A159487

COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT - DIVISION THREE

MICHAEL ARATA,
Petitioner and Appellant,

v.

DEBORAH COOPER, in her official capacity as COUNTY CLERK-RECORDER AND REGISTRAR OF VOTERS, and

SHARON L. ANDERSON, in her official capacity as CONTRA COSTA COUNTY COUNSEL,
Respondents.

CONTRA COSTA TRANSPORTATION AUTHORITY, a special district, and

CONTRA COSTA COUNTY BOARD OF SUPERVISORS,
Real Parties in Interest.

[PRIORITY MATTER PURSUANT TO ELECTIONS CODE § 13314(a)(3)]

After Order of the Superior Court for the County of Contra Costa,
Case No. MSN192489; Hon. Charles "Steve" Treat
Additional Judge: Hon. Edward G. Weil

APPELLANT'S REPLY BRIEF

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INTRODUCTION

The November 2020 election is approaching. The County of Contra Costa and cities, school districts and special districts therein will place numerous measures on the ballot. Elections Code disputes likely will arise, but ambiguities concerning procedural and substantive law persist from the last statewide election in March 2020. These uncertainties will undermine effective and timely administrative and judicial resolution.

Respondent County Elections Administrator Deborah Cooper once again might rush ballots and voter information guides to the printer to render legal disputes "moot." Election officials could concoct procedural restrictions, non-existent in statute (e.g., Elections Code Section 9190[1]), and deny the application of clearly-established voter rights, such as Section 13314, in order to derail legitimate legal challenges.

Elections officials could refuse to enforce the ballot label restrictions in Elections Code Section 13119 against self-interested sponsors who make untrue, partial, argumentative and/or prejudicial claims. Respondent Cooper and her agents could continue to designate ballot measure letters "randomly" in a manner inconsistent with Section 13116. Respondent County Counsel Sharon Anderson could continue to prepare "impartial analyses" that are partial, false, and/or misleading, inconsistent with Sections 9160 and 9190. Meanwhile Real Parties in Interest

[1] All Code references are to the Elections Code, unless otherwise noted.

Contra Costa County Board of Supervisors (hereinafter "County") and Contra Costa Transportation Authority (hereinafter “CCTA”) currently are pursuing special legislation in Sacramento, Senate Bill 1349, to pursue future sales tax ballot measures.

As these issues interfered with Appellant Michael Arata's efforts to enforce the Elections Code in the March 2020 election yet evaded immediate appellate review, Appellant seeks their resolution as they likely will recur in future elections.

I. THE CASE IS NOT MOOT.

This case concerns issues of broad public interest that are likely to recur, but might avoid timely appellate review. *Vargas v. Balz* (2014) 223 Cal.App.4th 1544, 1550. This case is distinguishable from the fact-specific issues unlikely to recur presented in *Building a Better Redondo, Inc. v. City of Redondo Beach* (2012) 203 Cal.App.4th 852, 867, cited by the County Parties. (County Opposition Brief (hereinafter "OB") 18.) Finding mootness in *Better Redondo*, a coastal land use dispute, that court held:

> [N]o future zoning ordinances purporting to amend the City's local coastal program can ever be passed by the city council … [T]he unusual facts giving rise to the present suit with its unique ties to local events likely will not be replicated again. 203 Cal.App.4th at 868.

In stark contrast, all Respondents and Real Parties in Interest in the case at bar very likely will repeat their behavior in future elections. Respondent County Elections Administrator

Cooper is likely to continue to administer elections in a manner inconsistent with Sections 9190 and 13119. Respondent Cooper is likely to continue to assign ballot measure letter designations inconsistent with Section 13116. Respondent County Counsel Anderson is likely to issue "impartial analyses" for ballot measures that are untrue, partial, false and/or misleading and/or otherwise inconsistent with Section 9160.

Real Parties in Interest CCTA and County are already planning for their next sales tax ballot measures. After Appellant filed his Notice of Appeal in January 2020, Senator Steve Glazer introduced Senate Bill 1349 (SB 1349), as amended, on April 8, 2020. (MJN Exh. Y.) SB 1349, special legislation to increase the statewide sales tax cap (Rev. & Tax. Code Section 7251.1) in Contra Costa County only, has passed the State Senate and is now pending approval in the State Assembly.

Sections 2 and 3 of SB 1349 would permit RPI CCTA to seek an additional one percent sales tax increase in a future ballot measure. (MJN Exh. Y.) Section 4 of SB 1349 would permit RPI County to seek a half-percent sales tax in a future ballot measure. (MJN Exh. Y.) The Senate Rules Committee's Senate Floor Analysis lists RPIs "Contra Costa County" and "Contra Costa Transportation Authority" as "SUPPORT" for SB 1349. (MJN Exh. Z, p. 4.) Most of the issues presented in this case are capable of repetition with RPIs' future ballot measures, yet could evade timely appellate review.

CCTA assails "Appellant's attempts to manufacture ambiguity." (CCTA OB 10.) CCTA claims, "Appellant first

incorrectly contends that the scope of Elections Code section 9190 is not clear and requires judicial resolution. (AOB at 16.) Nothing could be further from the truth." (CCTA OB 21.) Yet CCTA's attorney during the January 6, 2020 writ hearing effectively admitted the need for additional statutory interpretation, "We acknowledge the Elections Code isn't exactly a model of clarity in this area." (RT 7:25-26.)

The Court needs to clarify the scope of Section 9190, especially whether it encompasses challenges to ballot labels/questions (under Section 9051 and/or Section 13119) and ballot measure letter designations (under Section 13116), when Appellant argues it does not. Section 9190 is limited in its text to "the materials referred to in Sections 9119, 9120, 9160, 9162, and 9167," which do not explicitly or implicitly include ballot questions/labels or ballot measure letter designations. § 9190(a).

CCTA claims, "Dismissal is particularly warranted here given Appellant's baseless and unworkable position that *McDonough* should be discarded, and that no deadline should apply for challenges to certain ballot materials, including the ballot label." (CCTA OB 22; emphasis in original.) Appellant has never taken such positions. Appellant believes that *McDonough v. Superior Court* (2012) 204 Cal.App.4th 1169 should be distinguished as incorrectly decided where it relies upon nonexistent statutory authority in Sections 9190, 9295, etc., for public examination periods for ballot labels. Appellant contends that the "not substantially interfere with the conduct of the election" standard for issuance of a writ of mandate under

Section 13314 serves as the operative deadline for challenges to ballot labels and ballot measure letter designations.

Respondents Cooper and Anderson, along with RPI County (hereinafter "County Parties") claim, "[Appellant's] request for "clarification" or "interpretations" of four sections of the Elections Code is merely a request for an advisory opinion … As a request for an advisory opinion, Arata's request must be denied and the appeal dismissed." (County OB 22-23.) But "advisory opinions" are not uncommon in "moot appeals" of election disputes. See *Save Stanislaus Area Farm Economy v. Board of Supervisors* (1993) 13 Cal.App.4th 141, 146 concerning a ballot measure:

> … [T]he profusion of cases in which moot appeals have been decided in the public interest, makes it clear that mootness is not really a bar to production of a much-needed advisory opinion in writ proceedings [citations] and appeals," citing 9 Witkin, Cal. Procedure (3d ed. 1985) Appeal, § 526, pp. 509-510.)

See also *Mann v. Superior Court* (1986) 181 Cal.App.3d 372, 374, decided under the predecessor to today's Section 13314 (then Section 10015):

> The election mooted the dispute ... We have concluded, however, that respondent court's writ was issued in error and that public interest in proper conduct of elections and the probability that the issue will arise again warrant a decision on the merits of the issue presented.

Even in an election case deemed moot after defeat of a ballot measure, the Supreme Court has retained the matter and issued an opinion "in order to provide guidance for future cases." See *Costa v. Superior Court* (2006) 37 Cal. 4th 986, 994:

> Although the defeat of Proposition 77 renders moot the legal challenge to the measure, we nonetheless have concluded that we should retain this matter and issue an opinion in order to provide guidance for future cases, both with regard to the procedural question whether preelection review of this type of challenge to an initiative measure is appropriate and with regard to the substantive legal standard that is applicable in determining whether the type of discrepancy that was involved in this case warrants withholding an initiative measure from the ballot.

The County Parties ignored this key holding of *Costa* in their Opposition Brief mootness discussion. (County OB 10, 12.)

II. PROCEDURAL ISSUES.

A. Appellant Timely Filed Challenge to Impartial Analysis on December 30, 2019.

Appellant's challenge to Respondent County Counsel's impartial analysis was timely filed during the ten-day public examination period (December 18 to 28, 2019) because the final day was Saturday, December 28, 2019, which Elections Code Section 15, read in conjunction with Government Code Section 6700 and a reinterpreted Section 6702 and Code of Civil

Procedure Sections 12, 12a, 12b, 13, 134, and 135, extended the last day for performance to Monday, December 30, 2019.

"The writ of mandate or injunction request shall be filed no later than the end of the 10-calendar-day public examination period." Elections Code § 9190(b)(1). Appellant could not file on Saturday, December 28, 2019 because it was a judicial holiday under C.C.P. Section 135 ("Every Saturday … is a judicial holiday."). Appellant could not file on Sunday, December 29, 2019 because it was a judicial holiday under Government Code Section 6700(a)(1) ("The holidays in this state are: … Every Sunday"), via C.C.P. Section 135. Appellant timely filed on Monday, December 30, 2019, the next day that was not a judicial holiday.

Ignoring Elections Code Section 15, the County Parties argue, "However, in elections cases, when an act must be performed "not later than" a certain date, then that time period cannot be extended," citing *Steele v. Bartlett* (1941) 18 Cal.2d 573, 574, *Griffin v. Dingley* (1896) 114 Cal.481, and *DeLeon v. Bay Area Rapid Transit Dist.* (1983) 33 Cal.3d 456, 459. (County OB 14.) These cases are inapposite.

CCTA also ignores Section 15, asserting, "Appellant's fact-specific argument … regarding the calculation of the last day of the 10-calendar-day public examination period was rejected by the California Supreme Court in 1941, and also does not require judicial clarification," also citing *Steele*, 18 Cal.2d at 574. (CCTA OB 22 fn. 5.)

Elections Code Section 15 expressly defines "the last day for the performance of any act." It was first enacted as Stats. 1979, Chapter 667 (then codified as Elections Code § 60). Section 15, which expressly states "[n]otwithstanding any other provision of law," superseded *Griffin* (1896) and *Steele* (1941) when enacted in 1979. As explained in Appellant's Opening Brief, Section 15 is the controlling legal authority. (AOB 20, 22.) Respondents failed to oppose Appellant's Section 15 arguments. The Court should reject Respondents' attempt to render Section 15, a clear and unambiguous statutory command, a "dead letter."

DeLeon, concerning time limits on government tort litigation, is not an election case. Moreover, within *DeLeon* the State Supreme Court distinguishes *Steele* and *Griffin*:

> Steele and Griffin dealt with a different situation than is present here. The statutes in those cases counted backward from a given date -- election day -- to insure that no new candidates would emerge within a given time period and ballots could be printed identifying all candidates. In the present situation, by contrast, the statute is forward-looking, limiting the time in which one can file a lawsuit against a public agency to insure that claims are not stale and evidence is available. (33 Cal.3d at 459.)

Section 9190 does not count backward from election day, but rather designates "10 calendar days immediately following the deadline" for specified materials ("materials referred to in Sections 9119, 9120, 9160, 9162, and 9167"), including the impartial analysis (via Section 9160). See § 9190(a). Section

9190 is forward-looking, limiting the time in which one can file a lawsuit to challenge a public agency's specified ballot materials. Therefore, Appellant timely filed his challenge to the impartial analysis.

B. Appellant Timely Filed Challenges to Ballot Label/Ballot Question and Ballot Measure Letter Designation.

Opposing parties refuse to acknowledge the reality that Section 9190 is a limited statute, expressly restricted to "materials referred to in Sections 9119, 9120, 9160, 9162, and 9167." § 9190(a).

The County Parties write into Section 9190 a non-existent public examination period for challenges to ballot questions and ballot measure letter designations to argue that Appellant was "late in challenging the ballot question" (County OB 14) and "weeks too late to challenge these ballot materials." (County OB 15.) They cite *McDonough*, 204 Cal.App.4th at p. 1173, "10-day examination period for county election materials," and Section 9190(a), "10-calendar-day challenge period runs 'immediately following the deadline for submission of those materials.'" (County OB 14.) Appellant believes *McDonough* interpreted Section 9190(a) with overbreadth contrary to its text, making it wrongly decided on this specific point.

Similarly, CCTA contends, "Appellant elected to ignore the 10-calendar day challenge periods for these materials," (CCTA OB 14) and, "The 10-day limitations period governs challenges to ballot labels. (*McDonough v. Superior Court* (2012) 204

Cal.App.4th 1169, 1173)." (CCTA OB 21-22.) CCTA misleads the court, "The Elections Code clearly provides that ballot materials are subject to a "public examination period," and imposes a 10-day statute of limitations on challenges to ballot materials," citing "Elec. Code § 9190(b)." (CCTA OB 27.) But CCTA overlooks Section 9190(a), which limits the scope of Section 9190 to "the materials referred to in Sections 9119, 9120, 9160, 9162, and 9167," none of which concerns ballot labels/questions.

As Appellant explained in his Opening Brief, there is no statutory basis in Section 9190 to claim that ballot questions/labels are subject to public examination periods. (AOB 24-26.) Ballot questions are subject to review under Sections 13119 and 13314, which are independent of Section 9190, not cited in Section 9190, and do not have statutorily-mandated public examination periods, let alone public examination periods of fixed duration.

However, assuming *arguendo* that ballot labels/questions were to be subject to public examination periods under Section 9190, CCTA distorts the phrase "deadline for submission of those materials" in Section 9190(a). The Superior Court directly asked CCTA's attorney at the January 6, 2020 merits hearing:

> [O]ne of the questions that I had was when does this ten-day examination period start. Your papers seem to contemplate that it starts when the materials got filed, which was last October, but that's not actually what the statute says. The statute says upon the deadline for submission. … When was the

> deadline, and what was the triggering event? (RT 7:14-24.)

CCTA's attorney misled the court, "Our position -- and it's based on McDonough versus Superior Court -- is that the statute of limitations begins running on the date that the ballot label is adopted. It's done in public. Everyone is on notice at that point that that is the question." (RT 7:26-8:3.) Appellant contends that such a position leads to absurd results, given an agency's discretion to adopt a ballot label many months before an election submission deadline.

C. Section 13314 and C.C.P. Section 1085 Provide Rights to Electors.

CCTA attempts to justify its overbroad reading of Section 9190 to encompass challenges to ballot labels and ballot measure letter designations by simultaneously undermining Section 13314 and attempting to render Section 13314 and the traditional writ of mandate under C.C.P. § 1085 "dead letters."

CCTA claims, "Appellant misconstrues section 13314 as providing a separate substantive set of rights, governed by its own standards of proof. To the contrary, section 13314 simply establishes a procedural right to seek a preelection remedy," citing *McKinney v. Superior Court* (2004) 124 Cal.App.4th 951, 957. (CCTA OB 32-33.)

CCTA also contends, "[N]owhere in the Elections Code does a 'preponderance of evidence' standard appear." (CCTA OB 34.) But, by default unless otherwise stated, the general rule in

California is that " '[i]ssues of fact in civil cases are determined by a preponderance of testimony.' " *Weiner v. Fleischman* (1991) 54 Cal.3d 476, 483. The preponderance-of-the-evidence standard "simply requires the trier of fact 'to believe that the existence of a fact is more probable than its nonexistence.' " *In re Angelia P.* (1981) 28 Cal.3d 908, 918.

In stark contrast to Section 9190(b)(2), which says, "A peremptory writ of mandate or an injunction shall be issued only upon clear and convincing proof …," Section 13314(a)(2) says, "A peremptory writ of mandate shall issue only upon proof …," with no qualifying or limiting words before "proof." (Emphasis added.) Section 13314, within its text, does not state an alternative burden of proof, so a preponderance of evidence burden of proof applies, unless "this code or the Constitution" states otherwise. § 13314(a)(2). Sections 13116 (ballot measure letter designation) and 13119 (ballot label) do not contain alternative burdens of proof, so the preponderance of evidence standard applies when Section 13314 is used to enforce those provisions.

CCTA baselessly asserts that "deficiencies mar Appellant's argument that section 1085 of the Code of Civil Procedures sets forth a competing limitations period that overrides section 9190." (CCTA OB 31 fn. 9.) But *McKinney v. Superior Court* (2004) 124 Cal.App.4th 951, 957 fn. 7 states, "[E]ven if [petitioner] could not have sought mandate pursuant to section 13314, there is absolutely nothing in the basic law of mandamus which precluded his bringing a challenge …"

D. Superior Court's Denial of Ex Parte Application for Order to Shorten Time Was Improper.

The Superior Court's denial of Appellant's ex parte application for an order to shorten time to hear a motion for reconsideration was improper.

The County Parties misled this Court where they assert, "The application was filed after the Elections Office began printing the voter information guide, and any changes required by the court after the motion for reconsideration would have cost approximately $2 million. (AA, 229.)" (County OB 16:7-10.) While the declaration of Respondent Cooper actually says, "The cost of printing and mailing the voter information guides is approximately $2,000,000" (1 AA 229), no facts in the record state that any changes required by the court would have cost that amount.

The County Parties assert, "To the extent that Arata wants a ruling on whether the trial court's ruling was correct, he waived this by withdrawing his motion." (County OB 16.) Yet they cite no legal authority to support this contention.

III. SUBSTANTIVE ISSUES

A. Substantial Evidence Does Not Support Opponents' Claims That Respondent Elections Administrator Cooper Needed to Submit Ballots to Printer On December 31, 2019.

The County Parties' Opposition Brief claims, "The Elections Division submitted the official ballots to the printer on December

31, 2019, in order to meet the statutory deadline for mailing ballots to military and overseas voters. (AA, 111.)" (County OB 8-9.) CCTA's Opposition Brief similarly claims, "The Registrar submitted official ballots for printing on December 31, 2019, in order to meet the requirement to begin mailing ballots for military and overseas voters no later than January 17, 2020, as required by federal law. (1AA 111.)" (CCTA OB 30:1-5.)

Both County Parties' and CCTA's briefs assume facts that are not supported by the record. The source they both cited (1 AA 111; Konopasek Declaration) does not support their claim. The Konopasek Declaration merely states, "The first ballots for military and overseas voters must be mailed by January 17, 2020, as required by federal law." (1 AA 111, ¶ 6). Neither the Konopasek Declaration nor any other source with personal knowledge of the facts asserts why the Elections Division submitted ballots to the printer on December 31, 2019, just one day after Appellant filed his petition for writ of mandate.

The County Parties also assert without factual basis in the record, "[T]he Elections Division had no choice but to send the ballots to the printer on December 31, 2019, in order to meet federal and state statutory election deadlines for mailing ballots to military and overseas voters." (County OB 15:12-15; emphasis added.) Nowhere in the record does an agent of the Elections Division make a statement that the Elections Division had no option other than to send ballots to the printer on December 31, 2019.

CCTA refers to "uncontroverted, admissible evidence introduced by the County and Real Party showing that the relief would have … jeopardized the County's ability to comply with mandatory obligations to transmit ballots to military and overseas voters." (CCTA OB 30 fn. 8.) No such evidence exists.

As Appellant's Opening Brief explained, CCTA's attorney and the Assistant County Counsel made unfounded assertions concerning military and overseas voters during oral argument on January 6, 2020, to which Appellant's attorney objected. (AOB 36-37, citing RT 20:26-21:2; 21:20-24; 22:6-23.)

CCTA contends, "Appellant filed … less than a day before the ballots had to go to the printer …," but cites to no fact in the record to support this argument. (CCTA OB 22 fn. 5.)

B. The Cent Symbol is a Not Tax Rate.

The cent symbol "¢" is not equivalent to the word "percent" or the percent symbol "%." The cent symbol "¢" conveys a "cent" monetary unit or coin, not a rate. "Cent" is an abbreviation of "percent," but the cent symbol "¢" is not interchangeable with "percent" or the % symbol. CCTA's measure proposed a "percent" sales tax. (MJN Exh. A, §§ 5, 7.) Therefore "½ ¢" is not an accurate "rate … of the tax to be levied" for the CCTA measure ballot label. (Section 13119(b); 1 AA 115.)

CCTA claims in its opposition brief, "Appellant is essentially asking this Court to find that the state Attorney General's established method of describing sales tax increases is false and misleading." (CCTA OB 37.) The Attorney General

occasionally has used the word "cent" as an abbreviation for "percent." (RPIA 4.)

But CCTA has produced no evidence that the Attorney General ever has used the cent symbol "¢" in any ballot label to mean "percent."[2] The only example of the cent symbol "¢" that CCTA cited relates to a cigarette excise tax ballot measure. The cent symbol "¢" appeared only in a Voter Information Guide table concerning "Existing State Tobacco Excise Taxes" prepared by the Legislative Analyst (not by the Attorney General) (RPIA 15).

CCTA refers to "the longstanding precedent, as reviewed by the Superior Court recognizing that voters understand what is meant by the "¢" symbol in the context of sales tax proposals," yet offers no authority to substantiate the purported "longstanding precedent." (CCTA OB 39 fn. 11.) CCTA misleads the Court by invoking "longstanding precedent" where none exists.

Howard v. Judson (1948) 86 Cal.App.2d 128, 132, a property deed dispute concerning the absence of a dollar sign in a property tax assessment book, where a dollar sign could be inferred "upon an examination of the assessment book" is inapposite. In contrast, CCTA had an affirmative statutory duty to state to voters the "rate … of the tax to be levied" on the ballot. Section 13119(b). CCTA, the author of its own ballot label, deliberately chose to replace "½%" in its unsuccessful 2016 Measure X ballot label (MJN Exh. D) with "½¢" in 2020 Measure J (1 AA 115).

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[2] While CCTA's RPIA 4, 10, and 14 refer to "cent," they do not use the "¢" symbol to mean percent.

The Legislature first enacted Section 13119(b) in 2015 and amended Sections 13119(b) and 13119(c) in 2017 (AB 195) in order to apply these strictures to "to [measures] placed on the ballot by local government entities." (MJN Exh. S.) The 2017 amendments (AB 195) were especially intended to apply to county transportation authorities like CCTA. (MJN Exh. S.) As a matter of first impression, the Court should rule that the cent symbol "¢" is not an accurate "rate … of the tax to be levied" for the CCTA measure ballot label (violating § 13119(b)) and that the cent symbol "¢" is "likely to create prejudice for … the measure." (violating § 13119(c)).

C. The Ballot Measure Letter Designation Did Not Comply With Statutory Requirements.

Respondent Cooper's "random letter draw" (County OB 7) to determine ballot measure letter designations is clearly inconsistent with Section 13116. As Appellant stated in his opening brief, Section 13116(a) says "shall," which under Section 354 is "mandatory" (as opposed to "may," which is "permissive"). (AOB 40.)

But the County Parties obfuscate this "mandatory" statutory command by declaring, "Section 13116 is directory, not mandatory," backed by no statutory authority. (County OB 17.) They quote from *Daniels v. Tergeson* (1989) 211 Cal.App.3d 1204, 1208, "If [a statutory provision] goes to the substance or necessarily affects the merits or results of an election, the provision is mandatory." Then the County Parties assert, "The

assignment of a letter to a local measure does not go to the substance of the measure and will not affect the results of an election. There is no consequence for failing to assign measure letters in alphabetical order," citing *Edwards v. Steele* (1975) 25 Cal.3d 406, 410. (County OB 17-18.)

Appellant respectfully disagrees. First, a closer reading of *Daniels* demonstrates it conclusively proves Appellant's point that "shall" in Section 13116(a) means "mandatory," as stated in Section 354. *Daniels* holds:

> "Shall" means the requirement imposed is mandatory. There is no ambiguity in the language of the statute. Clear statutory language needs no interpretation. (*Holder v. Superior Court* (1969) 269 Cal.App.2d 314, 317 [74 Cal.Rptr. 853].) The wisdom of the legislation is not for us. Our duty is to enforce the statute as written. (211 Cal.App.3d at 1207.)

Second, the assignment of a letter to a local measure *can* affect the results of an election. Section 13116(b), which Appellant admits is "permissive" under Section 354 because it uses "may," expressly permits an elections official to alter lettering under certain circumstances "in order to avoid voter confusion that might result from different local measures carrying the same letter designation in successive elections." In the case at bar, CCTA's 2020 "Measure J" arguably created voter confusion with CCTA's existing "Measure J," then still in effect, referred to repeatedly in the 2020 Transportation Expenditure Plan as "Measure J," and touted on CCTA's road signs promoting

existing "Measure J" projects. (See MJN Exh. G and Arata Declaration, 1 AA 211-16.)

IV. THE BALLOT LABEL AND IMPARTIAL ANALYSIS DID NOT COMPLY WITH STATUTORY REQUIREMENTS FOR SUBSTANTIVE IMPARTIALITY.

A. The 2020 Measure J Ballot Label Contains Untrue, Partial, Argumentative and Prejudicial Language in Favor of the Measure, in Violation of Section 13119(c).

CCTA's Opposition Brief misleads the Court by essentially ignoring Section 13119(c) and analyzing the ballot label almost entirely under Section 9190. (CCTA OB 34-36, 40-48.) To wit:

> The Elections Code sets a high bar for challenges to a ballot label, providing that: "A peremptory writ of mandate or an injunction shall be issued only upon clear and convincing proof that the material in question is false, misleading, or inconsistent with the requirements of this chapter." (Elec. Code § 9190(b)(2).) (CCTA OB 35.)

As discussed repeatedly *supra* and in the Opening Brief (and demonstrated in the original Petition for Writ of Mandate; see 1 AA 21-26), Appellant is not challenging the ballot label under Section 9190. Therefore, the Section 9190 "false, misleading" standard does not apply, yet CCTA unjustly criticizes, "Appellant did not prove by clear and convincing evidence that the ballot question was false, misleading, or biased" (CCTA OB 41) and "[Appellant] has not carried his burden of proving that the ballot label text

was false, misleading, or biased." (CCTA OB 48.) Instead Appellant challenges the 2020 Measure J ballot label under Section 13119(c) (via Section 13314) and its untrue, partial, argumentative, and prejudicial standard.[3]

The language of Section 13119(c) concerning ballot labels (or ballot questions) for local measures is relatively new, first enacted in 2017:

> The statement of the measure shall be a true and impartial synopsis of the purpose of the proposed measure, and shall be in language that is neither argumentative nor likely to create prejudice for or against the measure.

It is based upon similar language in Section 9051(c)[4] for state measures:

> In providing the ballot title and summary, the Attorney General shall give a true and impartial statement of the purpose of the measure in such language that the ballot title and summary shall neither be an argument,

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[3] As CCTA has failed to address Appellant's core argument that the ballot label violated the untrue, partial, argumentative and/or prejudicial standard of Section 13119(c), CCTA has waived its Section 13119(c) counter-arguments.

[4] In evaluating the applicability of Section 9051 cases to local ballot measures, the Court should consider that ballot materials relating to state ballot measures have a broader basis for judicial review under Section 9092 than do local measure ballot materials. Section 9092 provides for a 20-day public examination period for the copy for the State Voter Information Guide. Local measures do not have an equivalent section to Section 9092.

> nor be likely to create prejudice, for or against the proposed measure.

Section 9051(c) applies to ballot labels for local measures through Section 10403(a)(2).

In *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 243, the Supreme Court interpreted the statute (then codified at Section 3531), which set forth the requirements for ballot titles and summaries to be true, impartial, and nonprejudicial: "The main purpose of these requirements is to avoid misleading the public with inaccurate information." See *Yes on 25, Citizens for an On-Time Budget v. Superior Court* (2010) 189 Cal.App.4th 1445, 1452 for a direct application to Section 9051(c).

1. The performance comparisons

Concerning the 2020 CCTA ballot measure at bar, the issue in contention is whether the ballot label's assertions that it would "[r]educe congestion," "[m]ake commutes faster and more predictable," and "[i]mprove air quality," are untrue, partial, argumentative and/or prejudicial claims, in violation of Section 13119(c). (1 AA 115.) Appellant contends that these claims are inherently argumentative, so they can be struck down under Section 13119(c) on their face. Appellant further asserts that the public would expect that a measure making those claims in its ballot label would deliver faster, less congested driving conditions than existing congested, slow traffic conditions.

Because the primary evidence offered by Appellant in his Petition (1 AA 22-24) comes from an environmental impact

report, a "baseline" analysis in the California Environmental Quality Act (CEQA; Pub. Resources Code, § 21000 et seq.), is instructive here (without being in any way controlling in an Elections Code case).[5] A core principle of CEQA analysis is "full disclosure" to the public:

> CEQA requires an EIR to reflect a good faith effort at full disclosure; it does not mandate perfection, nor does it require an analysis to be exhaustive. (*Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 712.)

CEQA case law sets "existing conditions" as the normal baseline for analysis (not "projected future conditions"):

> While an agency has the discretion under some circumstances to omit environmental analysis of impacts on existing conditions and instead use only a baseline of projected future conditions, existing conditions "will normally constitute the baseline physical conditions by which a lead agency determines whether an impact is significant." (Cal. Code Regs., tit. 14, § 15125, subd. (a).) A departure from this

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[5] Note that prior to *Sustainable Transportation Advocates of Santa Barbara v. Santa Barbara County Association of Governments* (2009) 179 Cal. App.4th 113, transportation sales tax measures were required to complete a CEQA analysis before going on the ballot, thereby providing the public with full disclosure of the impacts of a measure: "Measure A does not qualify as a project within the meaning of CEQA [i.e., it is exempt from review] because it is a mechanism for funding proposed projects that may be modified or not implemented depending upon a number of factors, including CEQA environmental review. (CEQA Guidelines, § 15378, subd. (b)(4).)"

> norm can be justified by substantial evidence that an analysis based on existing conditions would tend to be misleading or without informational value to EIR users. Here, however, the Expo Authority [Respondent in this case] fails to demonstrate the existence of such evidence in the administrative record. (*Neighbors for Smart Rail v. Exposition Metro Line Construction Authority* (2013) 57 Cal. 4th 439, 445, emphasis added.)

CCTA has not demonstrated that 2020 Measure J would reduce congestion, increase roadway speeds, and improve air quality compared to <u>existing (current, present day)</u> traffic and air quality conditions. CCTA's Opposition Brief admits that the 2017 Countywide Transportation Plan Environmental Impact Report shows that even after implementation of the plan, congestion (vehicle hours of delay or "VHD") in 2040 would increase by 166 percent (CCTA OB 45) and that two forms of air pollution (PM_{10} and $PM_{2.5}$) would worsen. ("… [P]opulation and employment growth will contribute to <u>an increase in countywide particulate matter emissions</u> that cannot be fully avoided" (CCTA OB 46, emphasis added.))

As argued in the AOB, the 2017 Countywide Transportation Plan Draft EIR concluded that, after implementation of the plan, by the year 2040,"[T]he total number of VMT is expected to increase, resulting in a reduction in average travel speeds on freeways and arterials." (MJN Exh. I, pp. 2.1-18.) Together, these three pieces of evidence demonstrate that the measure would not actually "[r]educe congestion," "[m]ake

commutes faster and more predictable," and "[i]mprove air quality," compared to existing traffic and air quality conditions.

CCTA asserts that the Countywide Transportation Plan would result in improvements in 2040 as compared to a No Project scenario in 2040: "Accordingly, the 2017 DEIR finds that not implementing the 2017 CTP "would result in a more substantial impact to vehicle miles traveled per capita; vehicle hours of delay; average speeds . . ."" (CCTA OB 46, citations omitted, emphasis added.) This fundamentally different way of looking at the data obviously leads to different conclusions. The question before the Court is whether this "projected future conditions" baseline approach resulted in an untrue, partial, argumentative and/or prejudicial ballot label, in violation of Section 13119(c).

In the instant case, CCTA did not disclose any information in the ballot label to indicate that the "[r]educe congestion," "[m]ake commutes faster and more predictable," and "[i]mprove air quality" claims were based on "projected future conditions" as opposed to "existing conditions." In the parlance of *Smart Rail*, CCTA has not shown that a comparison to existing conditions would be either "misleading or without informational value." As such these ballot label claims are untrue, partial, argumentative and/or prejudicial, in violation of Section 13119(c) because, absent further information or disclosures, the public would generally assume that "existing conditions" in 2020 are the "baseline."

Contrary to CCTA's assertion that the substantive issues raised in this case are "a quibble that CCTA did not draft the ballot label exactly as Appellant would have written it" (CCTA OB 41), Appellant's claims that the three phrases in the ballot label were untrue, partial, argumentative, and/or prejudicial in violation of Section 13119(c) have been incontrovertibly proven by CCTA's own brief and evidence.

2. CCTA's "reasoned judgment."

CCTA contends, "CCTA's reasoned judgement [sic] as to the content of the ballot label must be given appropriate deference …" (CCTA OB 41.)[6] Appellant's MJN Exhibits AA, BB and CC offer important insights into just how much deference should be given to the inherently partisan process that developed the 2020 Measure J ballot label and Transportation Expenditure Plan (TEP). Exhibit AA is an excerpt from the CCTA Board's meeting agenda packet of May 15, 2019, which included Item 4.1's Staff Report, labelled as Exhibit BB, and "Contra Costa County Voter Survey," a public opinion research (polling) presentation by EMC Research, labelled as Exhibit CC.

CCTA then was exploring whether or not to create a TEP and place a sales tax increase measure on the March 2020 ballot, nearly ten months before the election. The agenda (Exhibit AA)

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[6] *Yes on 25* gives judicial deference to the State Attorney General for preparation of state ballot measure titles and summaries. 189 Cal.App.4th at 1452. See also *Becerra v. Superior Court* (2017) 19 Cal.App.5th 967, 975. Local ballot measure sponsors prepare their own ballot labels/questions. Therefore, local ballot measure sponsors such as CCTA are not entitled to similar deference.

explains, "4.1 NEW ITEM: Consideration of Development of a New Transportation Expenditure Plan (TEP) and Next Steps … development of a new TEP and placement on the March 2020 ballot …" The Staff Report (Exhibit BB) explains on page 4, "Public Opinion Research Update: At its March 2019 Authority Board meeting, the Authority directed staff to conduct public opinion research concurrently with the development of a new TEP Work Plan." The survey included 1,333 interviews of "likely March 2020 voters." (Exhibit CC, p. 2.)

Note how Slide 11 of Exhibit CC, "Outcomes-Focused Ballot Question" (depicting question no. 8 of the polling, "If the election were held today, would you vote yes to approve or no to reject this measure?") is very similar to the language of the ballot question/label that ultimately appeared for Measure J on the March 2020 ballot (compare to MJN Exhibits V and W), even though the development of the 2020 TEP had not yet even begun.

Note that the "Outcomes-Focused Ballot Question" in CCTA's May 2019 voter survey includes all three ballot question claims in contention in this lawsuit: "[r]educe congestion," "[m]ake commutes faster and more predictable," and "[i]mprove air quality." (Compare Exh. CC, slide 11 with Exhs. V and W.)

Note also how the "Outcomes-Focused Ballot Question" language on Slide 11 differs from Slide 10, labelled "Traditional Ballot Question." That type of listing of projects is the traditional style of TEP ballot questions/labels, as acknowledged on Slide 2, "Sample A; Traditional ballot question, similar to format of

Measure X," referring CCTA's unsuccessful 2016 ballot measure. (The CCTA 2016 Measure X ballot label is seen in MJN Exh. D.)

A major conclusion of CCTA's May 2019 voter polling, which ultimately resulted in CCTA adopting an "Outcomes-Focused Ballot Question," can be found on Slide 4:

> An outcomes-focused measure fares better than a traditional project/program oriented format once additional information is presented that emphasizes the project and program elements. The outcomes-oriented model is also more resistant to opposition messaging. (MJN Exh. CC, slide 4.)

Slide 23 concluded, "Following more information about the potential measure, the outcomes-focused question sees a larger increase in support." Slide 25 asserted, "An outcomes-focused question is more resilient to opposition in all regions of the county." Slide 31 stated, "Republicans are slightly more supportive of an outcomes-focused ballot question."

Slides 12-14 tested the attractiveness of various messages to the voting public. Approximately 87 percent of survey respondents found the phrase "Reduce congestion on highways and major roads" to be "important." (Exh. CC, slide 12.) Nearly 81 percent of survey respondents found the phrase "Make commutes faster" to be "important." (Exh. CC, slide 13.) Around 77 percent of survey respondents found the phrase "Improve air quality" to be "important." (Exh. CC, slide 12.) The resulting

ballot label and TEP were composed of the highest scoring elements.[7]

As evidenced by Exhibit CC, the 2020 Measure J ballot label was designed to sway votes. The March 2020 Measure J ballot label was feeding back to the voters what had been learned by voter polling in May 2019. Exhibit CC tends to prove conclusively that the 2020 Measure J ballot label was inherently, intentionally, and deliberately partisan, partial, argumentative and prejudicial in favor of the measure, in violation of Section 13119(c).

3. Further muddying the waters.

CCTA takes its position further by asserting, "Telling voters that this is what the tax proceeds will be used for is therefore completely accurate and entirely beyond reproach." (CCTA OB 42; emphasis added.) Appellant distinguishes here that the intended use for the funds:

> In turn, the 2020 TEP expressly includes specific budget line items related to reducing congestion, improving commutes, and improving air quality" (*Id*.)

is not the same as the outcomes that will actually be accomplished. CCTA's "Performance Analysis of the Proposed 2020 TEP" in CCTA's Appendix demonstrates the outcomes

[7] CCTA's judgment, as manifest in its carrying out the dictates of public opinion, was the exact opposite of an exercise of professional judgment as to what would best serve Contra Costa County.

claimed are only in relation the 2040 No TEP alternative. (RPIA 20-44.) There is no evidence, other than the EIR for the 2017 Countywide Transportation Plan, as to the results of the 2020 Measure J Transportation Expenditure Plan (TEP) compared to existing conditions. This is why the claim that:

> As such, the 2020 TEP—which is the document that formed the backbone of Measure J by determining how its proceeds were to be spent—clearly and unequivocally supports the factual accuracy of the ballot label. (CCTA OB 44.)

is incorrect, because it confuses intent and outcome. Claiming an outcome in the ballot label that cannot be verified is impermissible as "argumentative" and/or "likely to create prejudice for … the measure" under Section 13119(c).

CCTA's *arguendo* section (CCTA OB 44-48) just digs their untenable position in deeper:

> Expected countywide population and employment growth will increase travel demand throughout Contra Costa and the rest of the Bay Area region. The resulting increase in VMT will thus be a product of an increased population and job base, the relative distance of each vehicle trip (primarily a function of the distance between home and work), and individual choices regarding mode of travel (i.e., the percent increase in drive-alone vehicles). (OB pp. 44-45.)

In effect, CCTA offers population and employment growth as an excuse for an ongoing worsening in congestion, roadway speeds and air quality compared to "existing conditions" in 2020.

Appellant's objections to the untrue, partial, argumentative and/or prejudicial nature of the increased speeds and improved air quality claims in the ballot question are proven similarly, when CCTA refers to the comparison to the No Project scenario in 2040, rather than to existing conditions in 2020. CCTA asserts:

> Consequently, even if the 2017 DEIR were somehow relevant to the accuracy of the Measure J ballot label (which it is not), it does nothing to support Appellant's argument, since the 2017 DEIR actually finds that specified road improvements will *reduce* overall congestion and commute times and will *improve* air quality. The DEIR therefore provides absolutely no evidence (let alone clear and convincing evidence) that the challenged statements are false, misleading, or biased. (CCTA OB 47, Emphasis in original.)

As argued *supra*, CCTA is blind to the fact that its argument relies on a comparison to the No Project scenario in 2040, when the issue raised by Appellant is in comparison to existing conditions (the "baseline") in 2020. CCTA also claims:

> Appellant also misses the mark by, in effect, challenging whether Measure J would have *perfectly achieved* each of the objectives and purposes in the ballot label. (CCTA OB 47, Emphasis in original.)

That's not the case at all. CCTA has not demonstrated that 2020 Measure J will "[r]educe congestion," "[m]ake commutes faster and more predictable," and "[i]mprove air quality," in relation to existing conditions in 2020. That is completely unrelated to "perfectly achiev[ing] each of the objectives."

As an opponent to Measure J, Appellant finds the CCTA's final argument to be an astonishing *non sequitur*:

> Further, the notion that the ballot label materials were biased in favor of adoption of Measure J is implausible on its face given the overwhelming rejection of the measure. (CCTA OB. 48.)

"[T]he overwhelming rejection of the measure" is far more likely to be the result of community opposition to increased taxes and to CCTA itself. If anything, the rejection indicates that a sufficient number of voters were unconvinced, despite CCTA's untrue, partial, argumentative, and/or prejudicial language that appeared in the ballot question/label in violation of Section 13119(c).

B. The Impartial Analysis of 2020 Measure J Is Partial, Untrue, False, and/or Misleading.

County Counsel Anderson and County Elections Administrator Cooper violated their duties under Sections 9160 and 9190 to not include partial, untrue, false, and/or misleading material in the 2020 Measure J Impartial Analysis.

In their Opposition Brief, Anderson and Cooper chose to not rebut or otherwise explain their deliberate removal of the

"additional … tax" disclosure from the first submission of the impartial analysis on December 10, 2019 in the second submission of the impartial analysis on December 18, 2019. Compare MJN Exhibits E and F. (County OB 19-21.)

The County Parties chose to not offer any rebuttal to Appellant's critique of the 2020 Measure J impartial analysis in his Opening Brief, under the "verifiability" and "objectively untrue" standards of *Huntington Beach City Council v. Superior Court* (2002) 94 Cal.App.4th 1417. (County OB 19-21.) As a result, the phrases "reduce congestion," "make commutes faster and more predictable," "improve air quality," and "relieve congestion" in the impartial analysis remain unrebutted as partial, objectively untrue, false and/or misleading.

CCTA offers no evidence to substantiate the basis for these phrases, aside from a "Performance Analysis of the Proposed 2020 TEP: Preliminary Results" slide presentation that CCTA placed in its Appendix. (RPIA 20-44.) For the reasons discussed in the ballot label section *supra*, comparing the "projected future conditions" to a No TEP 2040 baseline produces results that are partial and misleading.

The phrases "reduce congestion," "make commutes faster and more predictable," "improve air quality," and "relieve congestion" are partial by design. As discussed *supra* in the ballot label section, certain catchphrases in the 2020 Measure J

ballot label and Transportation Expenditure Plan had their genesis in a May 2019 CCTA voter survey. (MJN Exh. C.) Three of these four phrases were tested in CCTA's voter survey. (MJN Exh. CC, slides 12-13.) The only "verification" of these claims by CCTA that exists in the record is the high percentage of "likely March 2020 voters" who responded that they were "important" issues in CCTA's May 2019 voter survey. In response, CCTA then developed a TEP that incorporated the partial, voter-approved catchphrases. The catchphrases County Counsel Anderson imported into her so-called "impartial analysis" were by their very nature partial. This series of events does not satisfy the *Huntington Beach* "verifiability" standard.

CONCLUSION

Unless this Court clarifies the legality of county election procedures and interpretations of relevant statutes, future challenges to ballot measures will be subject to dismissals based on erroneous procedural and substantive Superior Court decisions, with no realistic opportunity for timely appellate review. Appellant requests the relief stated in his opening brief.

Dated: July 27, 2020

Respectfully submitted,

/s/ Jason A. Bezis

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CERTIFICATE OF WORD COUNT

Pursuant to Rule 8.204(c) of the California Rules of Court, I hereby certify that this brief contains 7,585 words, including footnotes, but excluding the caption page, Application, Table of Contents, Table of Authorities, Certificate of Service, this Certificate of Word Count, and signature blocks. I have relied on the word count of the Microsoft Word program used to prepare this Certificate.

Respectfully submitted,

DATED: July 27, 2020

By:

/s/ Jason A. Bezis

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PROOF OF SERVICE

I, the undersigned, declare under penalty of perjury that:

I am a citizen of the United States, over the age of 18, and not a party to the within cause of action. My business address is 3661-B Mosswood Drive, Lafayette, CA 94549-3509. On July 27, 2020, I served a true copy of the following document:

APPELLANT'S REPLY BRIEF

on the following parties in said action:

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BY U.S. MAIL: To the above addressee and address.

I declare, under penalty of perjury, that the foregoing is true and correct. Executed on July 27, 2020, in Lafayette, California.

/s/ Jason A. Bezis

JASON A. BEZIS