E.
LACK OF JURISDICTION

This is a legal argument of great importance.

The Board which is under the control of the DCA, lacks the legal authority to discipline chiropractors.

THE BOARD OF CHIROPRACTIC EXAMINERS AS REGULATED BY THE DCA CANNOT REVOKE OR SUSPEND THE LICENSE OF

1. Power to Grant Or Revoke Licenses Resides Only with the Board of Chiropractic Examiners and Not the DCA or the DCA Controlled Entity that Now Exists

Chiropractic Initiative Act of 1922 did not create the Department of Consumer Affairs. The Act did not place the Board of Chiropractic Examiners under the control of the Medical Board, the Department of Consumer Affairs or any other governmental agency.

The power to grant or revocation of chiropractic licenses arises from the Chiropractic Initiative Act of 1922. It does not arise because the Legislature passed a statute. It does not arise because the Governor restructured state government.

Prior to creation of the Board of Chiropractic Examiners, the Board of Medical Examiners regulated the approximately 800 chiropractors practicing in California. The Chiropractic Initiative Act of 1922, passed with 59% voter approval and changed that.

The Initiative Act created the Board of Chiropractic Examiners. Section 1 of the Act states that “A board is hereby created to be known as the "State Board of Chiropractic Examiners," hereinafter referred to as the board.” This Initiative established legal requirements

for chiropractic education, California licensure guidelines and created the regulatory scheme that included the first board of chiropractic examiners.

Section 4 (c) of the Act specifically grants to the Board of Chiropractic Examiners the power to "...examine applicants and to issue and revoke licenses to practice chiropractic...". Nothing in the Act gives this power to any other entity.

This means that the DCA cannot control the Board.

This means that the DCA cannot exert any power over the Board with respect to its section 4 powers.

2. The Legislature & the Governor are Powerless to Change the Act

The Act states "This act cannot be codified by the Legislature because of the constitutional limitations on the powers of the Legislature with reference to them." This means what it says. The Legislature can pass all the laws it wants. The Governor can exercise all the powers he wants, but neither of them can change any of the Act.

This is not a novel proposition. Courts have long held that "[t]he purpose of California's constitutional limitation on the Legislature's power to amend initiative statutes is to `protect the people's initiative powers by precluding the Legislature from undoing what the people have done, without the electorate's consent.' [Citations.]" (Proposition 103 Enforcement Project v. Quackenbush (1998) 64 Cal.App.4th 1473, 1484, (Proposition 103 Enforcement Project).)

Certainly if something is not in the Act the Legislature can dive in. This is the "related but distinct" language found in many cases.

The Legislature remains free to address a " `related but distinct area' " (County of San Diego v. San Diego NORML (2008) 165 Cal.App.4th 798, 830, 81

Cal.Rptr.3d 461 (San Diego NORML); see also Mobilepark West Homeowners Assn. v. Escondido Mobilepark West (1995) 35 Cal.App.4th 32, 43, 41 Cal.Rptr.2d 393 (Mobilepark West Homeowners Assn.) [construing the related initiative power of city voters under Cal. Const., art. II, § 11, and Elec.Code, § 9217]) or a matter that an initiative measure "does not specifically authorize or prohibit." (People v. Cooper (2002) 27 Cal.4th 38, 47, 115 Cal.Rptr.2d 219, 37 P.3d 403 (Cooper); see San Diego NORML, supra, 165 Cal.App.4th at p. 830, 81 Cal.Rptr.3d 461.)

(*People v. Kelly* 47 Cal.4th 1008, 1025-1026 (Cal.,2010))

Consistent with the ability of the Legislature to Act on related but distinct matters, in 1942, legislation was passed that included chiropractic services in the state's Workers' Compensation Act. The law also allowed chiropractors to be designated as primary care physicians if the chiropractor had treated the employee in the past and had their medical records.

It is sufficient to observe that for purposes of article II, section 10, subdivision (c), an amendment includes a legislative act that changes an existing initiative statute by taking away from it. (Cooper, supra, 27 Cal.4th 38, 44, 115 Cal.Rptr.2d 219, 37 P.3d 403; Knight v. Superior Court (2005) 128 Cal.App.4th 14, 22, 26 Cal.Rptr.3d 687 (Knight); Proposition 103 Enforcement Project, supra, 64 Cal.App.4th 1473, 1484-1486, 76 Cal.Rptr.2d 342; Mobilepark West Homeowners Assn., supra, 35 Cal.App.4th 32, 40, 41 Cal.Rptr.2d 393 [construing the related initiative power of city voters under Cal. Const., art. II, § 11, and Elec.Code, § 9217]; Cory, supra, 80 Cal.App.3d 772, 776, 145 Cal.Rptr. 819.)

(People v. Kelly, supra, 47 Cal.4th at pp. 1026-1027.)

However, although distinct matters may be added by the Legislature, the general authority for issuing and revoking licenses firmly resides with the Board of Chiropractic Examiners. The "Powers" section of the Act (Section 4), is not ambiguous. It very specifically sets forth the Board's powers (and responsibilities) and no Legislature or Governor can change that.

3. Reorganization of The Board Into The Department of Consumer Affairs Has Unconstitutionally Infringed on The Board's Independence Exercise of Its Oversight and Licensing Duties

From 1922 to 1946, the Board of Chiropractic Examiners remained an independent entity within state government. In 1946, it was added to the Department of Professional and Vocational Standards (the "DPVS"). In 1970, DPVS was renamed the Department of Consumer Affairs. The Department of Consumer Affairs licenses or certifies practitioners in more than 255 professions. Currently, there are over 2.4 million practitioners licensed by the DCA.

In 1976, the Board was removed from the Department of Consumer Affairs and once again became an independent agency under the direct supervision of the Governor's Office. From 1976 until reorganization in July of 2013, the Board has operated independently from the DCA.

The reorganization process for certain departments within state government is established by Government Code Sections 8523 and 12080. These codes authorize the Governor to propose a Government Reorganization Plan (GRP), the Little Hoover Commission to review that plan, and the Legislature to either allow the plan to go into effect, or to reject it by a majority vote in either house.

Given the state of the law, one would think that it was clear as day that this legislation, passed by the Legislature, could not subvert or reverse the Chiropractic Initiative Act. And in fact, it was and is crystal clear. The Legislature cannot subvert the Act.

In spring of 2012, the Governor introduced GRP No. 2, which proposed numerous changes in the organization of state government. The Legislature did not reject the plan; therefore, it will be implemented. For purposes of this legislative oversight hearing, we are focused on the part of the GRP that affects DCA. Specifically, the following state entities will be transferred into the DCA effective July 1, 2013:

· Department of Real Estate

· Office of Real Estate Appraisers

· Structural Pest Control Board, and

· Board of Chiropractic Examiners

This means that by Legislative fiat, the Initiative Act has been overturned and the real BCE been dissolved. The new entity is a branch of the DCA and whether you call it the Board of Chiropractic Examiners or any name you wish, it is now a totally different entity.

According to testimony at the Little Hoover Commission hearing, GRP No. 2 is intended to increase efficiencies in state government by consolidating resources and functions. The DCA Director provided the following written testimony at the hearing:

> Having 36 separate and unique licensing entities has allowed the Department of Consumer Affairs to create economies of scale that reduce costs and improve efficiency for our boards, bureaus and programs. All of our programs share one human resources office, one contracts office, one information technology office, one legal office, and one

budget office. Moving the Department of Real Estate and the Office of Real Estate Appraisers will allow us to leverage these economies of scale to eliminate redundancies and use the resources we have more efficiently.

Sharing one "legal office" is particularly disturbing. The Initiative Act was in large part created to free chiropractors from the animosity and supervision of the physicians via the Board of Medical Examiners. Exhibit 4 is an issue of the California State Journal of Medicine which strongly urged voters to reject the Chiropractic Initiative Act. It attacked chiropractic saying that "[t]he Ponzis in the healing art leave many wrecks behind, but as long as they can flaunt testimonials like fake patent medicines, they will thrive and dupes will pay the price." Now, through the DCA, the Medical Board and Board of Chiropractic Examiners share the same lawyers, same administrators and perhaps most chilling, share the same Human Resources department. The independence of the Board is gone.

A representative from the DRE provided the following written testimony:

Given the common purpose that the DRE would share as a bureau and with the sister boards and commissions at the DCA, there are no doubts that the consolidation will allow for leveraging of resources to enhance consumer protections.

(BACKGROUND PAPER REGARDING ISSUES TO BE ADDRESSED BY THE DEPARTMENT OF CONSUMER AFFAIRS, Oversight Hearing, March 11, 2013, Senate Committee on Business, Professions & Economic Development)

The same written testimony suggested that GRP No. 2 might cause elimination of duplicative staff positions and create opportunities for shared technology, shared exam centers, and shared call centers. Sharing staff, technology and other resources

compromises the independent functioning of the Board. Therefore, the Board of Chiropractic Examiners has lost the independence that it needs to distinguish itself and protect itself from outside influences. In the case of Dr. , the touching necessary to perform medically necessary procedures is under attack from a Board that also regulates the generally unfriendly competition, medical doctors. Implementation of the "common purpose" sought under GRP No. 2 cannot be reconciled with an independent Board.

4. Courts Must Liberally Construe The Act In Favor of The People's Reserved Powers

There appears to have been no prior challenge to the DCA's legal right to take over the Board. It is time that this issue is raised albeit at great expenses to the Respondent herein. Respondent does seek reimbursement for his legal fees in raising this issue.

Courts have expressed an unwavering commitment to jealously guarding the People's reserved powers exercised through the initiative and referendum process and there appears to be no rational basis to allow this usurpation of the People's expressed powers. As our present Chief Justice said while sitting on the Court of Appeal:

> The will of the electorate is involved in our consideration of initiative measures like Proposition 116 as well as Article XIX A and Article XIX B. Statutes and constitutional provisions adopted by the voters "must be construed liberally in favor of the people's right to exercise the reserved powers of initiative and referendum. The initiative and referendum are not rights `granted the people, but ... power[s] reserved by them. Declaring it "the duty of the courts to jealously guard this right of the people" [citation], the courts have described the initiative and referendum as articulating "one of the most

precious rights of our democratic process" [citation]. "[I]t has long been our judicial policy to apply a liberal construction to this power wherever it is challenged in order that the right not be improperly annulled. If doubts can reasonably be resolved in favor of the use of this reserve power, courts will preserve it." ' [Citations.]"

(*Rossi v. Brown* (1995) 9 Cal.4th 688, 694-695.)

Therefore, the courts have a mandate to protect the will of the People by protecting the Chiropractic Act to preserve the independence of the Board.

"The people's reserved power of initiative is greater than the power of the legislative body. The latter may not bind future Legislatures [citation], but by constitutional and charter mandate, unless an initiative measure expressly provides otherwise, an initiative measure may be amended or repealed only by the electorate. Thus, through exercise of the initiative power the people may bind future legislative bodies other than the people themselves." (*Id*. at pp. 715-716.)

(*Shaw v. People ex rel. Chiang* 175 Cal.App.4th 577, 596 (2009)