

1 CHRISTI HOGIN, State Bar No. 138649
City Attorney, City of Malibu
2 TREVOR L. RUSIN, State Bar No. 241940
SHAHIEDAH S. COATES, State Bar No. 258565
3 JENKINS & HOGIN, LLP
1230 Rosecrans Avenue, Suite 110
4 Manhattan Beach, CA 90266
(310) 643.8448; Fax: (310) 643.8441
5

6 Attorneys for the City of Malibu
7

8 **UNITED STATES DISTRICT COURT**
9 **CENTRAL DISTRICT OF CALIFORNIA**

10 THE PARK AT CROSS CREEK, LLC
11 and MALIBU BAY COMPANY,

12 Plaintiffs,

13 vs.

14 CITY OF MALIBU, A MUNICIPAL
15 CORPORATION, and DOES 1-10,

16 Defendants.
17
18
19
20

CASE NO. 2:15-CV 00033-JAK (SHx)

Complaint served: January 5, 2015

[Assigned to the Hon. John A. Kronstadt]

**CITY OF MALIBU'S NOTICE OF
MOTION AND MOTION FOR
ABSTENTION AND STAY OF
FURTHER PROCEEDINGS**

**[MOTION TO DISMISS FILED
CONCURRENTLY]**

**DATE: March 30, 2015
TIME: 8:30 a.m.
DEPT: 750**

21
22 **TO THE HONORABLE JOHN A. KRONSTADT, UNITED STATES DISTRICT**
23 **COURT JUDGE, PLAINTIFFS AND THEIR ATTORNEYS OF RECORD**
24 **HEREIN:**
25
26
27
28

1 **PLEASE TAKE NOTICE** that on March 30, 2015, at 8:30 a.m., or as
2 soon thereafter as the matter may be heard in Courtroom 750, of the above-entitled
3 court, located at 255 East Temple Street, Los Angeles, California, defendant the City of
4 Malibu (the “City”) will and hereby does move this court to abstain from and stay
5 further proceedings in this action pending a state court determination of the validity of
6 Measure R under the California Constitution. In particular, the fifth and sixth claims for
7 relief seek to invalidate a citizen initiative on the ground that it allegedly violates two
8 provisions unique to the California Constitution (the single-subject rule and the scope of
9 the reserved power of initiative). In addition, Plaintiffs bring a challenge to Measure R
10 alleging preemption by state Planning Law (seventh claim). If Plaintiff is correct on any
11 of these claims, all remaining claims are rendered moot because Measure R would be
12 invalid. Plaintiffs also challenge various portions of Measure R which may invoke the
13 initiative’s severability clause; whether invalid portions of a state statute are severable
14 from other portions of that statute is a question of state law. Plaintiffs raise a number of
15 other objections to Measure R, which, if decided in their favor would change
16 substantially the nature of their alleged federal claims, even if they were not rendered
17 completely moot.

18 The motion is brought pursuant to the Federal Rules of Civil Procedure Rule 7(b),
19 on the grounds that while jurisdiction in this court is proper, it is appropriate for this
20 court, pursuant to the *Pullman* doctrine, to abstain from exercising its jurisdiction over
21 claims raised in the complaint which may be made moot by a state court decision on
22 sensitive issues of California law.

23 The motion is supported by this notice, the memorandum of points and authorities
24 served and filed herewith, the pleadings, files and records in this action, the declarations
25 filed herewith, and all matters upon which the court may and does take judicial notice.

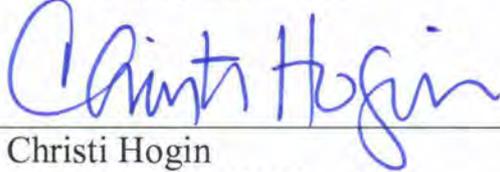
26 ///

27 //

1 Pursuant to Local Rule 7-3, Counsel met and conferred in good faith on January
2 20, 2015. Counsel discussed the relevant factual and legal contentions but were unable
3 to reach agreement.

4
5 DATED: February 4, 2015

Respectfully submitted,

6
7 

8 Christi Hogin
9 JENKINS & HOGIN, LLP
10 Attorneys for Defendant
11 City of Malibu
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF CONTENTS

Page

1

2

3

4 TABLE OF AUTHORITIES..... ii

5 I. INTRODUCTION & SUMMARY OF ARGUMENT 1

6 II. THIS COURT SHOULD ELECT TO ABSTAIN IN ACCORDANCE

7 WITH *PULLMAN* 3

8 A. Legal Standard 3

9 B. The *Pullman* Abstention Criteria Are Satisfied 5

10 1. The Complaint challenges land use regulations adopted by

11 voter initiative, a sensitive area of social policy 5

12 2. Interpretation of the Validity of Measure R under California

13 Law May Render the Federal Constitutional Claims Moot..... 6

14 3. Validity of Measure R under State Law is Uncertain..... 9

15 III. PROCEDURAL CONSEQUENCES OF *PULLMAN* ABSTENTION 10

16 IV. CONCLUSION..... 11

17

18

19

20

21

22

23

24

25

26

27

28

TABLE OF AUTHORITIES

Cases

1

2

3 *Bellotti v. Baird*

4 428 U.S. 132 (1976)..... 4

5 *Columbia Basin Apartment Ass’n v. City of Pasco*

6 268 F.3d 791 (9th Cir.2001).....3, 4, 7, 8

7 *C-Y Development Co. v. City of Redlands*

8 703 F.2d 375 (9th Cir.1983)..... 5

9 *England v. Louisiana State Bd. of Medical Examiners*

10 375 U.S. 411 (1964)..... 9

11 *Fireman’s Fund Ins. Co. v. City of Lodi*

12 302 F.3d 928 (9th Cir.2002).....2, 3, 7, 8

13 *Hawaii Hous. Auth. v. Midkiff*

14 467 U.S. 229 (1984)..... 3

15 *Hernandez v. County of Los Angeles*

16 167 Cal.App.4th 12 (Cal.App.4.Dist.2008) 5

17 *Hollingsworth v. Perry*

18 133 S.Ct. 2652 (2013)..... 1

19 *Midkiff v. Tom*

20 702 F.2d 788(9th Cir.1983)..... 1

21 *Pala Band of Mission Indians v. Board of Supervisors*

22 54 Cal.App.4th 565 (Cal.App.4.Dist.1997) 5

23 *Pearl Invest. Co. v. City & County of San Francisco*

24 774 F.2d 1460 (9th Cir.1985) 7

25 *Portero Hills Landfill, Inc. v. County of Solano*

26 657 F.3d 876 (9th Cir.2011)..... 7

27

28

1 *Quackenbush v. Allstate Ins. Co.*
 2 517 U.S. 706 (1996)..... 1

3 *Railroad Commission of Texas v. Pullman Co*
 4 312 U.S. 496 (1941).....2, 3, 4

5 *Rancho Palos Verdes Corp. v. City of Laguna Beach*
 6 547 F.2d 1092 (9th Cir.1976)..... 4

7
 8 *Santa Clara County Local Transportation Authority v. Guardino*
 9 11 Cal.4th 220 (1995) 6

10 *Santa Fe Land Improvement Co. v. City of Chula Vista*
 11 596 F.2d 838 (9th Cir.1979)..... 8

12 *Stubblefield Construction Co. v. City of San Bernardino*
 13 32 Cal.App.4th 687(1995)..... 4

14
 15 *The San Remo Hotel v. City of San Francisco*
 16 145 F.3d 1095(9th Cir.1998)2, 4, 8

17 *U.S. v. Morros*
 18 268 F.3d 695 (2001)..... 2

19 *United Parcel Serv., Inc. v. California Pub. Util. Comm'n*
 20 77 F.3d 1178(9th Cir.1996)..... 9

21
 22 **Constitutional Provisions**

23 California Constitution
 24 Article II, Section 11 4
 25 Article II, Section 8(d) 4

1 **I. INTRODUCTION & SUMMARY OF ARGUMENT**

2 Exercising their reserved power under the California Constitution to directly enact
3 legislation, Malibu voters gathered the required signatures to qualify Measure R for the
4 ballot and then overwhelmingly approved the initiative at a November 2014 special
5 municipal election. Measure R amends the City’s zoning ordinance by imposing certain
6 restrictions and procedural requirements for commercial development. Complaint,
7 Exhibit 1. Plaintiffs bring this facial challenge to the voter-enacted land use law (1)
8 under the California Constitution, claiming that the initiative violates the single-subject
9 rule (fifth cause of action), exceeded the power of the electorate (sixth cause of action),
10 violates equal protection and due process afforded by the California Constitution (eighth
11 and ninth cause of action, respectively); (2) under pure state law, claiming Measure R is
12 inconsistent with California Planning and Zoning Law (seventh cause of action); and (3)
13 under federal constitutional law (first through fourth causes of action). Complaint at ¶9.

14 The California Constitution affords voters a unique and precious right to legislate
15 directly through ballot initiatives, a right which courts jealously guard by presuming the
16 validity of enacted ballot measures except in the most extreme cases. *Santa Clara*
17 *County Local Transportation Authority v. Guardino*, 11 Cal.4th 220, 253 (1995).
18 Because the voter-initiative process is so particular to California, federal courts faced
19 with questions involving adopted ballot initiatives seek guidance from the California
20 courts.¹ Although abstention is “an extraordinary and narrow exception to the duty of a
21 district court to adjudicate a controversy properly before it” [*Quackenbush v. Allstate*
22 *Ins. Co.*, 517 U.S. 706, 728 (1996)], this case presents precisely the circumstances in

23 _____
24
25 ¹Most recently, in evaluating the constitutionality of Prop 8, a voter-enacted ballot measure that
26 purported to define marriage as between a man and a woman, the Ninth Circuit Court of Appeals
27 certified a question to the California Supreme Court regarding the role of ballot proponents in a post-
28 election constitutional challenge. *Hollingsworth v. Perry*, 133 S.Ct. 2652, 2659 (2013) (discussing
Perry v. Schwarzenegger, 628 F.3d 1191, 1193 (2011) and *Perry v. Brown*, 52 Cal.4th 1116, 1127
(2011) and deciding that in California, official proponents have standing to “to appear and assert the
state’s interest in the initiative’s validity and to appeal a judgment invalidating the measure when the
public officials who ordinarily defend the measure or appeal such a judgment decline to do so.”).

1 which abstention is appropriate. Under the *Pullman* doctrine, abstention is particularly
2 appropriate where a state court may find that the challenged regulation violates a
3 provision of the state's own constitution that is "specialized... with no clear counterpart
4 in the federal constitution." *Midkiff v. Tom*, 702 F.2d 788, 799-800 (9th Cir.1983), *rev'd*
5 *on other grounds*, 467 U.S. 229 (1984). Plaintiffs' challenge implicates two aspects of
6 California's unique voter-initiative process which have no federal counterpart: the
7 single-subject rule and the legislative scope of initiatives. The Complaint challenges a
8 land use regulation which involves property rights that are defined exclusively by state
9 law. One of the claims in the Complaint involves the allocation of land use authority
10 between state and local government. These are all claims without federal counterparts.

11 Several claims raised in the Complaint present questions entirely within the
12 purview of sensitive areas of state law. Plaintiffs' Complaint: (a) seeks to apply the
13 California Constitution's single-subject rule to a measure which enacts several
14 limitations on commercial development [Complaint at ¶¶ 9, 56]; (b) challenges whether
15 the scope of the initiative power under the California Constitution extends to Measure
16 R's voter-approval requirement [Complaint at ¶¶ 9, 65]; and (c) seeks to interpret state
17 planning law so as to preempt local enactment of Measure R's use permit requirement
18 for chain stores [Complaint at ¶¶ 9, 71].

19 Plaintiff asks this court to decide whether chain stores may be regulated
20 separately in local zoning laws, whether large commercial developments may be
21 required to proceed pursuant to a voter-approved specific plan as defined by state law,
22 and whether a ballot measure that requires both of these things either violates the single-
23 subject rule or exceeds the scope of the state constitutional initiative power. These are
24 questions that no published state court decision has answered. A state court may find
25 that Measure R violates California's unique constitutional provisions, which would
26 obviate the need for adjudication of the federal constitutional claims asserted by
27 Plaintiffs. Further, land use regulation is a sensitive area of social policy in which
28

1 federal courts have invoked *Pullman* to defer resolution of state law questions to state
 2 courts. The City’s authority to regulate land use that Plaintiffs challenge is derived from
 3 its police powers also granted under the California Constitution.

4 Abstention under the *Pullman* doctrine is appropriate because this action is a
 5 facial challenge to a voter-approved City land use law which presents novel land use
 6 regulations and questions pertaining to the ballot initiative process set forth in the
 7 California Constitution. Given the number of alternate theories asserted by Plaintiffs
 8 upon which Measure R could be invalidated in whole or in part, a prediction cannot be
 9 made with certainty as to how a California court would construe Measure R. A state
 10 court’s ruling on claims purely under state law may render the federal claims moot.

11 For these reasons, pursuant to Federal Rule of Civil Procedure 7(b), the City
 12 respectfully invites this court abstain from exercising its jurisdiction and defer resolution
 13 of Plaintiffs’ federal claims until the state claims have been adjudicated.

14 **II. THIS COURT SHOULD ELECT TO ABSTAIN IN ACCORDANCE**
 15 **WITH *PULLMAN***

16 **A. Legal Standard**

17 Plaintiffs bring a facial challenge to Measure R—a local land use law enacted as a
 18 voter-initiative—under the California Constitution, California law, and the United States
 19 Constitution. Complaint at 1:1-7. This Complaint presents a textbook case for
 20 abstention under *Railroad Commission of Texas v. Pullman Co*, 312 U.S. 496 (1941).

21 “*Pullman* abstention is the oldest of the abstention doctrines and perhaps the
 22 easiest to understand.” *U.S. v. Morros*, 268 F.3d 695, 703 (9th Cir. 2001). It is “an
 23 equitable doctrine that allows federal courts to refrain from deciding sensitive federal
 24 constitutional questions when state law issues may moot or narrow the constitutional
 25 questions.” *Fireman’s Fund Ins. Co. v. City of Lodi* (“*Fireman’s Fund*”), 302 F.3d 928,
 26 938, n.11 (9th Cir.2002) (citing *The San Remo Hotel v. City of San Francisco* (“*San*
 27 *Remo Hotel*”), 145 F.3d 1095, 1104 (9th Cir.1998)). “[F]ederal courts should abstain
 28

1 from decisions when difficult and unsettled questions of state law must be resolved
2 before a substantial federal constitutional question can be decided. By abstaining in
3 such cases, federal courts... avoid both unnecessary adjudication of federal questions
4 and ‘needless friction with state policies.’” *Columbia Basin Apartment Ass’n v. City of*
5 *Pasco* (“*Columbia Basin*”), 268 F.3d 791, 801-802 (9th Cir.2001) (citing *Hawaii*
6 *Housing Authority v. Midkiff*, 467 U.S. 229, 236 (1984)).

7 A district court may abstain from exercising its jurisdiction under *Pullman* when
8 three factors exist: “(1) the complaint must involve a ‘sensitive area of social policy’
9 that is best left to the states to address; (2) ‘a definitive ruling on the state issues by a
10 state court could obviate the need for federal constitutional adjudication by the federal
11 court’; and (3) ‘the proper resolution of the potentially determinative state law issue is
12 uncertain.’” *Cedar Shake and Shingle Bureau v. City of Los Angeles*, 997 F.2d 620, 622
13 (9th Cir. 1993) (citing *Kollsman v. City of Los Angeles*, 737 F.2d 830, 833 (9th
14 Cir.1984), *cert. denied*, 469 U.S. 1211, 105 S.Ct. 1179 (1985)) (invoking *Pullman*
15 abstention and reversing district court’s contrary conclusion where case challenged
16 authority of city to regulate building code by banning wood shake roofs). The United
17 States Supreme Court has clarified that *Pullman* “abstention is appropriate where an
18 unconstrued... statute is susceptible of a construction by the state judiciary which might
19 avoid in whole or in part the necessity for federal constitutional adjudication, or at least
20 materially change the nature of the problem.” *Bellotti v. Baird*, 428 U.S. 132, 146-147
21 (1976) (internal citations omitted).

22 It makes no difference that the state law claims asserted in the Complaint are
23 supplemental. In *San Remo Hotel*, *Pullman* abstention was appropriate despite dismissal
24 of plaintiff’s supplemental state law claim because the treatment of a hotel’s prior non-
25 conforming use and designation under a city’s zoning law constituted “unsettled
26 questions of state law” that could render plaintiff’s federal constitutional claim moot.
27 *San Remo Hotel*, *supra*, 145 F.3d 1095, 1105. In a developer’s lawsuit challenging a
28

1 city's requirement that its property meet certain safety standards containing thirteen
 2 causes of action, *Pullman* supported remand of claims involving pure state law and
 3 claims relying on both federal and state law to state court. *VH Property Corp. v. City of*
 4 *Rancho Palos Verdes* ("*VH Property Corp.*") (2009) 622 F.Supp.2d 958, 970-971.

5 **B. The *Pullman* Abstention Criteria Are Satisfied**

6 **1. The Complaint challenges land use regulations adopted by voter**
 7 **initiative, a sensitive area of social policy**

8 This complaint asks the court to be the first to weigh-in on whether California
 9 cities can require voter-approved specific plans for large developments, can limit the
 10 number of chain stores in their commercial centers and can accomplish those things by
 11 voter-initiative. Section 3 of Measure R states that its purposes include preserving the
 12 City's small-town, rural character through voter-approved specific plans and limitations
 13 on chain stores in the City. Complaint, Exhibit 1 at 20. Measure R is a land use
 14 regulation.

15 The Ninth Circuit has "consistently held that land use planning is a sensitive area
 16 of social policy that meets the first requirement for *Pullman* abstention." *San Remo*
 17 *Hotel, supra*, 145 F.3d at 1105 (internal citations omitted) (remanding with instructions
 18 to abstain under *Pullman* at 1106); *see also Columbia Basin, supra*, 268 F.3d 791, 802
 19 (9th Cir.2001) ("[w]e often have held that land-use planning questions 'touch a sensitive
 20 area of social policy' into which the federal courts should not lightly intrude") (citing
 21 *Pearl Inv. Co. v. City & County of San Francisco*, 774 F.2d 1460, 1463 (9th Cir.1985));
 22 *C-Y Development Co. v. City of Redlands* 703 F.2d 375, 377 (9th Cir.1983) (land use
 23 planning is a sensitive area of social policy); *Santa Fe Land Improvement Co. v. City of*
 24 *Chula Vista*, 596 F.2d 838, 840 (9th Cir.1979) (same); *Rancho Palos Verdes Corp. v.*
 25 *City of Laguna Beach*, 547 F.2d 1092, 1094 (9th Cir.1976)(same).

26 "Lower federal courts have also applied an abstention doctrine to refrain from
 27 turning local land use disputes into federal civil rights claims." *Stubblefield*

1 *Construction Co. v. City of San Bernardino*, 32 Cal.App.4th 687, 705 (1995)(citing *C-Y*
2 *Development Co. v. City of Redlands* 703 F.2d 375 (9th Cir.1983)).

3 “More important, whether the city ordinance is preempted by state law is a
4 sensitive and complex issue involving the distribution of power between the state and
5 local governments.” *Cedar Shake and Shingle Bureau v. City of Los Angeles* (9th Cir.
6 1993) 997 F.2d 620, 622. The Compliant herein claims that California Planning Law
7 preempts the City from creating chain store as a separate land use and regulating them
8 with a conditional use permit. Complaint at ¶¶ 69-72 (Seventh Claim)

9 Likewise, interpretation of ballot measures raises sensitive state issues. *Potrero*
10 *Hills Landfill, Inc. v. County of Solano* (“*Portrero Hills*”) (9th Cir. 2011) 657 F.3d 876,
11 889 (the absence of a definitive state court interpretation of county ballot Measure E
12 limiting import of solid waste may warrant abstention under *Pullman*).

13 The Complaint challenges land use regulation adopted pursuant to a local ballot
14 initiative; thus, according to well-established precedent, the first *Pullman* factor is
15 satisfied.

16 **2. Interpretation of the Validity of Measure R under California Law May**
17 **Render the Federal Constitutional Claims Moot**

18 If Plaintiffs prevail in any of their state claims and Measure R is declared invalid,
19 the City would be precluded from implementing the Measure, rendering moot the
20 federal constitutional claims asserted by Plaintiffs.

21 Article II, Section 8(d) of the California Constitution, known as the “single-
22 subject rule,” provides that “[a]n initiative embracing more than one subject may not be
23 submitted to the electors or have any effect.” Article II, Section 11 of the California
24 Constitution extends the statewide initiative and referendum powers to voters in local
25 elections, and the single-subject limitation applies equally to state and local measures.
26 *Pala Band of Mission Indians v. Board of Supervisors*, 54 Cal.App.4th 565, 582 (1997).
27 *Pala Band* considered whether the single-subject rule applies to county elections, and
28

1 California courts have held that the limitation applies to charter cities (*e.g.*, *Hernandez v.*
2 *County of Los Angeles*, 167 Cal.App.4th 12 (2008)); however, no California court has
3 specifically addressed whether the single-subject rule applies to voter initiative measures
4 in general law cities such as the City of Malibu. The Complaint presumes that it does.

5 California's initiative power is jealously guarded by the courts. As against a
6 constitutional challenge to a voter initiative, "all presumptions favor the validity of
7 initiative measures," which "must be upheld unless their unconstitutionality clearly,
8 positively, and unmistakably appears." *Santa Clara County Local Transportation*
9 *Authority v. Guardino*, 11 Cal.4th 220, 253 (1995). Nevertheless, if the single-subject
10 rule applies to Measure R, and a court determines Measure R impermissibly regulates
11 more than one distinct subject matter, the measure could be invalidated and have no
12 effect pursuant to article II, Section 8(d) of the California Constitution.

13 Alternatively, a state court could uphold Measure R against the single-subject rule
14 challenge, but find the measure invalid as exceeding the scope of the authority of the
15 electorate. "Only legislative acts are subject to the initiative process." *Citizens for*
16 *Planning Responsibly v. County of San Luis Obispo*, 176 Cal.App.4th 357, 367
17 (Cal.App. 2 Dist.2009) (reversing trial court's ruling invalidating initiative measure
18 amending county's general plan and zoning regulations). Plaintiffs allege that by
19 (hypothetically) subjecting certain development projects to a new requirement that a
20 specific plan be prepared by the City and approved by the voters, Measure R imposes a
21 new legislative approval requirement on projects that would otherwise be subject to
22 administrative approval in violation of California law. Complaint at ¶¶ 65-68.

23 Although the City does not think it should, conceivably, a court could find
24 Measure R invalid in its entirety on grounds that the voters lacked authority to enact it.
25 Or perhaps, a court would find that only a portion of Measure R exceeds the voters'
26 authority, severing the offending provisions as urged by Section 16 of Measure R
27
28

1 [Complaint at Ex. 1 at 30²] and preserving the provisions of Measure R within the
 2 voters' authority, which would substantially alter the contours of Plaintiffs' federal
 3 claims. Or the state court may interpret Section 9(B)³ of the Measure to exempt any
 4 non-legislative action from the specific plan requirement. Any one of these three
 5 possibilities would moot the federal claims as pleaded. Even if a state court found
 6 Measure R partially invalid, Plaintiffs' federal claims would be narrowed to those
 7 provisions surviving the state law challenge. "For *Pullman* purposes, it is sufficient [to
 8 satisfy the second criterion] if the state law issues might 'narrow' the federal
 9 constitutional questions." *Sinclair Oil Corp. v. County of Santa Barbara*, 96 F.3d 401,
 10 410 (9th Cir.1996) (holding abstention from deciding ripe claim was proper under
 11 *Pullman* doctrine).

12 The Complaint also alleges that Measure R violates the California Planning and
 13 Zoning law "by purporting to create a [conditional use permit] that is tenant-specific
 14 rather than use-specific." Complaint ¶71. It is unclear how a state court would decide
 15 this issue and whether disposition of the question of state law could result in full or
 16 partial invalidation of Measure R, thereby rendering the federal claims moot.

17 In all events, the second criterion for abstention is met because interpretation of
 18 the validity of Measure R under the California Constitution or state Planning Law may
 19 eliminate the need to determine whether it also violates the federal constitution.

20 _____
 21 ²Section 16 of Measure R provides: "This Act shall be interpreted and applied so as to be consistent
 22 with all federal, state, and local laws, rules, and regulations, including the Local Coastal Program. If
 23 any provision of this Act or part thereof, or any application thereof, is for any reason held to be invalid
 24 or unconstitutional, the remaining sections and applications shall not be affected but shall remain in full
 25 force and effect, and to this end, the provisions of this Act are severable." Whether invalid portions of a
 26 state statute are severable from other portions of that statute is a question of state law. *Del Real, LLC v.*
 27 *Harris*, 966 F. Supp. 2d 1047, 1066 (E.D. Cal. 2013)

28 ³The sixth cause of action is based on a hypothetical in which a certain type of development is
 proposed that might not otherwise require legislative action; Plaintiffs seek to invalidate the whole
 Measure to protect against the one possibility. However, Section 9(B) of Measure R already
 anticipated this possibility: "This initiative shall not be interpreted to apply to any development, land,
 or use that, under state or federal law, is beyond the power of the local voters to affect by the initiative
 power reserved to the people via the California Constitution."

1 *Columbia Basin, supra*, 268 F.3d 791, 802 (9th Cir.2001); see also *Portero Hills, supra*,
 2 657 F.3d at 889 (finding support for *Pullman* abstention in the absence of a definitive
 3 state court interpretation of a county ballot measure challenged as violating the federal
 4 Commerce Clause).

5 **3. Validity of Measure R under State Law is Uncertain**

6 The Ninth Circuit requires “only a minimal showing of uncertainty to satisfy the
 7 third *Pullman* factor in land use cases.” *VH Property Corp., supra*, 622 F.Supp.2d at
 8 964 (finding uncertainty as to how a California court would apply “peculiar facts” to
 9 determine whether a city abused its discretion in requiring a developer to demonstrate
 10 that a property met specified safety criteria). See, e.g., *Sinclair Oil Corp. v. County of*
 11 *Santa Barbara*, 96 F.3d 401, 410 (9th Cir.1996) (finding uncertainty despite plaintiff’s
 12 “conventional inverse condemnation claim” that did not implicate “a novel claim of
 13 statutory construction” because the community plan at issue had not yet been challenged
 14 in a state court); *Portrero Hills, supra*, 657 F.3d at 889 (finding that “the absence of a
 15 definitive state court interpretation of Measure E” could support *Pullman* abstention);
 16 *Columbia Basin, supra*, 268 F.3d at 806 (finding uncertainty where no Washington court
 17 had evaluated the constitutionality of a land use ordinance under the unique provisions
 18 of the state Constitution).

19 For purposes of *Pullman*, uncertainty does not require silence in California
 20 jurisprudence on the broad legal doctrines upon which Plaintiffs assert their state law
 21 claims. Rather, uncertainty exists when a federal court cannot predict with confidence
 22 how a state court would decide an issue of state law. *Pearl Invest. Co. v. City & County*
 23 *of San Francisco*, 774 F.2d 1460, 1465 (9th Cir.1985); see also *Sinclair Oil, supra*, 96
 24 F.3d at 410 (citing *Santa Fe Land Improvement Co. v. City of Chula Vista*, 596 F.2d
 25 838, 841 (9th Cir. 1979)).

26 The City recognizes that a significant body of law exists with respect to the
 27
 28

1 single-subject rule, scope of authority of ballot initiatives, and the California Planning
 2 and Zoning Law, and posits in its Motion to Dismiss filed concurrently herewith that the
 3 Complaint fails to state a claim that Measure R is invalid under any of these three
 4 theories. *See* City’s Motion to Dismiss at 20-25 (state law claims). However, as
 5 illustrated by the discussion in Section II.B(2), *supra*, a California court has not yet
 6 considered these particular applications of state law before this Court: 1) whether
 7 provisions of a ballot initiative limiting the formula retail businesses that may occupy a
 8 shopping center and subjecting commercial development projects to voter-approved
 9 specific plans are germane to a common theme or purpose in satisfaction of the single-
 10 subject rule; 2) whether the imposition of a requirement that a defined class of
 11 development projects obtain voter approval of a specific plan exceeds the valid scope of
 12 authority of a ballot initiative; and 3) whether the use permit required by Measure R is
 13 preempted by the California Planning and Zoning Law.

14 With respect to a preemption challenge to a city’s land use ordinance, the second
 15 *Pullman* factor is satisfied if the federal court “cannot say without doubt that the
 16 California Supreme Court” would rule in a particular fashion, even when it “is clear that
 17 the ordinance does not contradict state law” and the California Attorney General has
 18 issued an opinion consistent with a position asserted in the federal action. *Cedar Shake*
 19 *and Shingle Bureau v. City of Los Angeles* (9th Cir. 1993) 997 F.2d 620, 624-626.
 20 Greater uncertainty exists here, where Plaintiffs describe the use permit required by
 21 Measure R as “unrecognized in California law.” Complaint ¶9.

22 Thus, the third *Pullman* factor is satisfied because a prediction cannot be made
 23 with confidence that a state court would invalidate Measure R in whole or in part based
 24 on any of Plaintiffs’ state law claims.

25 **III. PROCEDURAL CONSEQUENCES OF *PULLMAN* ABSTENTION**

26 “A district court abstaining under *Pullman* must dismiss the state law claim and
 27 stay its proceedings on the constitutional question until a state court has resolved the
 28

1 state issue.” *Cedar Shake and Shingle Bureau v. City of Los Angeles* (9th Cir. 1993) 997
2 F.2d 620, 622. See also *VH Property Corp., supra*, 622 F.Supp.2d at 970; *San Remo*
3 *Hotel, supra*, 145 F.3d at 1104 (“Once *Pullman* abstention is invoked by the federal
4 court, the federal plaintiff must then seek a definitive ruling in the state courts on the
5 state law questions before returning to the federal forum.”); *Columbia Basin, supra*, 268
6 F.3d at 802 (citing *Santa Fe Land Improvement Co. v. City of Chula Vista*, 596 F.2d
7 838, 841 (9th Cir.1979)).

8 Plaintiffs are free to present their federal claims in a state action or make the
9 appropriate reservation in that venue to return to federal court if adjudication of the
10 federal claims remains necessary after a state court has evaluated Measure R under the
11 California Constitution and California Planning and Zoning Law. *England v. Louisiana*
12 *State Bd. of Medical Examiners*, 375 U.S. 411, 420-21 (1964); see also *United Parcel*
13 *Serv., Inc. v. California Pub. Util. Comm’n*, 77 F.3d 1178, 1182-88 (9th Cir.1996)
14 (discussing *England* reservation).

15 Indeed, Plaintiffs could have brought their claims involving the application of
16 state election law *before* the November election, thereby alleviating the procedural
17 complications of raising federal constitutional questions in a facial challenge to a local
18 land use law adopted by citizen-initiative. But since Plaintiffs elected to proceed in this
19 manner, the cases cited above suggest that this court should abstain from a premature
20 consideration of a land use initiative over which there are unresolved questions of
21 sensitive state law which would affect the alleged federal claims.

22 **IV. CONCLUSION**

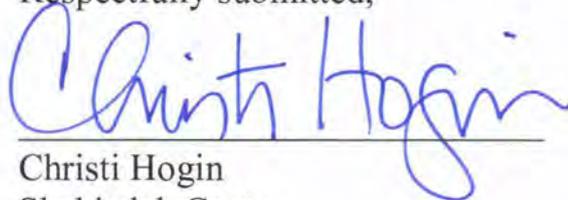
23 Abstention is a doctrine rooted in comity existing “for ‘the rightful independence
24 of the state governments and for the smooth working of the federal judiciary.’” *San*
25 *Remo, supra*, 145 F.3d at 1105 (citing *Railroad Commission of Texas v. Pullman Co.*,
26 312 U.S. 496 (1941)). Abstention under *Pullman* is well-supported in this case. Federal
27 courts have consistently held that land use is a sensitive area of social policy satisfying
28

1 the first *Pullman* factor. The second *Pullman* factor is satisfied here because a state
2 court could find Measure R entirely invalid purely on state law grounds (rendering
3 Plaintiffs' federal claims moot) or partially invalid purely on state law grounds
4 (narrowing Plaintiffs' federal claims). The third factor is satisfied because no ballot
5 initiative with provisions resembling Measure R has been considered by a California
6 court and only a minimal showing of uncertainty is required to support *Pullman*
7 abstention in a land use case.

8 For all of the reasons set forth herein, the City respectfully invites this Court to
9 invoke *Pullman*, dismiss Plaintiffs' claims asserted purely under state law (particularly
10 the fifth, sixth, seventh, eighth and ninth claims for relief), instruct Plaintiffs to seek
11 adjudication of the state claims in state court, and retain jurisdiction over the remaining
12 federal claims but stay further action thereon pending adjudication of Plaintiffs' state
13 law claims in state court.

14 DATED: February 4, 2015

Respectfully submitted,

15 

16
17 Christi Hogin
18 Shahiedah Coates
19 JENKINS & HOGIN, LLP
20 Attorneys for Defendant
21 City of Malibu
22
23
24
25
26
27
28

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 1230 Rosecrans Avenue, Suite 110, Manhattan Beach, CA 90266.

On February 4, 2015, I served the foregoing documents described as:

CITY OF MALIBU’S NOTICE OF MOTION AND MOTION FOR ABSTENTION AND STAY OF FURTHER PROCEEDINGS

on the interested party or parties in this action by placing the original thereof enclosed in sealed envelopes with fully prepaid postage thereon and addressed as follows:

PLEASE SEE SERVICE LIST ATTACHED

VIA U.S.MAIL. I enclosed the above described documents in a sealed envelope or package addressed to the person(s) listed above or on the attached; caused such envelope with postage thereon fully prepared to be placed in the United States mail at Los Angeles, California.

I am readily familiar with the Jenkins & Hugin, LLP’s practice of collection and processing correspondence for outgoing mailing. Under that practice it would be deposited with U.S. Postal Service on that same day with postage thereon prepaid at Manhattan Beach, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

(TO BE SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING (“NEF”)). The foregoing documents will be served by the court via NEF and hyperlink to the document. On February 4, 2014, I checked the CM/ECF docket for this case and determined that the following person(s) are on the Electronic Mail Notice List to receive NEF transmission.

Service information continued on attached page.

FEDERAL. I declare that I am employed in the office of a member of the Bar of this Court at whose direction the service is made.

Executed this 4th day of February, 2015, at Manhattan Beach, California.

/s/ _____
WENDY HOFFMAN

SERVICE LIST

The Park at Cross Creek, LLC and Malibu Bay Company v. City of Malibu
Case No. 2:15-cv-00033-JAK-(SHx)

<p>David P. Waite Kenneth B. Bley Frederick H. Kranz Tamar C. Stein Alexander M. Degood COX, CASTLE & NICHOLSON LLP 2049 Century Park East, 28th Floor Los Angeles, CA 90067-3284 Tel: (310) 284-2200 Fax: (310) 284-2100 dwaite@coxcastle.com kbley@coxcastle.com tstein@coxcastle.com adegood@coxcastle.com</p>	<p><i>Attorneys for Plaintiffs:</i></p> <p>The Park at Cross Creek, LLC and Malibu Bay Company</p>
--	--

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28