measure on the fundamental rights of Californians, such as the right of privacy, the right to pursue a lawful occupation, and the right to an education, provided the additional weight necessary to compel a "strict scrutiny" examination within the larger context of an irrationality analysis.

The Petition for Extraordinary Relief was designed as a safety net to the educational campaign to defeat the initiative at the ballot box. In preparing the legal challenge, our first reference was to existing state law. The California Legislature has been a pioneer in the examination of AIDS-related information. Thus, the petition section of the pleading contains numerous allegations based upon legislative findings embodied in statutory law, allegations which are further buttressed in the body of the Memorandum of Points and Authorities with expert declarations and with the leading scientific studies. The strength of the "facts" acknowledged by leading experts, scientific journals, *and* the legislature cannot be overemphasized.

Additionally, the state law we examined was not limited to codified statutes. Administrative rules and regulations, which in California often have the force and effect of legislative enactments, also provided a rich reservoir of ammunition against the initiative.

As to the form of the petition, it should be noted that final approval of some of the plaintiffs was not received prior to the initiative's defeat. Therefore, some names which would have otherwise been included have been deleted from the petition. The descriptions of the parties contained in the petition, however, indicate the types of plaintiffs whose interests the appellate courts might find compelling. Additionally, the entire Petition for Extraordinary Relief, including the declarations attached thereto, is a penultimate draft. If the brief had been needed, it would have undergone some additional editing

denied, — U.S. —, 107 S. Ct. 1913 (1987); Thomas v. Atascadero Unified School District, 662 F. Supp. 376 (C.D. Cal. 1987); Chalk v. U.S. Dist. Ct., 832 F.2d 1158 (9th Cir. 1988).

and formatting. Lastly, it should be noted that the citation style used in the pleading conforms to California rather than federal standards.

As of January 1988 an initiative in basically the same form and substance as the LaRouche Initiative qualified for inclusion on the June 1988 statewide ballot.

Special acknowledgment must be given to Thomas F. Coleman, Laurence R. Sperber, and Mickey J. Wheatley, for their crucial assistance in the preparation of the pleading, and to Susan McGrievy, whose vision as well as her knowledge of the massive body of AIDS-related scientific data have been invaluable in most all the litigation on related issues in California and the nation.

Case No. LA _____

IN THE

SUPREME COURT OF THE STATE OF CALIFORNIA

_____ Medical Association; _____;
_____, M.D., Medical Director of the _____
Health Center; _____, M.D., U.C.L.A. School of Medicine;
State Assemblyman _____, State Senator
_____, and State Assemblyman _____, in
Their Capacities as Taxpayers of the State of California,

Petitioners.

– v. –

_____, as Director of the California Department of Health Services; _____, City Attorney of Los Angeles, as Representative of All Misdemeanor Prosecutors in the State of California,

Respondents.

PETITION FOR EXTRAORDINARY RELIEF IN THE NATURE OF PROHIBITORY MANDAMUS; REQUEST FOR TEMPORARY RELIEF (STAY); MEMORANDUM OF POINTS AND AUTHORITIES

TO THE HONORABLE ROSE ELIZABETH BIRD, CHIEF JUSTICE, AND THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALFIORNIA:

1. The subject of this Petition is the constitutional and statutory validity of Proposition 64, the LaRouche Initiative, which was passed at the general election held in California on November 4, 1986.

FACTUAL CONTEXT

2. The United States and, indeed, the entire world, is presently experiencing a life-threatening medical emergency, a deadly "viral-based epidemic" of a magnitude perhaps unequalled in recent history, "which [epidemic] poses an unprecedented major public health crisis in California which threatens, in one way or another, the life and health of every Californian."[6] Acquired Immune Deficiency Syndrome (AIDS) is caused by a viral infection that breaks down the body's natural immunities protections, leaving it vulnerable to virulent diseases normally resisted or repulsed by a healthy immune system.[7]

3. In the short time AIDS has been recognized by the medical community, its causative agent (an unusual retrovirus known as HTLV-III and recently renamed HIV or Human Immunodeficiency Virus) has been found and isolated, and its methods of transmission have been *conclusively* determined.[8] However, there is presently no cure,[9] and the "best hope of stemming the spread of the AIDS virus" is research to find and develop "an AIDS vaccine."[10]

4. Persons whose bodies carry the virus fall into a spectrum of clinical reactions, from totally asymptomatic (the largest percentage), to mild to severe illnesses consisting of non-specific symptoms (AIDS-related complex or ARC), to major and deadly opportunistic diseases (AIDS).[11] Once infected, absent medical intervention based upon some future scientific discovery, the body remains infected for life.[12] Up to 2,000,000 persons in the United States have been exposed to the virus.[13]

5. Between five and twenty-five percent of persons infected with the virus may ultimately develop the full-blown disease. For them, the incubation period from infection to development of AIDS varies form three to seven years.[14] To date, about 4,000 cases of the full-blown disease have been treated

6. *See* Health and Safety Code [hereinafter H & S] § 199.55(a), amended Sept. 1986 (Assembly Bill [hereinafter AB] 2404). Many of the factual allegations herein are taken from legislative findings embodied in California statutes.

7. *See* H & S § 6199.46, Ch. 498, Sec. 1.

8. *See* Stats. 1986, Ch. 498, Sec. 1.

9. *See* AB 2404.

10. *See* AB 4250.

11. *See* AB 4250; Senate Bill [hereinafter SB] 1928 (Sept. 1986).

12. *See* H & S § 199.46; AB 4250.

13. *See* AB 4250.

14. *Id.*

in California, at a medical cost of $250,000,000.[15] In addition, the legislature has found that there are over four times as many persons suffering from ARC, some with disabling symptoms, which can put a "severe burden on county-supported health programs," and approximately 135,000 persons in Los Angeles County alone who have been infected.[16]

6. Scientific evidence is *conclusive* that modes of transmission of the unusual HIV virus are limited to transfer of body fluids and blood products (a) through sexual contact, (b) by intravenous injections, or (c) to infants born to infected women;[17] therefore, the disease has primarily affected certain "risk" groups. Conversely, since the AIDS virus is not spread by air, water, food, or casual social contact,[18] it has not moved into the general population in the United States; it has not infected even those persons — such as family members or health care and hospital workers — who are physically most closely and intimately (but not sexually) associated with infected persons.[19] Thus, neither AIDS nor the HIV infection is easily transmissible or contagious or communicable in the traditional and generally understood sense.

7. The largest "risk" group consists of male homosexuals,[20] a group which has traditionally experienced an unusually high degree of prejudice and discrimination from both the government and the private business sector, as well as from the general public.[21] Others at risk include bisexuals, intravenous drug users, hemophiliacs, and non-monogamous sexually active heterosexuals.

8. The state legislature has enacted a complex statutory scheme designed specifically to help protect the public health and to promote an effective fight against the disease.[22] Included within this scheme are provisions which recognize the need for confidentiality of medical records and blood antibody test results[23] and, in some cases, anonymity in testing for antibodies to the virus,[24] since "disclosures relating to AIDS involve potential issues of invasion of privacy, confidentiality of medical information, informed consent, and civil rights."[25] Especially because "[p]ublic speculation about the potential for transmission . . . and other factors, have led to expression of public

15. *See* AB 2404.

16. *See* AB 1928.

17. *See* Stats. 1986, Ch. 498, Sec. 1.

18. *Id.*

19. *See* Surgeon General's Report on Acquired Immune Deficiency Syndrome (U.S. Government, 1986) at page 13, a copy of which is attached to the Declaration of ____, M.D., and marked Exhibit B-1. [Ed. note: With the exception of Exhibit A, Proposition 64 with Ballot Argument, the Exhibits referred to in the Petition and Memorandum are not republished here.]

20. *See* AB 4250.

21. *See Report*, California Commission on Personal Privacy (State of California, 1982); *Report*, Attorney General's Commission on Racial, Ethnic, Religious and Minority Violence (California Dept. of Justice, 1986).

22. *See* Points and Authorities, attached hereto, Section III.

23. *See* H & S § 199.21.

24. *See* H & S § 1632.

25. *See* Stats. 1986, Ch. 498, Sec. 1.

fears or anxieties approaching, in some circumstances, panic and hysteria,"[26] such confidentiality and anonymity is necessary to ensure that persons in the said "risk" groups (a) will not be afraid to seek medical intervention if they are ill, (b) will not avoid being tested as an aid to effectuating behavioral changes, (c) will be encouraged to participate in medical research projects aimed toward finding a cure, and, (d) especially those testing positive, will not have to endure the prejudice, intolerance, and discrimination, and, in some cases, violence, bred out of fear and of ignorance about the infection and about those thought to be infected.

9. The actual disease AIDS is already present on the list of "reportable" diseases maintained by the California Department of Health Services[27] and transfusion-associated, blood donor, and hospital cases of AIDS are otherwise reportable by doctors, hospitals, and public health officials.[28]

10. Public health officials presently also already have the discretion, authority, and responsibility to use whatever measures are necessary to protect the public health;[29] they exercise such discretion based upon guidelines developed for the unique characteristics and modes of transmission of each individual disease.[30]

11. It is in this context that Proposition 64, known as the LaRouche Initiative, proposed to voters a series of provisions which would (a) declare AIDS *and* the condition of carrying the virus "an infectious, contagious and communicable" disease and condition respectively; (b) place *both* on the list of reportable diseases maintained by the California Department of Health Services; and, (c) in cases of the said disease *and* condition, mandate the use of certain Health and Safety Code provisions and Administrative Code sections, many of which presuppose air-borne, food-borne, or casual transmissibility, and which carry criminal sanctions for non-enforcement. The ballot argument makes it clear that the proponents intended that "Proposition 64 will keep AIDS out of our schools [and] out of commercial food establishments." A copy of the LaRouche Initiative with the ballot argument is attached hereto and marked Exhibit A.

12. Petitioners herein respectfully ask this Court to determine the validity of the LaRouche Initiative under the laws and Constitution of the State of California. Petitioners contend the Initiative is invalid for the following reasons:[31]

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26. *Id.*

27. *See* Cal. Admin. Code § 2500, § 2503.

28. *See* H & S § 1603.1.

29. *See* H & S § 3110.

30. *See* Exhibit B, Declaration of _____, M.D.

31. Although the Initiative raises the spectre of quarantine and isolation, these measures probably remain within the discretion of health officers and will, therefore, not be discussed in this Petition. However, it should be noted that such measures would require special procedural due process and, because the infection is not curable, might, under certain circumstances, result

(a) It is irrational and otherwise internally inconsistent in that its medical purpose is not furthered by its substantive provisions.

(b) Its terms are so vague and ambiguous that its meaning can not be determined, although there are criminal sanctions for failure to enforce provisions.

(c) It is inconsistent with the existing legislative and administrative regulatory schemes designed to protect and safeguard the public health.

(d) It creates a conflict between the medical ethics and the legal obligations of both doctors and public health officials.

(e) Its intent is to obstruct and foreclose certain fundamental rights and liberties of many Californians, including the Right of Privacy, the Right to Pursue a Lawful Occupation, and the Right to Attend School, all without a rational basis in fact, let alone a compelling interest.

(f) It is a vague, confusing and "unnecessary" law which will promote litigation but will do nothing to prevent the spread of the disease, protect the public, or help those already infected. It is, in fact, likely to harm those public health objectives.

(g) It will divert public funds from the education of the population necessary to achieve the behavior modifications required to stem the tide of the infection, from research necessary to find or create a vaccine, and from providing necessary medical and social services to those who are ill, by focusing those public funds on the unnecessary task of gathering and maintaining records on hundreds of thousands of individuals, on the meaningless and impossible task of mass contact tracing, and on the policing of schools and certain businesses to purge them unnecessarily of infected persons.

(h) It will affect California's most valuable resource, its human potential, by causing the removal of significant numbers of persons from the work force, requiring many of them to rely on public assistance, and depriving the state of their productivity.

ORIGINAL JURISDICTION OF THE SUPREME COURT

13. Petitioners invoke the original jurisdiction of this Court to grant extraordinary relief in the nature of prohibitory mandamus and immediate temporary relief in the nature of a stay order under Article VI, Section 10 of the California Constitution, Code of Civil Procedure Sections 1085-86, and Rule 56 of the California Rules of Court.

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in a lifetime sentence amounting to cruel or unusual punishment. (*See In re Reed* (1983) 33 Cal.3d 914).

The Initiative is also likely to have the indirect effect of endangering the nation's blood supply by frightening people — especially those working in schools or in businesses dealing with foods and who would face loss of their jobs — to the extent that they will be unwilling to donate blood because of the possibility and inevitability of some false positive antibody test results. (*See* Statement of Ralph Wright, Director of Public Relations, Red Cross, Los Angeles Times, September 20, 1986, part A, at 3, col. 1-3.)

14. The issues set forth in this Petition involve matters of the greatest possible magnitude of public importance — both for the entire state of California and for the rest of the country — and require the fastest possible resolution, for they deal with the obligations of all public health officials and doctors in the midst of the terrible epidemic which our state legislature has found "poses an unprecedented major public health crisis in California" threatening "the life and health of every Californian."[32] The disposition of the questions discussed herein will determine whether the time, energy, and resources of both government and the medical profession, will be focused on controlling and preventing the spread of the disease, protecting the people of this state, and helping those already infected, or on litigation over the meaning of the various aspects of this initiative, on the gathering and maintenance of unnecessary records, driving "risk" groups underground, and on unnecessarily interfering with the fundamental rights of those who most need the state's protection, all to the detriment of the People of the State of California.

URGENCY OF STAY

15. Based upon paragraphs 12 and 14, above, temporary relief in the nature of a stay is urgently needed to keep the provisions of the Initiative (a) from harming public health and interfering with the legitimate public health objectives and procedures presently being administered by doctors and public health officials,[33] (b) from irreversibly injuring the fundamental rights of many Californians, including the sensitive Right of Privacy[34] upon which the Initiative's reporting requirements have a significant impact; (c) from forcing health care professionals to choose between violating the confidentiality of patients by reporting those who do not have AIDS but have tested positive for the virus or antibodies, or suffering criminal prosecution for failing to report such persons, and (d) from causing a massive unnecessary expenditure of public funds under circumstances in which those funds are so urgently needed elsewhere. Because of the statewide impact of the provisions of the Initiative, the stay order should be given statewide effect pending this Court's resolution of the serious matters raised by the Petition.

CAPACITIES AND INTEREST OF PETITIONERS

16. Petitioner _____ (hereinafter referred to as _____) is the statewide organization of doctors, charged with the duty to oversee the professional ethics and responsibilities of members of the medical profession in Cali-

32. H & S § 199(a), amended Sept. 1986 by AB 2404.

33. If H & S § 208.7 requires administrative review and interpretation of the Initiative because the Initiative in essence amends referenced provisions of the California Administrative Code, then its enforcement must be stayed until such review is completed.

34. Once a doctor has reported to the Department of Health Services the personal information of a person who has been determined to carry the virus, if the provisions of the Initiative requiring such reporting are later invalidated, there is no way to "unreport" that person's information; that person's privacy will have been lost without a remedy.

fornia. Its member physicians provide services to persons who are in "risk" groups for the HIV infection and who, in some cases, have AIDS, and, in other cases, have tested or will test positive for antibodies to the virus. The organization and its members ask that this Court take the actions requested herein because the Initiative intrudes on the rights of _____ and its physical members by (a) creating a conflict in which doctors are caught between the legal obligations imposed by the Initiative and the ethical obligation to provide confidential health care; (b) compromising the professional integrity and ethical responsibility of its members to provide such care without intruding upon the patients' privacy and other rights except to the extent *necessary* for the protection of the public health as determined by the medical and public health communities; and (c) corrupting the integrity of the body of law which governs the medical profession and the activities of doctors in the state. In addition, members can be criminally prosecuted for failure to implement the Initiative's mandate. _____ also asserts the rights of patients of members to confidential health care and privacy.

17. Petitioner _____ (hereinafter referred to as _____) is the statewide organization of all local public health officers in the State of California. _____ is established under H & S § _____ and is given the authority and responsibility to review, prior to enactment and implementation, all state administrative regulations and rules dealing with public health issues.[35] Its members presently have the power to do whatever is necessary to curb the spread of HIV, and this power is presently being exercised judiciously based upon sound medical judgment.[36] The organization and its members ask that this Court take the actions requested herein because the Initiative (a) intrudes upon the authority of its members by mandating certain applications of certain state health regulations, in effect amending such regulations, without the _____ review and comment process required by the law and which serves as a safeguard in the arena of public health, (b) requires the members of ____ ____ to act inconsistently with their medical and professional ethics and in a manner which will harm public health, (c) undermines the spirit of trust which public health officers have labored so carefully to create with those in "risk" groups in order to ensure a cooperative effort toward making the behavioral changes necessary to stem the tide of the disease, and to prevent those infected with the virus from being driven underground for fear of losing their jobs or being earmarked for discrimination, and (d) will waste valuable public health personnel, time, energy, and financial resources in litigation over the various possible interpretations of the vague language of the Initiative even though the provisions do nothing for the public health, *no matter how interpreted.*

18. Petitioner _____, M.D., Sc.M., J.D., is the medical director of the _____ Health Center located at the Gay and Lesbian Community Serv-

35. *See* H & S § 208.5.

36. *See* Exhibit B, Declaration of ____, M.D.

ices Center in _____. Dr. _____ has the responsibility of overseeing the administration of testing of large numbers of persons for antibodies to HIV. The _____ Health Center is a designated anonymous test site.[37] In addition, the Center maintains the confidential medical records of many patients who have AIDS or ARC or who have required or requested services relating to a positive antibody test. Dr. _____ asks that this Court take the actions requested herein because the Initiative intrudes upon his statutory obligation and ethical responsibility to deliver anonymous testing and confidential medical services. In addition, Dr. _____ can be criminally prosecuted for his failure to implement the Initiative's mandate. He also asserts the rights of the patients to confidential health care and privacy.

19. Petitioner _____, M.D., is board certified in infectious diseases and, for the past three years, has had primary responsibility for conducting research at the Men's AIDS Clinic at the _____ Department of Medicine, in order ultimately to find a cure for the HIV infection. Dr. _____ asks that this Court take the actions requested herein because the Initiative will destroy the confidentiality rules which have been necessary to induce possibly infected persons to participate in the medical and epidemiological research which is necessary to find a cure or to develop a vaccine. Dr. _____ asserts his interest in the public health of the state and the country and in finding a medical solution to the disease problem. He also asserts his right as a researcher to engage in research in which it is necessary that the confidentiality of participant medical records and test results is guaranteed. In addition, Dr. _____ can be criminally prosecuted for failure to implement the Initiative's mandate. Finally, he asserts the privacy rights of all persons participating in such research.

20. Petitioners _____, _____, and _____ are all citizens and resident taxpayers of the State of California, are members of the state legislature, and, in their capacity of taxpayers, ask that this Court take the actions requested herein to enjoin the expenditure of any and all public health monies in the enforcement of the Initiative which, they assert, is an invalid law for all persons set forth in paragraph 12, above.

21. Finally, all petitioners assert an interest in the subject of this Petition as citizens concerned for the public health, for the integrity of the laws affecting public health, and for the proper performance of the duties of public health officials in the State of California.

CAPACITIES AND DUTIES OF RESPONDENTS

22. Respondent _____, M.D., is the Director of the California Department of Health Services and, as the state's chief health officer, is charged with the responsibility of implementing existing laws dealing with public health, including statutes, regulations, rules, and the LaRouche Initiative. He

37. *See* H & S § 1632.

is also responsible for maintaining the list of reportable diseases.[38] In addition, his department must make determinations as to the proper interpretation and required enforcement of health regulations.[39] All local health officers derive their power from the state Department of Health Services.

23. Respondent _____, the City Attorney of Los Angeles, and all other misdemeanor prosecutors in the State of California, are charged with the responsibility of prosecuting all misdemeanor offenses within their jurisdictions, including offenses under H & S § 3354 and the more general § 24800, which makes it a misdemeanor to neglect or refuse to perform the duties mandated by any law dealing with the public health. These prosecutors are empowered under these sections and the mandate of the LaRouche Initiative and its referenced Health and Safety Code sections and Administrative Code provisions, to prosecute public health officers, doctors, nurses, dentists, coroners, clergymen, business proprietors, and school principals and teachers, among others.[40]

24. If the LaRouche Initiative is made effective, for all of the reasons set forth in paragraphs 12, 14, and 15, above, the People of the State of California and, specifically, persons with AIDS, persons with HIV infections, doctors and public health officials, and taxpayers, will all suffer irreparable injury. Most importantly, the entire nation will suffer from the distrust and fear engendered by the Initiative, hampering research and education and ultimately prolonging the reign of the disease.

NO ADEQUATE REMEDY AT LAW

25. Petitioners have no plain, speedy, and adequate remedy in the ordinary course of law to challenge the validity sought herein, in that the issues are of such great statewide interest, concern, importance, and impact, that they must immediately be decided by the highest court of statewide jurisdiction. An action for declaratory relief in a trial court would be too time consuming and would not result in a decision of statewide authority. Similarly a "test" case "would take considerable time to traverse the avenues of trial and appellate review. Relief by writ of mandate . . . is substantially the only adequate way to provide the necessary prompt relief and certitude prayed for by petitioners."[41]

WHEREFORE, Petitioners pray:

1. That this Court issue an order staying enforcement statewide of any and all provisions of the LaRouche Initiative by Respondent _____, as Director of the California Department of Health Services, and all persons under his jurisdiction, and Respondent _____, City Attorney of Los Ange-

38. *See* H & S § 3123.

39. *See* H & S § 208.7.

40. *See* H & S §§ 3118, 3125; Cal. Admin. Code § 2500.

41. *Planned Parenthood Affiliates v. Van de Kamp* (1986) 181 Cal.App.3d 245.

les, and all other misdemeanor prosecutors in the State of California, pending this Court's determination of the validity of that Initiative;

2. That this Court issue its alternative writ of mandate ordering the said respondents to perform their legal duties without regard to the said Initiative or to show why this Court's peremptory writ should not issue;

3. That if the matter may not be resolved by the pleadings alone, this Court set this matter for oral argument at the earliest possible time compatible with its calendar;

4. That this Court render and opinion an issue its peremptory writ indicating the invalidity of the LaRouche Initiative and permanently restraining and enjoining enforcement of its provisions; and

5. That this Court grant such other and further relief as it deems just and proper.

Respectfully submitted,

ALSCHULER, GROSSMAN & PINES
by BURT PINES

Of Counsel:
THOMAS F. COLEMAN
JAY M. KOHORN
LAURENCE R. SPERBER

VERIFICATION

I, _____, am a petitioner in this action. I have read the foregoing Petition and know the contents thereof. The statements made therein are true to the best of my knowledge.

I declare under penalty of perjury that the foregoing is true and correct and that this Verification was executed on November —, 1986, at Los Angeles, California.

MEMORANDUM OF POINTS AND AUTHORITIES

I.
PRELIMINARY STATEMENT

Although its language is deceptively simple, Proposition 64, known as the LaRouche Initiative, which was passed at the general election on November 4, 1986, enacts into law a set of extraordinarily irrational, vague, and medically inapposite provisions which purport to help control Acquired Immune Deficiency Syndrome (AIDS) and to protect the public from this disease. By voting for this measure, the voters voiced their agreement with the underlying purpose.

The Initiative requires reporting of all persons in a new and very large category, people who carry the virus but who do not have AIDS. Public health officials agree that this is both unnecessary and counterproductive to achieving the object of protecting the public and slowing the spread of the disease by creating an atmosphere of fear, driving risk groups underground.

Certain other provisions of the Initiative could be interpreted broadly or narrowly, either requiring mandatory or allowing discriminatory action relating to limiting the public exposure to persons with the disease or virus. While the intention of the proponents, as shown herein, is that the provisions be mandatory, with either interpretation the public health suffers.

The broader construction of the Initiative mandates that certain Health and Safety Code and California Administrative sections *must* be applied in cases of persons with AIDS *and* persons with the HIV infection, impinging on a number of fundamental rights with no factual or medical basis whatsoever. The Initiative is thus unjustifiable as a means to achieve its stated purpose.

Even if the provisions were held to be only discretionary, the infirmity of the Initiative would not be cured. In a health crisis, the perception and cooperation of the general public is critical. The medical experts agree that the necessary cooperation would be thwarted by the reporting requirement of this Initiative as well as by the fear that intense public pressure on health officials to exercise the discretion against persons with the virus would overcome sound medical judgments. *See* section III(B), *infra*.

The public is given several dangerously wrong messages by the Initiative. First, the Initiative, by focusing on restricting the public activities of persons with AIDS and with the virus, in essence ratifies misinformation about spread of the disease through casual contacts, misinformation which can lead to private discrimination and even violence. Second, persons in "risk" groups are made vulnerable to the powers of government to invade their privacy, take away their jobs, and limit their freedom, and are thus encouraged to avoid necessary medical governmental interaction. Third, the Initiative diverts attention from the need for self-education by every person in the state, lulling people into the false security that government is doing something effective about the disease and has made them safe.

In addition, scarce fiscal resources, desperately needed for AIDS education, research, and health care, would be diverted and wasted by reason of the enforcement of provisions of the Initiative, including the provision requiring gathering and maintenance of records on the new and extremely large category of persons to be reported. *See Amicus Curiae* brief of National Gay Rights Advocates on file in this matter, which brief centers around the fiscal impact of the Initiative.

On October 22, 1986, C. Everett Koop, M.D., Sc.D., the Surgeon General of the United States, released his *Report on Acquired Immune Deficiency Syndrome*. In his Statement announcing the Report, at page 2, Dr. Koop states:[42]

> From the start, this disease has evoked highly emotional and often irrational responses. Much of the reaction could be attributed to fear of the many unknowns surrounding a new an very deadly disease. This was compounded by personal feelings regarding the groups of people primarily affected — homosexual men and intravenous drug abusers. Rumors and misinformation spread rampantly and became as difficult to combat as the disease itself. It is time to put self-defeating attitudes aside and recognize that we are fighting a disease — not people. We must control the spread of AIDS, and at the same time offer the best we can to care for those who are sick.

And at page 6:

> I'd like to comment briefly on the issues of mandatory blood testing and of quarantine of infected individuals. Ideas and opinions on how to best control the spread of AIDS vary, and these two issues have generated heated controversy and continuing debate. . . . [T]he AIDS epidemic must be contained, and any public health measure that will effectively help to accomplish this goal should be adopted. Neither quarantine nor mandatory testing for the AIDS antibody will serve that purpose.

The people of the State of California desire to do whatever is appropriate to eradicate the disease. By voting for the Initiative, they have made that desire known. However, it is not clear that the People have the medical knowledge to determine and mandate the appropriate medical means to that end. A layman reading the Initiative would not even know what means were actually being proposed. On the other hand, public health officials presently have the power to do whatever is necessary and appropriate to accomplish the intended result.[43] Forcing public health officials and other people in the state to take actions that medical science has concluded are inappropriate is both

42. *See* Exhibits B-1 and B-2, attached hereto.

43. *See* H & S § 3110.

dangerous and inconsistent with the objective of the People in passing the Initiative.

As the Surgeon General noted, not all reactions to the disease have been rational. Public education is the key to ensuring that society's responses are right-minded and not mean-spirited or borne solely out of ignorance and fear. The present case is part of that educational process. The purpose of this Petition is to make certain that the law remains rational and does not fuel the misinformation which can only prolong the tenure of the disease, unnecessarily injuring many individuals and the society at large on the way.

II.
THIS CASE PRESENTS COMPELLING REASONS FOR EXERCISE OF THIS COURT'S ORIGINAL JURISDICTION

Article VI, Section 10 of the California Constitution grants to the Supreme Court original jurisdiction in "proceedings for extraordinary relief in the nature of mandamus, certiorari and prohibition." That jurisdiction is discretionary and is exercised in special circumstances in which the matter is one of public importance requiring prompt resolution. *California Housing Finance Agency v. Elliot* (1976) 17 Cal.3d 575, 580; *Wenke v. Hitchcock* (1972) 6 Cal.3d 746, 750; *Sacramento County v. Hickman* (1967) 66 Cal.2d 841, 845.

The health of the people of the State of California is certainly a matter of public importance, and the immediate threat of injury to the public health as well as to the fundamental rights of citizens mandate a prompt resolution.

Because, as shown herein, the Initiative is constitutionally invalid, this Court should issue a writ of prohibitory mandate to enjoin its enforcement.

> A writ may issue to compel a nonjudicial officer to perform a legally mandated ministerial duty, and to do so properly in accordance with law. [Citations omitted.] The official's duty to perform a mandatory ministerial duty in accordance with law embodies a corollary duty to *not* perform the duty in violation of law. The lawful exercise of the ministerial duty may be compelled; the unlawful exercise of the duty may be restrained. [Citations omitted.] Technically, however, a writ of prohibition will not lie to restrain a nonjudicial act. [Citations omitted.] Mandate is therefore employed to restrain a public official from the unlawful performance of a duty; as so employed, the writ is known as "prohibitory mandate." [Citations omitted.]
>
> . . . Prohibitory mandate has also been used to restrain state officials from enforcing ministerial statutory provisions found to be unconstitutional. [Citations omitted.] The writ has been repeatedly employed in sexual privacy cases to restrain the enforcement of unconstitutional provisions of law. [Citations omitted.]

Planned Parenthood Affiliates v. Van de Kamp (1986) 181 Cal.App.3d 245, 262-63.

Since the LaRouche Initiative mandates official action by state officials, a petition for a writ of prohibitory mandate in this Court is the proper vehicle with which to restrain enforcement of such an unconstitutional provision.

Also, in *Planned Parenthood, supra*, one of the plaintiffs was a California taxpayer seeking to enjoin the expenditure of public monies in the enforcement of an invalid law. The court held that she was a proper plaintiff in the action for writ of prohibitory mandate.

III.
THE LAROUCHE INITIATIVE IS IRRATIONAL AND INTERNALLY INCONSISTENT; ITS MEDICAL PURPOSE IS NOT FURTHERED BY ITS SUBSTANTIVE PROVISIONS

The explicit public health purpose of the LaRouche Initiative is laudable, and no one can disagree with it. However, the Initiative is misleading and irrational in that the means set forth to carry out that objective are unnecessary for and, in fact, dangerous to the public health. That reason alone should be sufficient to justify invalidating the Initiative in its entirety.

A. The Initiative's Express Objectives Are Not Offensive.

By its own terms, the Initiative's purposes are threefold: (1) to "enforce" and confirm existing legislative findings on AIDS; (2) to protect persons with AIDS and the public health; and (3) to use the existing structure of public health personnel, statutes, and regulations to preserve the public health. *See* full text attached hereto as Exhibit A. [Ed. note: Exhibit A is attached as an Appendix to the Petition and Memorandum of Points and Authorities.]

A.(1) Legislative Findings Confirm the Factual Information About AIDS.

The Initiative refers to the legislative findings set forth in H & S § 195, which declares that AIDS is serious and life-threatening, usually lethal, and caused by an infectious agent, with a high concentration of cases in California.

Other legislative findings, however, are equally important and are set forth in the various laws which comprise the statutory scheme relating to public health. It is the explicit purpose of the Initiative to use this existing statutory scheme; there is no intent, expressed or implied, to contradict or override any of the present legal structure.

The legislature has found, for example, that the "medical evidence regarding transmission of the [AIDS] virus is conclusive that this infection is spread by sexual conduct with infected persons, exposure to contaminated blood or blood products through transfusion [sharing of hypodermic needles or contaminated transfusion], and by perinatal transmission, and that there is

no known risk by other means. In other words, the AIDS virus is not transmitted by casual contact." Stats. 1986, Ch. 498, Sec. 1.

A.(2) The Existing Statutory Scheme Is Consistent With the Legislative Findings.

Most of the existing legal structure relates to public health and diseases generally, but there is an entire framework of statutes that focus specifically on AIDS. A number of these specific provisions are set forth in the opening paragraphs of the Petition herein. Included are sections that provide for confidentiality of medical records and blood antibody test results (H & S § 199.21) and, in some cases, anonymity in testing for antibodies to the virus (H & S § 1632), since "disclosures relating to AIDS involve potential issues of invasion of privacy, confidentiality of medical information, informed consent, and civil rights" (Stats. 1986, Ch. 498, Sec. 1).

Especially because "[p]ublic speculation for transmission . . . and other factors, have led to expression of public fears or anxieties approaching, in some circumstances, panic and hysteria" (Stats. 1986, Ch. 498, Sec. 1), such confidentiality and anonymity is a necessary component in a program designed to curb the spread of the disease; this privacy ensures that persons in "risk" groups will not be subjected to the fear, ignorance, discrimination, and stigma associated with AIDS, and that they (a) will not be afraid to seek medical intervention if they are ill, (b) will not avoid being tested as an aid to effectuating behavioral changes, and (c) will be encouraged to participate in medical research projects aimed toward finding a cure.

Thus, the express purposes of the LaRouche Initiative are reasonable.

B. The Means Set Forth to Implement the Initiative Are Inconsistent with Its Express Objectives.

The means selected by the Initiative to accomplish its goals are also threefold: (1) to declare AIDS *and* the condition of carrying the virus "an infectious, contagious and communicable" disease and condition respectively; (2) to place *both* on the list of reportable diseases maintained by the California Department of Health Services; and, (3) in cases of the said disease *and* condition, to mandate the use by health officials and other persons of each and every provision contained in Division 4 of the Health and Safety Code (in pertinent part §§ 3000-3199 and §§ 3350-3356) and in Title 17, Part 1, Chapter 4, Subchapter 1 of the Administrative Code (in pertinent part §§ 2500-2636).

B.(1) The New Reporting Requirement Does Not Further the Public Health Objective of the Initiative.

The Initiative's primary declared purpose is to protect persons with AIDS, members of their families, members of their local communities, and the public health at large. The Initiative's requirement that the condition of carrying the virus be added to the list of reportable diseases not only fails to

achieve movement in the direction of this objective, it is, in fact, counter-productive. *See* Exhibit B, Declaration of _____, M.D.; Exhibit C, Declaration of _____, M.D.

As indicated above, this issue was addressed by the legislature when it provided for anonymous testing and criminal sanctions for violations of specific confidentiality provision. *See* H & S § 199.21; H & S § 1632. United States Surgeon General C. Everett Koop, M.D., Sc.D., in his *Report on Acquired Immune Deficiency Syndrome* (Exhibit B-1), agrees (at page 30):

> Because of the stigma that has been associated with AIDS, many afflicted with the disease or who are infected with the AIDS virus are reluctant to be identified with AIDS. Because there is no vaccine to prevent AIDS and no cure, many feel there is nothing to be gained by revealing sexual contacts that might also be infected with the AIDS virus. When a community or a state requires reporting of those infected with the AIDS virus to public health authorities in order to trace sexual and intravenous drug contacts — as is the practice with other sexually transmitted diseases — those infected with the AIDS virus have gone underground out of the mainstream of health care and education. For this reason current public health practice is to protect the privacy of the individual infected with the AIDS virus and to maintain the strictest confidentiality concerning his/her health records.

As noted in *Note: The Constitutional Rights of AIDS Carriers* (1986) 99 Harv.L.Rev. 1274 (hereinafter Note), at 1287-1288:

> As one Florida court recognized, "AIDS is the modern day equivalent of leprosy. AIDS, or a suspicion of AIDS, can lead to discrimination in employment, education, housing and even medical treatment. If the donors' names were disclosed . . . they would be subject to this discrimination and embarrassment. . . ." [Citing *South Fla. Blood Serv., Inc. v. Rasmussen* (Fla. Dist. Ct. App. 1985) 467 So.2d 798, 802.] . . .
>
> . . . When an AIDS-reporting regulation requires the disclosure of identity . . . it threatens the individual's privacy as well as his liberty interest in his "good name, reputation, honor, or integrity." . . .

That law review article concludes that the negative consequences of mandatory reporting include the risk that "disclosure might discourage some individuals from seeking tests," undermine "research progress," and would invade "significant privacy interests" (at 1288-89). These problems are even more critical when the person whose privacy is invaded does not have AIDS but only when the virus or only a test result which suggests but is not conclusive as to the fact that the person carries the virus. And there is no countervailing public health benefit from such disclosures. On the contrary, the

public health is only harmed when those infected or most at risk are placed in fear of government and are driven underground. *See* Exhibit B, Declaration of _____, M.D.

B.(2) The Initiative Refers to a Body of Existing Law Much of Which Should Not Apply to the AIDS Context.

Included among the general provisions to which the Initiative makes reference — none specific to AIDS — are the following:

— H & S § 3118. "No instructor, teacher, pupil, or child who resides where any *contagious*, *infectious*, or *communicable* disease exists or has recently existed, which is subject to strict isolation or quarantine of contacts, shall be permitted by any superintendent, principal, or teacher of any college, seminary, or public or private school to attend the college, seminary, or school, except by the written permission of the health officer." (Emphasis added.)

— H & S § 3122. "Each health officer shall immediately report by telegraph or telephone to the state department every discovered or known case or suspect case of those diseases designated for immediate reporting by the state department. Within 24 hours after investigation each health officer shall make such reports as the state department may require."

— H & S § 3123. "The state department may establish a list of reportable diseases and this list may be changed at any time by the state department. Those diseases listed as reportable shall be properly reported as required to the state department by the health officer. . . ."

— H & S § 3125. "All physicians, nurses, clergymen, attendants, owners, proprietors, managers, employees, and persons living, or visiting any sick person, in any hotel, lodginghouse, house, building, office, structure, or other place where any person is ill of any *infectious*, *contagious*, or *communicable* disease, shall promptly report that fact to the health officer, together with the name of the person, if known, the place where he is confined, and the nature of the disease, if known." (Emphasis added.)

— Cal. Admin. Code § 2500. "Reporting to the Local Health Authority. It shall be the duty of every physician, practitioner, dentist, coroner, every superintendent or manager of a dispensary, hospital, clinic, or any other person knowing of or in attendance on a case or suspected case of any of the following diseases or conditions, to notify the local health authority immediately. A standard type report form has been adopted and is available for this purpose. . . ." (AIDS — but not HIV carrier status — is already on the reportable list, added through Cal. Admin. Code § 2503, *infra*.)

— Cal. Admin. Code § 2503. "Occurrence of Unusual Diseases. Any person having knowledge of a case of an unusual disease not listed in Section 2500 shall promptly convey the facts to the local health officer. . . ." [This section was the vehicle for placing AIDS on the list of reportable diseases. *See* Exhibit B, Declaration of _____, M.D.]

— Cal. Admin. Code § 2504. "Report by Individual. When no physician is in attendance, it shall be the duty of any individual having knowledge of a person suffering from a disease presumably *communicable* or *suspected* of being *communicable* to report forthwith to the local health officer all the facts relating to the case, together with the name and address of the person." (Emphasis added).

— Cal. Admin. Code § 2508. "Reporting by Schools. It shall be the duty of anyone in charge of a public or private school, kindergarten, boarding school, or day nursery to report at once to the local health officer the presence or suspected presence of any of the *communicable* diseases." (Emphasis added.)

— Cal. Admin. Code § 2526. "Exclusion and Readmission by School Authorities. It shall be the duty of the principal or other person in charge of any public, private or Sunday school to exclude therefrom any child or other person affected with a disease presumably *communicable*, until the expiration of the prescribed period of isolation for the particular communicable disease. If the attending physician, or health officer finds upon examination that the person is not suffering from a communicable disease, he may submit a certificate to this effect to the school authority who shall readmit the person." (Emphasis added.)

— Cal. Admin. Code § 2530. "Public Food Handlers. No person known to be infected with a *communicable* disease shall engage in the commercial handling of food, or be employed on a dairy or on premises handling milk or milk products, until he is determined by the health officer to be free of such disease, or incapable of transmitting the infection." (Emphasis added.)

— Cal. Admin. Code § 2538. "Funerals. Funeral services for individuals who have died of a *communicable* disease shall be conducted in accordance with instructions of the health officer. . . . " (Emphasis added.)

— Cal. Admin. Code. § 2540. "General Clause. In addition to the requirements stipulated in these regulations, the local health officer shall, after suitable investigation, take such additional steps as he deems necessary to prevent the spread of communicable disease or a disease suspected of being communicable in order to protect the public health." (Emphasis added.)

In addition, criminal sanctions apply to all of these provisions: H & S§ 3544[44] and H & S § 2800.[45]

44.

Any person who violates any section in Chapter 3 of this division [H & S §§ 3110-3125], with the exception of Section 3111, is guilty of a misdemeanor, punishable by a fine of not less than fifty dollars ($50) nor more than one thousand dollars ($1000), or by imprisonment for a term of not more than 90 days, or by both. He is guilty of a separate offense for each day that the violation continues.

45. "Every person charged with the performance of any duty under the laws of the State relating to the preservation of the public health, who wilfully neglects or refuses to perform the same, is guilty of a misdemeanor."

This provision covers *all* laws "relating to . . . public health," which, since provisions of the administrative code, adopted by the state department of public health, have the force and

All of these provisions, and, in fact, most of the statutory scheme relating to public health, is presently applied judiciously and in the discretion of health officers and medical personnel based upon the best current medical and scientific information. The Initiative thus does *not* confer new discretionary powers on health officers. They already have these powers, limited by the principle that only public health actions which are *necessary* to further *legitimate* public health goals are justified. H & S § 3110. *See* Exhibit B, Declaration of _____, M.D.

By labeling *both* AIDS *and* the condition of being infected with HIV "infectious, contagious and communicable," and by making *both* "reportable," the intent of the proponents of the Initiative is clear: persons with AIDS *and* persons carrying the HIV are to come under all the provisions of the sections set forth above which specify "infectious," "contagious," or "communicable" diseases as their object. Persons carrying HIV are to lose the anonymity, confidentiality, and privacy which they presently enjoy under state law[46] and they, along with persons with AIDS, are to be affected by many provisions that presuppose air-borne, food-borne, or casual transmissibility.

If the intent is not clear enough, the Initiative further specifies that "all personnel of the Department of Health Services and all health officers shall fulfill *all* of the duties and obligations specified in *each and all* of the sections of said statutory division and administrative code subchapter *in a manner consistent with the intent of this Act*, as shall *all other persons* identified in said provisions." (Emphasis added.)

Any question about the proposed application of the Initiative is settled by the ballot argument.[47] "Proposition 64 will keep AIDS out of our schools [and] out of commercial food establishments." *See* Exhibit A.

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effect of state law, includes the provisions of the California Administrative Code referenced by the Initiative. *See Alta-Dena Dairy v. San Diego County* (1969) 271 Cal.App.2d 66.

46. *See* H & S § 199.21; H & S § 1632.

47. This Court in *White v. Davis* (1975) 13 Cal.3d 757, 775, and n. 11, noted the "propriety of resorting to . . . election brochure arguments as an aid in construing legislative measures . . . adopted pursuant to a vote of the people," since such argument "represents, in essence, the only legislative history available to the court."

Prior to the printing of the present version of the ballot arguments in favor of Proposition 64, a lawsuit was filed in the Superior Court of the County of Sacramento to resolve a conflict as to the propriety and accuracy of certain language contained in those arguments. The language stated as a "fact" that "AIDS is *not* 'hard to get'; it is easy to get." As a result of that lawsuit, the present argument omits that language. Petitioners request that this Court take judicial notice of the Declarations of Donald P. Francis, M.D., D.Sc.; Marcus A. Connant, M.D.; and Paul Volberdin, M.D., on file in that case which is entitled *Eu v. Male*, Superior Court of the County of Sacramento Case No. 341940. This request is made under California Evidence Code § 459 and § 452(d), and the said Declarations are attached hereto and marked respectively, D, E, and F.

B.(3) Concern About Public Health Does Not Justify Exclusion of HIV Carriers from Schools or Jobs.

As to the risks from casual contact the Surgeon General concludes (at pages 13-14 of *Report*, attached to Exhibit B):

> There is no known risk of non-sexual infections in most of the situations we encounter in our daily lives. We know that family members living with individuals who have the AIDS virus do not become infected through sexual contact. There is no evidence of transmission (spread) of AIDS virus by everyday contact even though these family members shared food, towels, cups, razors, even tooth brushes and kissed each other.[48]
>
> We know even more about health care workers exposed to AIDS patients. About 2,500 health workers who were caring for AIDS patients when they were sickest have been carefully studied and tested for infection with the AIDS virus. These doctors, nurses, and other health care givers have been exposed to the AIDS patients' blood, stool and other bodily fluids. Approximately 750 of these health workers reported possible additional exposure by direct contact with a patient's body fluid through spills or being accidentally stuck with a needle. Upon testing these 750, only 3 who had accidentally stuck themselves with a needle had a positive antibody test for exposure to the AIDS virus. Because health workers had much more contact with patients and their body fluids than would be expected from common everyday contact, it is clear that the AIDS virus is not transmitted by casual contact.[49]

And regarding children in school (page 24):

> None of the identified cases of AIDS in the United States are

48. *See* Friedland, et al., *Lack of Transmission of HTLV-III/LAV Infection to Household Contacts of Patients with AIDS or AIDS-Related Complex with Oral Candidiasis*, 314 New Eng. J. Med. 344, 346 (Feb. 1986), attached hereto as Exhibit B-3 herein.

49. *See Summary: Recommendations for Preventing Transmission of Infection with Human T-Lymphotrophic Virus Type III/Lymphadenopathy-Associated Virus in the Workplace*, 34 Morbidity & Mortality Weekly Rep. (hereinafter MMWR) 681, 684, 693 (1985) (recommending that persons infected with HIV be allowed to work without restriction), attached hereto as Exhibit B-4; *Update: Prospective Evaluation of Health-Care Workers Exposed Via The Parenteral or Mucous-Membrane Rout to Blood or Body Fluids From Patients With Acquired Immunodeficiency Syndrome — United States*, 34 MMWR 101 (1985), attached hereto as Exhibit B-5; *Update: Evaluation of Human T-Lymphotrophic Virus Type III/Lymphadenopathy-Associated Virus Infection in Health Care Personnel — United States*, 34 MMWR 575 (1985), attached hereto as Exhibit B-6; Sande, *Transmission of AIDS: The Case Against Casual Contagion*, 314 New Eng. J. Med. 380, 381 (1986), attached hereto as Exhibit B-7; Henderson, et al., *Risk of Nascomial Infection With Human T-Cell Lymphotrophic Virus Type III/Lymphadenopathy-Associated Virus in Large Cohort of Intensively Exposed Health Care Workers*, 104 Annals Internal Med. 644, 647 (1986), attached hereto as Exhibit B-8. These studies provide the factual basis for the conclusions of the Surgeon General. There is no competent evidence to the contrary.

> known or are suspected to have been transmitted from one child to another in school, day care, or foster care setting. Transmission would necessitate exposure of open cuts to the blood or other body fluids of the infected child, a highly unlikely occurrence. . . . Casual social contact between children and persons infected with the AIDS virus is not dangerous.[50]

Thus, "[e]xcluding AIDS carriers from public employment that requires no participation in activities through which the virus could be transmitted is not substantially or even rationally related to the protection of public health. The Federal Centers for Disease Control has concluded that '[e]mployees with AIDS should work to the extent of their physical capacity.' Medical experts agree that even AIDS-infected food handlers pose no threat to the public. [*See* n. 44, *supra*, 34 MMWR 681, 693.] . . . Opposition from co-workers or clients may make an employer reluctant to keep an AIDS carrier on the staff. But where important civil rights of an unpopular group are at stake, mere uneasiness cannot justify denial of public employment. . . ." *Note*, *supra*, 99 Harv.L.Rev. at 1290.

B.(4) The Initiative Is Thus Irrational.

It is clear that public health officials have both the duty and the power to do what is necessary to combat disease and to protect the public health. H & S § 3110. If the LaRouche Initiative simply were to confirm that this power exists, without mandating anything new, it would be doing *nothing* — it would not be "necessary" — to further its public health objective. In fact, there would still be a negative effect on public health, since public perceptions are as important as legal technicalities in the emotion-ridden battle against the epidemic. The fear and suspicion engendered by the Initiative's passage has a public health significance independent of its legal effect. *See Preliminary Statement, supra.*

However, the Initiative unequivocally does more. It puts persons carrying the virus in the same category for mandatory reporting as persons with AIDS. As noted throughout this Petition and Points and Authorities, public health experts agree that this harms, not helps public health goals.

Then it declares that being a carrier is an "infectious, contagious and communicable" condition and makes reference to existing legal provisions which use the terms "infectious," "contagious," or "communicable," many of which provisions are appropriate *only* to air-borne, food-borne, and casually contagious diseases. It then mandates the use of *each and every* one of those legal provisions. And this mandate is confirmed by the ballot argument in favor of the Initiative, the only legislative history this court has available.

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50. *See Education and Foster Care of Children Infected with Human T-Cell Lymphotrophic Virus Type III/Lymphadenopathy-Associated Virus*, 34 MMWR 517 (1985) (recommending that children infected with HIV usually be allowed to attend school without restrictions), attached hereto as Exhibit B-9.

Again, the Initiative, by this mandate, is "unnecessary" for and does nothing to advance the public health. It does not protect AIDS "victims," their families, communities, or "the public health at large." What *is* necessary for the public health is what H & S § 3110 presently gives health officials the discretion to accomplish, based upon their best medical judgment and scientific information.

Thus, the means employed by the Initiative are not related to accomplishing its explicit purposes. The measure is, therefore, irrational and constitutionally unjustifiable, as explained below.

C. *Because It Is Internally Inconsistent and Its Provisions Do Not Have a Relationship to Its Public Health Purpose, the Initiative is Irrational and Constitutionally Unjustifiable.*

In the context of the bubonic plague in San Francisco, an early case set forth the principles and limitations of public health statutes (*Wong Wai v. Williamson* (N.D. Cal. 1900) 103 F. 1, 7, *citing Blue v. Beach*, 56 N.E. 89):

> As a general proposition, whatever laws or regulations are necessary to protect the public health and secure public comfort is a legislative question, and appropriate measures intended and calculated to accomplish these ends are not subject to judicial review. But nevertheless such measures or *means must have some relation to the end* in view, for, under the mere guise of the police power, personal rights and those pertaining to private property will not be permitted to be arbitrarily invaded by the legislative department; and consequently its determination, under such circumstances, is not final, but is open to review by the courts. If the legislature, in the interests of the public health, enacts a law, and thereby interferes with the personal rights of an individual, — destroys or impairs his liberty or property, — it then, under such circumstances, becomes the duty of the courts to review such legislation, and determine *whether it in reality relates to, and is appropriate to secure, the object in view*; and in such an examination the court will look to the substance of the thing involved, and will not be controlled by mere forms. (Emphasis added.)

"The touchstone of due process is protection of the individual against arbitrary action of government." *People v. Flores* (1986) 178 Cal.App.3d 74, 84, *citing Wolff v. McDonnell* (1974) 418 U.S. 539, 558. To guard against such arbitrary or capricious action, due process requires that laws be rational, that they be reasonably related to a proper legislative goal (*Hale v. Morgan* (1978) 22 Cal.3d 388, 398) and that they have a real and substantial relation to the object sought to be obtained (*Nebbia v. People of State of New York* (1934) 291 U.S. 502, 525). " 'Precision of regulation is required so that the exercise of our most precious freedoms will not be unduly curtailed except to the extent *neces-*

sitated' by the legitimate governmental objective. [Citations omitted.] *Vogel v. County of Los Angeles* (1967) 68 Cal.2d 18, 22." *City of Carmel-By-The-Sea v. Young* (1970) 2 Cal.3d 259, 263. (Emphasis added.)

Significantly, placating the unsubstantiated fears of the voting public is not a compelling, important, or legitimate state interest. *See City of Cleburne v. Cleburne Living Center* (1985) —U.S.—, 105 S.Ct. 3249. Even public health regulations can not be justified if the only real interest is discrimination or oppression of a sexual minority of persons with a disease. *Cf. O'Connor v. Donaldson* (1975) 422 U.S. 563, 575 ("Mere public intolerance or animosity cannot constitutionally justify the deprivation of a person's physical liberty.").

As expressed in *Note, supra,* 99 Harv. L. Rev. at 1280:

> The stigma attached to AIDS carriers — because of the disease's close association with both homosexuality and intravenous drug use — suggests that improper purpose should be a concern of courts, especially when important civil rights are at issue. Although courts have not often been willing to inquire into the motives of legislators, the Supreme Court has held that courts, especially in equal protection cases, should not "accept at face value assertions of legislative purpose, when an examination of the legislative scheme and its history demonstrates that the asserted purpose could not have been a goal of the legislation." [*Citing Weinberger v. Wiesenfeld* (1974) 420 U.S. 636, 648 n. 16; *cf. Hunter v. Erickson* (1969) 393 U.S. 385, 392 (rejecting a city's articulated justification for a racially discriminatory rule).]

Applying the principle requiring a reasonable relationship between a regulation's legitimate objective and the means employed to achieve it (*see Kramer v. Union Free School Dist.* (1969) 395 U.S. 621, 633), in the present case, the Initiative must fall, since, as argued throughout this brief, the mandate of the Initiative is *not* factually related to either a proper legislative goal or the object sought to be obtained, namely control of disease and protection of the public health. Rather, the provisions of the Initiative are unfair and oppressive.[51]

A variation of the state's constitutional "real and substantial relationship" rule is found in California statutory law pertaining to administrative regulations. Gov. Code § 11342.2 requires that a valid regulation be reasonably *necessary* to effectuate the purpose of the authorizing legislation.

To ensure that administrative regulations *are* necessary to enforce or accomplish the mandate of the statutory objective, California law (Gov. Code §§ 11346 et seq.) requires a complex procedure of review and checks preced-

51. In summary, for legislation to meet the rational basis test for the purposes of substantive due process under the California Constitution, Article I, Sections 7 and 15, the law must not be unreasonable, arbitrary, or capricious but must have a real and substantial relation to the object sought to be obtained. *Goggin v. State Personnel Bd.* (1984) 156 Cal.App.3d 96, 107.

ing adoption or amendment of Administrative Code sections. Gov. Code §§ 11349.1 provides that the "Office of Administrative Law shall review all regulations . . . and make determinations using the following standards: (a) Necessity."

In addition, a "regulation may be declared invalid if the court cannot find that the record of the rulemaking proceeding supports the agency's determination that the regulation is reasonably necessary to effectuate the purpose of the statute relied on as authority for the adoption of the regulation." Gov. Code § 11350. Finally, these provisions "shall not be superseded or modified by any subsequent legislation except to the extent that such legislation shall do so expressly." Gov. Code § 11346.

The requirement in the LaRouche Initiative that AIDS and the condition of being a carrier of the virus "shall be included within the provisions of . . . the rules and regulations set forth in [the specified sections of the] Administrative Code," is tantamount to an amendment of those sections, done without the necessary administrative safeguards to determine if they satisfy the "necessity" criterion. Indeed, such an administrative review, which must be based upon "the record of the rulemaking proceeding" (Gov. Code § 11349), would have caused the rejection of the Initiative's provisions, since factual "necessity" can not be shown.[52]

52. The fabric of law covering public health is in concurrence with this "necessity" requirement, and since the Initiative states explicitly that its purpose is to use the "existing structure" of laws on the subject, it is reasonable to conclude that it is not the intent of the Initiative to supersede any of that structure.

H & S § 204 gives the Department of Health Services power to "commence and maintain all proper and *necessary* actions and proceedings . . . (d) To protect and preserve the public health." (Emphasis added.) And health officers have authority to "take such measure as may be *necessary* to prevent the spread of . . . disease." H & S § 3110 (emphasis added).

In addition to the normal administrative safeguards set forth in the Government Code (*see* text accompanying this note), the Department of Health Services must send its regulations through a process of medical review before they can become law. The Department has the jurisdiction to "adopt and enforce rules and regulations" (H & S § 208), referring to Administrative Code regulations, but, *"[n]otwithstanding any other provision of law [existing or "hereafter made" (see* H & S § 9)], the state department shall submit all of its rules and regulations on matters related to statutory responsibilities delegated to or enforced by local health departments . . . to the ____ [hereinafter ____] for review and comment prior to adoption. . . ." H & S § 208.5 (emphasis added). This added safeguard of review by the organization made up of the health officers from every local jurisdiction in the state, further ensures that California administrative rules and regulations in the area of public health are, in fact, "necessary" and proper to accomplish their legitimate objectives.

The very presence of the ____ in the present case and the concerns it has expressed herein lead to the conclusion that ____ would not have given the LaRouche Initiative's provisions a favorable recommendation, had those provisions been properly referred to ____ for review.

Additionally, when disputes arise as to interpretation or enforcement of public health regulations, the Department has the jurisdiction and power to hold hearings and make a determination. The LaRouche Initiative attempts to bypass all of these procedural safeguards.

Finally, the Legislature has found and declared that "unambiguous and rational law are vital elements in providing public health services to meet the needs of the people of the State of California; [and] duplicative and unwieldy legislative requirements . . . hamper the optimal effectiveness of public health care adminstration. . . ." H & S § 209. The LaRouche Initiative has attempted to weave into the fabric of California law irrational and unnecessary health regu-

While the administrative safeguards discussed above are statutory and not constitutional, they reinforce the constitutional requirement of a "real and substantial relation" between the objective of a statute and the means chosen to achieve that objective; the legislature and, thus, the people of the state, have created a complex structure of law which guarantees the existence of that "real and substantial relation" in the context of public health law. The LaRouche Initiative both contradicts the principle and evades the existing procedural protection.

This Court has noted that, when engaging in an evaluation of a statute, the courts should examine "the entire system of law" surrounding that statute and " 'should take into account matters such as context, the object in view, the evils to be remedied [and] the history of the times.' " *Cossack v. City of Los Angeles* (1974) 11 Cal.3d 726, 733. *See also Planned Parenthood Affiliates v. Van de Kamp, supra*, 181 Cal.App.3d 245.

The history of the present times includes the public expression of fear, anxiety, and panic. It includes a dreaded disease which has principally affected a traditionally hated minority. It is in this context that the LaRouche Initiative, ignoring all available medical and scientific facts, and evading all constitutional, statutory, and administrative standards, procedures, and safeguards, builds an irrational structure of discrimination and suspicion, unnecessary for, not furthering, and unrelated to any legitimate end.

Under the rational basis standard, the LaRouche Initiative is constitutionally invalid.

IV.
THE INITIATIVE INFRINGES UPON THE FUNDAMENTAL RIGHTS OF CITIZENS WITHOUT A COMPELLING INTEREST OR EVEN A RATIONAL BASIS

While the Initiative fails to meet even a rationality test, it simultaneously intrudes upon several fundamental rights under a more stringent strict scrutiny standard, thus violating the due process required by the California Constitution. As this Court stated in *Hale v. Morgan, supra*, 22 Cal.3d at 398, "The due process clauses, federal and state, are the most basic substantive checks on government's power to act unfairly or oppressively. As such, they protect against infringements by the state upon those 'fundamental' rights implicit in the concept of ordered liberty.' [Citation.]"

First and foremost, the Initiative intrudes on that "right most valued by civilized men" and women, the "right to be let alone," privacy. *Olmstead v. United States* (1928) 277 U.S. 438, 478. *See also Report*, California Commission on Personal Privacy (State of California 1982), which, at pages 63 and 130, discusses "informational privacy," describing it as shielding one from

lations which would not have withstood the scrutiny of the administrative law process. In this context, the Initiative gives concrete justification in reason for the Doctrine of the Separation of Powers.

"unfair and unnecessary collection and dissemination of personal information." Article I, Section 1 of the California Constitution, provides explicit privacy protection for the people of the state, protection which is much broader than the federal counterpart. *Committee to Defend Reproductive Rights v. Myers* (1981) 29 Cal.3d 252, 262-63. Informational privacy, as protected by this constitutional provision, bans "the overbroad collection and retention of unnecessary personal information by government. . . ." *White v. Davis* (1975) 13 Cal.3d 757, 775.

In the context of an alleged intrusion on privacy by the requirement for reporting to authorities potential child abuse information contained in medical records, the court in *Planned Parenthood, supra*, 181 Cal.App.3d 245, noted that "[t]he confidentiality of the medical treatment would vanish by reporting intimate personal information to state agencies, and by a resulting governmental investigation." The court found that there was no compelling state interest to justify the privacy violation.

In the context of the AIDS crisis, informational privacy is even more critical. *See* section III.B.(1), *supra*. "AIDS is the modern day equivalent of leprosy. AIDS, or a suspicion of AIDS, can lead to discrimination in employment, education, housing and even medical treatment. If the [persons'] names were disclosed . . . they would be subject to this discrimination and embarrassment. . . ." *South Fla. Blood Serv., Inc. v. Rasmussen* (Fla. Dist. Ct. App. 1985) 467 So.2d 798, 802.

If a reporting regulation requires disclosure of the person's name, it threatens her reputation and integrity as well, since it is common knowledge that most persons infected with the virus are homosexuals and drug users. This problem is most egregious when the person whose privacy is invaded has only tested positive on an antibody test and may not even carry the virus. Even if the person is a "carrier," however, there is no countervailing public health benefit from such disclosures. On the contrary, the public health is only harmed when those infected or most at "risk," knowing the potential of harm from the "system," are driven underground. *See* Exhibit B, Declaration of _____, M.D. Recognizing these factors, the legislature has specifically designed H & S § 199.21 and § 1632 to ensure respectively confidentiality and anonymity of medical records regarding HIV antibody test results.

Thus, the "carrier" reporting requirement of the LaRouche Initiative is sufficiently irrational, unnecessary, and without a compelling governmental interest that its invalidation is merited.

* * *

The initiative also infringes on the fundamental right to pursue a lawful occupation and the right to an education. In *Sail'er Inn v. Kirby* (1971) 5 Cal.3d 1, this Court struck down a law that forbade women from serving as bartenders. The Court found that the law infringed upon a woman's fundamental right to employment. "The instant case compels the application of the strict scrutiny standard of review . . . because the statute limits the fundamen-

tal right of one class of persons to pursue a lawful profession. . . ." 5 Cal.2d at 17. Because the intent of the proponents of the LaRouche Initiative is that all HIV infected persons should be removed from food handling and school related jobs, and because such removal is not necessary to further an important governmental interest, to the extent that it mandates such action, the Initiative is constitutionally invalid.

Similarly, in *Serrano v. Priest* (1971) 5 Cal.3d 584, 608-09, this Court found that "the distinctive and priceless function of education in our society warrants, indeed compels, our treating it as a 'fundamental interest.' " If HIV infected children are removed from the classroom, as the proponents of the LaRouche Initiative intend, they will miss "the pivotal position of education to success in American Society and its essential role in opening up to the individual the central experiences of our culture. . . ." 5 Cal.3d at 605. Because the AIDS virus is not normally contagious or infectious in these settings, the Initiative is not necessary to further an important governmental interest in protecting persons in schools. Again, to the extent that the Initiative mandates exclusion from schools, it is constitutionally infirm.[53]

V.

THE TERMS IN THE INITIATIVE ARE VAGUE AND AMBIGUOUS

The irrational nature of this Initiative is also exacerbated by the fact that the most important terms giving meaning to its provisions are irremediably vague and ambiguous. For example, the term "carriers" [of the AIDS virus] is used to designate those who are to be reported to the Department of Health Services under the new law. However, there is no method of determining

53. Heightened judicial scrutiny is appropriate for another reason. The Supremacy Clause of the United States Constitution requires that if a state law and federal law conflict in an area in which the federal law has jurisdiction, the state law must give way to the federal. Section 504 of the Federal Rehabilitation Act of 1973 (22 U.S.C. § 794) forbids recipients of federal funds from discriminating against the handicapped in schools and in employment. Because California accepts federal money for its general education programs, it is forbidden from engaging in such discrimination. Similarly, employers of food handlers are constrained not to discriminate against the handicapped if they receive federal money.

To date, all courts that have considered this issue have found infection with HIV to be a handicapping condition under § 504. *Cronan v. New England Telephone Company*, Civ. No. 80332 (Mass. Sup. Ct., Aug. 15, 1986); *Shuttlesworth v. Broward County Office of Management & Budget Policy*, F.C.H.R. 85-0624, slip op. (Fla. Comm'n on Human Relations, Dec. 11, 1985), *reprinted in* Daily Lab. Rep. (BNA) No. 242, E1, E5 (Dec. 17, 1985) (decided under statute modeled after § 504); *District 27 School Bd. v. Bd. of Educ.* (1986) 130 Misc.2d 398, 502 N.Y.S.2d 325; *Bogart v. White*, Civ. No. 86-144 (Clinton Circuit Court, Indiana, Apr. 24, 1986); *Phipps v. Saddleback Valley Unified School District*, Civ. No. 47-49-81 (Orange County Superior Court, Feb. 1986). *See also Arline v. School Bd. of Nassau County* (11th Cir. 1985) 772 F.2d 759 (cert. granted 54 U.S.L.W. 3695) (holding that tuberculosis is a handicap under the Federal Rehabilitation Act); *New York Ass'n for Retarded Children v. Carey* (2d Cir. 1979) 612 F.2d 644 (holding that carriers of Hepatitis B antigens, a virus with similar routes of transmission to HIV, are protected by § 504 of the Rehabilitation Act).

In addition, the *Carey* case, *supra*, holds that if the health hazard posed is nothing "more than a remote possibility," then the risk is insufficient to be legally cognizable. 612 F.2d at 650.

"carrier" status widely available; the infamous "HTLV-III antibody test," the only indicator available for widespread use, was developed to be especially sensitive so as to provide an added safeguard for the nation's blood supply. As a result, when used in the general population, a high rate of false positives can be expected.[54] The alternative is to culture the virus, which is expensive and experimental. *See* Exhibit B, Declaration of _____, M.D. Given these factors, it is unclear to whom the term "carrier" refers, making especially onerous the 'doctors' and 'health officers' responsibility to report such persons.

The Initiative's terms "contagious," "infectious," and "communicable" are also vague and ambiguous in the context of the statutory scheme regarding disease. The current public health structure does not use such broad terms to mandate automatic action. Instead, public health measures taken to restrict the spread of the disease vary according to the method and extent of transmissibility of the disease and a variety of other factors. Therefore, the terms have no discernable meaning in the context of the Initiative. *See* Exhibit B, Declaration of _____, M.D.

A third difficult and most disturbing term is found in one of the statutes referenced by the Initiative. H & S § 2500 requires reporting by "every physician, practitioner, . . . or any other person knowing of . . . a case or *suspected* case . . ." (Emphasis added.) This language could lead mean-spirited *and* frightened people to "report" not only persons testing positive on the antibody test, but also persons *suspected* or known to be members of "high risk" groups.[55]

While the primary infirmity of the LaRouche Initiative remains the lack of a "real and substantial relation" between its expressed public health purpose and its means for achieving that purpose, both the intrusion on fundamental rights and the vague and ambiguous terms used to define its parameters, are also sufficient to justify invalidating the measure.

VI.
CONCLUSION

The LaRouche Initiative presents many interpretation questions. However, it is not necessary for this Court to answer those questions or to adopt a particular interpretation of the Initiative, since the Initiative cannot be saved with a judicial gloss.

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54. *See* Carlson, *et al.*, *AIDS Serology Testing in Low- and High-Risk Groups*, 253 J.A.M.A. 3405 (1985); Curren, *AIDS Research and "The Window of Opportunity."* 312 New Eng. J. Med. 903, 904 (1985).

55. And again, failure to follow these vague and ambiguous but purportedly mandatory provisions is a misdemeanor offense. H & S §§ 2800, 3354. Because the Initiative's terms that define the circumstances appropriate for these criminal sanctions do not give adequate information (notice) to citizens, and because they vest too much discretion in the authorities who enforce them, the Initiative violates both the Fourteenth Amendment to the United States Constitution (*Kolender v. Lawson* (1983) 461 U.S. 352) and the state counterpart, Article I, section 15 of the California Constitution.

Assuming that the only legitimate purpose of the Initiative is to protect the public health, if the working provisions merely continue to give existing discretion to public health officials, the Initiative does not legally further its goal. If the working provisions take discretion away and require mandatory reporting for a new set of persons and, in some situations, mandatory loss of job, education, and privacy, the Initiative still does not further its objective.

In either case, the Initiative has an effect far beyond that provided by the legal technicalities of its provisions. And virtually all experts working in the fields of medicine, medical science, and public health agree that the effect is dangerous to the public health.

No matter how the Initiative is interpreted, at best it opens the door to the bigotry of those who would find in it a rationale and public mandate for discrimination. At worst it commands health officials and others to invade the fundamental rights of those who most need society's help and protection. Either way, it hampers research, drives underground the affected population, and hinders the ability of health officials to stop the spread of the disease and to protect the public.

For all the reasons set forth herein, this Court should issue its alternative writ of mandate ordering the respondents herein to perform their legal duties without regard to the LaRouche Initiative or to show why it should not do so and why this Court's peremptory writ should not issue; if the matter may not be resolved by the pleadings alone, set this matter for oral argument; and render an opinion and issue its peremptory writ indicating the invalidity of the Initiative and permanently restraining and enjoining enforcement of its provisions.

Respectfully submitted,

ALSCHULER, GROSSMAN & PINES
by BURT PINES

Of Counsel:
THOMAS F. COLEMAN
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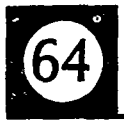
LAURENCE R. SPERBER

EXHIBIT A



Acquired Immune Deficiency Syndrome (AIDS). Initiative Statute

Official Title and Summary Prepared by the Attorney General

ACQUIRED IMMUNE DEFICIENCY SYNDROME (AIDS). INITIATIVE STATUTE. Declares that AIDS is an infectious, contagious and communicable disease and that the condition of being a carrier of the HTLV-III virus is an infectious, contagious and communicable condition. Requires both be placed on the list of reportable diseases and conditions maintained by the director of the Department of Health Services. Provides that both are subject to quarantine and isolation statutes and regulations. Provides that Department of Health Services personnel and all health officers shall fulfill the duties and obligations set forth in specified statutory provisions to preserve the public health from AIDS. Summary of Legislative Analyst's estimate of net state and local government fiscal impact: The fiscal effect of the measure could vary greatly depending upon how it would be interpreted by public health officers and the courts. If only existing discretionary communicable disease controls were applied to the AIDS disease, given the current state of medical knowledge, there would be no substantial change in state and local costs as a direct result of this measure. If the measure were interpreted to require added control measures, depending upon the level of activity taken, the cost of implementing these measures could range to hundreds of millions of dollars per year.

Analysis by the Legislative Analyst

Background

Acquired immune deficiency syndrome (AIDS) is a disease that impairs the body's normal ability to resist harmful diseases and infections. The disease is caused by a virus that is spread through intimate sexual contact or exposure to the blood of an infected person. As of the preparation of this analysis, there was no readily available method to detect whether a person actually *has* the AIDS virus. A test does exist to detect whether a person has ever been *infected* with the AIDS virus and as a result has developed antibodies to it. A person infected with the AIDS virus may or may not develop the AIDS disease after a period of several years. There is no known cure for AIDS, which is ultimately fatal.

As of June 30, 1986, there were 5,188 cases of AIDS and 2,406 deaths from the disease in California. The State Department of Health Services estimates that up to 500,000 persons in California are infected with the AIDS virus, and that by 1990 there will be approximately 30,000 cases of AIDS in the state.

Existing Laws Covering Communicable Diseases. Local health officers have broad authority to take measures they believe are necessary to protect public health and prevent the spread of disease-causing organisms. However, this broad authority is limited to situations where there is a reasonable belief that the individual affected has or may have the disease and poses a danger to the public. The kind of measure taken by health officers varies, depending on how easily an organism is spread from one person to another. For example, to prevent the spread of a disease, local health officers may require isolation of infected or diseased persons and quarantine of exposed persons. In addition, persons infected with a disease-causing organism may be excluded from schools for the duration of the infection and excluded from food handling jobs. In some cases, these measures may be applied to persons suspected of having the infection or the disease.

Current AIDS Reporting Requirements. Physicians and other health care providers are now required to report cases of certain listed communicable diseases to local health officers who, in turn, report the cases to the State Department of Health Services. At the time this analysis was prepared, AIDS was not on the list of communicable diseases that must be reported to local health officers. However, AIDS is being reported under a regulation which requires an unusual disease, not listed as a communicable disease, to be reported by local health officers.

Under other provisions of law, hospitals are required to report cases of AIDS to local health officers who, in turn, report the cases to the State Department of Health Services. Counties also report to the state the number of cases in which blood tests performed at certain facilities reveal the presence of antibodies to the AIDS virus, indicating that a person has been infected with the virus. Existing law does not allow the release of the names or other identifying information for persons who take the AIDS antibody test.

According to the State Department of Health Services, persons who have AIDS and persons who are capable of spreading the AIDS virus are subject to existing communicable disease laws. However, no health officer has ever taken any official action to require persons infected with the AIDS virus to be isolated or quarantined, because there is no medical evidence which demonstrates that the AIDS virus is transmitted by casual contact with an infected person. In addition, no health officer has recommended excluding persons with AIDS, or those who are capable of spreading AIDS, from schools or jobs.

Proposal

This measure declares that AIDS and the "condition of being a carrier" of the virus that causes AIDS are communicable diseases. The measure also requires the State Department of Health Services to add these conditions to the list of diseases that must be reported. Because AIDS cases are already being reported, the measure would require the reporting of those who are "carriers of the AIDS virus." Currently, no test to make this determination is readily available.

The measure also states that the Department of Health Services and all health officers "shall fulfill all of the duties and obligations specified" under the applicable laws "in a manner consistent with the intent of this act." Although the meaning of this language could be subject to two different interpretations, it most likely means that the laws and regulations which currently apply to other communicable diseases shall also apply to AIDS and the "condition of being a carrier" of the AIDS virus. Thus, health officers would continue to exercise their discretion in taking actions necessary to control this disease. Based on existing medical knowledge and health department practices, few, if any, AIDS patients and carriers of the AIDS virus would be placed in isolation or under quarantine. Similarly, few, if any, persons would be excluded from schools or food handling jobs. If, however, the language is interpreted as placing new requirements on health officers, it could result in new actions such as expanding testing programs for the AIDS virus, imposing isolation or quarantine of persons who have the disease, and excluding persons infected with the AIDS virus from schools and food handling positions.

Fiscal Effect

The fiscal effect of this measure could vary greatly, depending on how it would be interpreted by state and local health officers and the courts. If existing *discretionary* communicable disease controls were applied to the AIDS disease, there would be *no* substantial net change in state and local costs as a *direct* result of this measure. Thus, the primary effect of this measure would be to require the reporting of persons who are carriers of the virus which causes AIDS. Very few cases would be reported because no test to confirm that a person carries the virus is readily available. If such a test becomes widely available in the future, more cases would be reported.

The fiscal impact could be very substantial if the measure were interpreted to require changes in AIDS control measures by state and local health officers, either voluntarily or as a result of a change in medical knowledge on how the disease is spread, or as a result of court decisions which mandate certain control measures. Ultimately, the fiscal impact would depend on the level of activity that state and local health officers might undertake with respect to: (1) identifying, isolating and quarantining persons infected with the virus, or having the disease, and (2) excluding those persons from schools or food handling positions. The cost of implementing these actions could range from millions of dollars to hundreds of millions of dollars per year.

In summary, the net fiscal impact of this measure is unknown—and could vary greatly, depending on what actions are taken by health officers and the courts to implement this measure.

Text of Proposed Law

This initiative measure is submitted to the people in accordance with the provisions of Article II, Section 8 of the Constitution.

This initiative measure proposes to add new provisions to the law; therefore, the new provisions proposed to be added are printed in *italic type* to indicate that they are new.

PROPOSED LAW

Section 1.

The purpose of this Act is to:

A. Enforce and confirm the declaration of the California Legislature set forth in Health and Safety Code Section 195 that acquired immune deficiency syndrome (AIDS) is serious and life threatening to men and women from all segments of society, that AIDS is usually lethal and that it is caused by an infectuous agent with a high concentration of cases in California;

B. Protect victims of acquired immune deficiency syndrome (AIDS), members of their families and local communities, and the public health at large; and

C. Utilize the existing structure of the State Department of Health Services and local health officers and the statutes and regulations under which they serve to preserve the public health from acquired immune deficiency syndrome (AIDS).

Section 2.

Acquired immune deficiency syndrome (AIDS) is an infectuous, contagious and communicable disease and the condition of being a carrier of the HTLV-III virus is an infectuous, contagious and communicable condition and both shall be placed and maintained by the director of the Department of Health Services on the list of reportable diseases and conditions mandated by Health and Safety Code Section 3123, and both shall be included within the provisions of Division 4 of such code and the rules and regulations set forth in Administrative Code Title 17, Part 1, Chapter 4, Subchapter 1, and all personnel of the Department of Health Services and all health officers shall fulfill all of the duties and obligations specified in each and all of the sections of said statutory division and administrative code subchapter in a manner consistent with the intent of this Act, as shall all other persons identified in said provisions.

Section 3.

In the event that any section, subsection or portion thereof of this Act is deemed unconstitutional by a proper court of law, then that section, subsection or portion thereof shall be stricken from the Act and all other sections, subsections and portions thereof shall remain in force, alterable only by the people, according to process.

64 Acquired Immune Deficiency Syndrome (AIDS). Initiative Statute

Arguments in Favor of Proposition 64

Proposition 64 extends existing public health codes for communicable diseases to AIDS and AIDS virus carriers. This means that the same public health codes that already protect you and your family from other dangerous diseases will also protect you from AIDS. Proposition 64 will keep AIDS out of our schools, out of commerical food establishments, and will give health officials the power to test and quarantine where needed. These measures are not new; they are the same health measures applied, *by law*, every day, to every other dangerous contagious disease.

Today AIDS is out of control. There are at least 300,000 AIDS carriers in California, and the number of cases of this highly contagious disease is doubling every 6 to 12 months. The number of "unexplained" AIDS cases—cases not in "high-risk" groups, such as homosexuals and intravenous drug users—continues to grow at alarming rates. Indeed, the majority of cases worldwide fall into no identifiable "risk group" whatsoever. The AIDS virus has been found living in many bodily fluids, including blood, saliva, respiratory fluids, sweat, and tears, and it can survive upwards of seven days outside the body. There presently exist no cure for the sick and no vaccination for the healthy. It is 100% lethal.

AIDS is the gravest public health threat our nation has ever faced. The existing law of California clearly states that certain proven public health measures *must* be taken to protect the public from *any* communicable disease, and no competent medical professional denies that AIDS is "communicable." Despite these facts, politicians and special interest groups have circumvented the public health laws. For the first time in our history, a deadly disease is being treated as a "civil rights" issue, rather than as a public health issue.

The medical facts are clear. The law is clear. Common sense agrees. You and your family have the right to be protected from *all* contagious diseases, including AIDS—the deadliest of them all. If you agree, vote YES on Proposition 64.

KIYOSHIRO CHANDHI
California Director, National Democratic Policy Committee (NDPC), and Member-elect, Los Angeles County Democratic Party Central Committee
JOHN GRAUERHOLZ, M.D., FCAP
(Fellow, College of American Pathologists)

California law today makes it illegal for public health authorities to be informed of a large number of those (about 385,000) who can spread the deadly AIDS virus to others. How can they take the necessary steps to slow its spread as long as this is true?

Under existing law, a physician who encounters any of 58 reportable diseases is required to report to health officials. Included are several venereal diseases, such as syphilis and gonorrhea. Contact tracing is conducted. But, for those with the AIDS virus, not yet developed into AIDS, a special state law passed at the request of the male homosexual lobby prohibits contact tracing. Proposition 64 will require that those with the AIDS virus be reported as are other communicable diseases. It does not require quarantine.

The cost of the AIDS epidemic in California, it is estimated, will be at least 59,400 lives by 1991 and almost $6 billion to be paid by insurance and/or taxpayers. Let's reduce those statistics by voting YES on Proposition 64.

WILLIAM E. DANNEMEYER
Member of Congress, 35th District

Rebuttal to Arguments in Favor of Proposition 64

Would you let a stranger with no medical training or medical background diagnose a disease or illness that you have? Would you let a political extremist dictate medical policy? *OF COURSE NOT.*

The followers of Lyndon LaRouche suggest that the hands of the medical community have been tied. *THIS IS NOT TRUE! In fact,* the California Medical Association, the California Nurses Association, the California Hospital Association and other health professionals believe that Proposition 64 *would seriously hurt* their ability to treat and find a cure for AIDS. These health professionals are seriously concerned that years of research will be undermined by fear generated by this irrational proposition.

NO ONE has contracted AIDS from casual contact at a restaurant, grocery store, or in the workplace. Think for a moment. If it were true that AIDS is casually transmitted, clearly many more men, women and children would be ill. *This is just not the fact.*

The followers of Lyndon LaRouche are at it again! Using partial truths and falsehoods, they are attempting to create panic in California. Say NO to PANIC. Vote NO on Proposition 64.

HELEN MIRAMONTES, R.N., M.S., CCRN
President, California Nurses Association
C. DUANE DAUNER
President, California Hospital Association
GLADDEN V. ELLIOTT, M.D.
President, California Medical Association

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Acquired Immune Deficiency Syndrome (AIDS). Initiative Statute 64

Argument Against Proposition 64

Proposition 64 must be defeated for the *safety* and *public health* of all Californians. It is an irrational, inappropriate and misguided approach to a serious public health problem. The proponents of this measure are followers of *extremist* Lyndon LaRouche. They want to create an atmosphere of *fear*, misunderstanding, *inadequate health care* and *panic*. In fact, the acronym of their campaign committee is PANIC.

Public health decisions must be left in the hands of the medical profession and public health officials or we will endanger the lives of Californians. The California Medical Association and county public health officials recognize the danger of allowing political extremists to dictate state public health and medical policy.

This type of repressive and discriminatory action forced upon Californians by followers of Lyndon LaRouche will not serve to limit the problem, *but rather could prolong the spread of this terrible disease.* The fear of quarantine or other discriminatory measures, including loss of jobs, will make people reluctant to be tested. Fearing social isolation, individuals at risk will avoid early medical intervention, or even infection testing, driving AIDS underground.

Enforcement of this measure *could cost the taxpayers billions of dollars* to quarantine and isolate AIDS carriers and could require public health officials to do so. Quarantine would serve no medical purpose because *there are no documented cases of AIDS ever being transmitted by casual contact.*

Californians from all walks of life know they must unite to end this dreadful epidemic. Californians can be proud that doctors and public health officials have acted in a professional, rational and responsible manner to protect the health of Californians and have taken all appropriate precautions as they are needed. *This kind of initiative can only divide, create panic and force thousands not to get tested or treated because of fear.*

Join us, the *Los Angeles Times, The Los Angeles Herald Examiner, San Francisco Examiner, the California Medical Association,* and many others in opposing the extremes of followers of Lyndon LaRouche. Vote NO on *Proposition 64!*

GLADDEN V. ELLIOTT, M.D.
President, California Medical Association
ED ZSCHAU
Member of Congress, 12th District
ALAN CRANSTON
United States Senator

Rebuttal to Argument Against Proposition 64

Opponents of Proposition 64 have spent a great deal of rhetoric, while avoiding medical issues.

The facts:

- Health officials' failure to implement existing public health laws has resulted in nearly 500,000 people infected in California, each capable of infecting others.
- AIDS is the most rapidly spreading lethal disease in the country.
- Of those infected, between 40% and 99% will probably die—between 200,000 and 500,000 deaths in California —and AIDS is doubling every year.
- The vast majority of AIDS cases worldwide lie *outside* "high risk" groups. The victims are *not* homosexuals, and are *not* intravenous drug users. In Haiti, three years ago, 70% of AIDS cases were in "high risk" groups. Today, over 70% are *not* in "high risk" groups. Could this happen here? It can and it will, unless we stop it.
- Do we know with certainty how AIDS spreads? We do not. The majority of cases have *never been studied.*
- Many health officials are demanding public health measures. Dr. Kizer, California's top health official, has called for more reporting and testing powers.
- The AIDS virus exists in many bodily effluents and survives outside the body.

Proposition 64 implements the *existing* health laws; laws scientifically designed to protect your health; laws which have been ruled constitutional by courts for decades.

Don't gamble with human life. Vote YES on Proposition 64.

GUS S. SERMOS
Former Centers for Disease Control Public Health Adviser with AIDS Program in Florida
NANCY T. MULLAN, M.D.
Burbank
JOHN GRAUERHOLZ, M.D., FCAP
(Fellow, College of American Pathologists)