No. A159487

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COURT OF APPEAL OF CALIFORNIA
FIRST APPELLATE DISTRICT, DIVISION 3

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MICHAEL ARATA,
Petitioner and Appellant,

vs.

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.

REAL PARTY IN INTEREST CONTRA COSTA TRANSPORTATION AUTHORITY'S OPPOSITION BRIEF

On Appeal from the Superior Court of Contra Costa County
Superior Court Case No. MSN192489
Hon. Charles "Steve" Treat
Additional Judge: Hon. Edward G. Weil

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I. INTRODUCTION

This appeal is the epitome of a moot case. On December 30, 2019, Appellant brought an untimely pre-election challenge to ballot materials for Measure J, a special tax measure that appeared on the March 3, 2020 ballot to fund transportation projects, contending that the materials would bias voters and result in the passage of a ballot measure he opposed. Having obtained no relief or modifications to the ballot materials in the Superior Court, Appellant's political position on Measure J nevertheless prevailed when the voters of Contra Costa County rejected Measure J by a substantial margin at the March election. As the Measure J election has now passed, there is no live controversy regarding the issues in the lawsuit. Further, the only relief requested by Appellant—an order to revise and make specific edits to the Measure J election materials for the March 3, 2020 Primary Election—is now irrelevant and would be absurd to grant.

Moreover, not only has this Court been asked to opine on a moot matter, but it has been asked to do so in the context of an untimely lawsuit that the Superior Court—based on uncontroverted evidence—correctly determined would impermissibly interfere with the conduct of the election in violation of the Elections Code. Appellant inexplicably delayed filing his lawsuit until after the close of the 10-calendar-day public inspection period for challenges to ballot materials and, in any event, filed far too late in the ballot type-setting and printing process (i.e., less than a day before the County was required to send the ballot materials to be printed). As such, the relief Appellant sought could not be granted as a matter of law, even if it had been warranted (which it was not). California's longstanding requirements governing challenges to ballot materials are unambiguous and serve an important equitable function of enabling oversight of election-related tasks, without grinding the machinery of election administration to a halt and

jeopardizing the integrity of the entire electoral process. Appellant's attempts to manufacture ambiguity to circumvent mootness ring hollow. Pre-election challenges to elections materials must comply with statutory deadlines, and the legal standard for such challenges—the materials cannot be false, misleading, or biased—has long been, and remains, clear and unambiguous.

Finally, although this Court need not reach Appellant's arguments on the merits to resolve this appeal, they are unsound and paper thin. The Superior Court, *in addition to* finding that the claims were filed too late, reviewed and considered each of them, determining that they were "unconvincing," and concluding that Appellant failed to meet his burden of proving by "clear and convincing" evidence that the ballot materials were false, misleading, or biased. Appellant's hyper-technical and disingenuous critiques of the ballot label for Measure J amount to nothing more than a signal that Appellant would have drafted the label and other materials differently, a position that has been repeatedly rejected by California courts. Yet, even without any of the changes sought by Appellant, Appellant's political opposition to Measure J prevailed at the election, effectively proving that the Superior Court got it right, and that the ballot materials did not, as alleged by Appellant, bias or mislead electors into voting for the measure.

The Court should dismiss the appeal and in so doing, uphold the judgment of the Superior Court.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. In October 2019, Contra Costa Transit Authority Placed a ½ Cent Sales Tax Measure on the March 3, 2020 Ballot

On **October 30, 2019**, Contra Costa Transit Authority ("CCTA") adopted Ordinance 19-03, authorizing CCTA to impose a ½ cent sales tax increase if the tax ordinance were to be approved by two-thirds of the County's voters. (1AA 36-43.) On the same date (October 30, 2019), CCTA

adopted Resolution 19-55-P, requesting that the County Board of Supervisors submit the proposed tax measure to the voters at the consolidated statewide primary election on March 3, 2020, and adopting a ballot label for the measure. (1AA 47-51; see also Elec. Code §§ 10400 *et seq.* [districts (such as CCTA) may request consolidation of elections on their proposed measures with the regularly scheduled elections to be conducted by the County, but must do so no later than 88 days prior to the election].) A "ballot label," which is also known as the "ballot question" for local measures, is what is printed on the actual ballots provided to the voters, and in this case was the responsibility of CCTA. (See Elec. Code § 10403 [consolidation request must "set[] forth the exact form of the question, proposition, or office to be voted upon at the election, as it is to appear on the ballot"] and § 13119 [setting forth the general form for a ballot label for a local measure, in the form of a question and "stating the nature thereof"].)

The ballot label for the proposed sales tax measure, as adopted by CCTA on October 30, 2019, provided:

> To:
> - Reduce congestion and fix bottlenecks on highways and major roads;
> - Make commutes faster and more predictable;
> - Improve the frequency, reliability, accessibility, cleanliness, and safety of buses, ferries, and BART;
> - Improve air quality;
> - Repave roads;
>
> Shall the measure implementing a Transportation Expenditure Plan, levying a ½¢ sales tax, providing an estimated $103,000,000 for local transportation annually for 35 years that the State cannot take, requiring fiscal accountability, and funds directly benefitting Contra Costa County residents, be adopted?

(1AA 50.)

The ballot label adopted by CCTA reflected the fact that the proposed measure expressly provided that the proceeds of the tax were to be used

"solely for the projects and purposes set forth in the 2020 TEP [Transportation Expenditure Plan], as it may be amended from time to time, and for the administration thereof." (1AA 43.) In turn, the 2020 TEP provides a list of funding categories for 1) "relieving congestion on highways, interchanges, and major roads," and 2) "improving transit and transportation countywide in all our communities." (1AA 64.) Within those two major categories of funding priorities, the 2020 TEP includes specific budget line items to accomplish these overarching goals, which include improvements to specified county roads intended to "improve traffic flow," "relieve congestion," and "improve local access," and improving accessibility, reliability, and desirability of public transportation options by providing "additional Ebart train cars," "provid[ing] greater access to BART stations along I-680 and Highway 24," providing "accessible transportation for seniors, veterans, and people with disabilities," and providing a "cleaner, safer BART." (*Id.*) The funding categories for the 2020 TEP also include a specific budget line item to "reduce emissions and improve air quality." (*Id.*)

B. The County Board of Supervisors Grants Consolidation of CCTA's Measure with the March 2020 Statewide Primary Election to Be Conducted by the County, Which Is Subject to Numerous Statutory Deadlines

On **November 19, 2019**, the County Board of Supervisors adopted Ordinance 2019-33, officially submitting the CCTA measure to the voters for the March 3, 2020 election with the ballot label adopted by CCTA at its October 30, 2019 meeting. (1AA 53-55.) Pursuant to Elections Code section 10403, the filing deadline for CCTA and the County to take that action was December 6, 2019, the 88th day before the statewide primary election scheduled for March 3, 2020 (See Elec. Code § 10403(a) [consolidation request with ballot label "shall [be filed with the County] at least 88 days prior to the date of the election"].)

This is because state and federal law require election administrators like the County Registrar of Voters to take numerous actions long before Election Day, in order to ensure that ballots and related materials are timely produced and made available to voters, and that elections are properly administered. For instance, for the March 2020 primary, County elections officials were required to transmit ballots and ballot materials to military and overseas voters by **January 17, 2020**. (See 52 U.S.C. § 20302; Elec. Code § 3114; 1AA 111.) The County was therefore obligated to send ballots and other election materials to the printer early enough to meet the requirement for military and overseas voters, as well as all other voters throughout the County. (*Id.*; see also Elec. Code § 3001(b) [County must *mail* vote by mail ballots to all other voters "[n]o later than 29 days before the date of the election"].)

Accordingly, legal challenges to the adequacy of ballot materials, including both with respect to the ballots themselves and the voter information guide, are subject to strict statutes of limitations and high burdens of proof. (See, e.g., Elec. Code § 9190 [establishing 10-calendar-day public inspection and challenge period, which runs "immediately following the filing deadline," for election materials to be printed by the County, and providing that a "writ of mandate or injunction shall be filed no later than the end of the 10-calendar-day public examination period," and that a writ can only issue upon "clear and convincing proof" and only if it "will not substantially interfere with the printing or distribution of official election materials as provided by law"]; Elec. Code § 13314 [election related writ, in any event, cannot issue if it would "substantially interfere with the conduct of the election"].)

With these rules as a backdrop, and pursuant to the standard process used by the County Elections Department, the proposed CCTA measure was

designated as "Measure J" on **December 12, 2019**. (1AA 112-113.) In addition, pursuant to Elections Code sections 9313 and 9160, "whenever a district measure is submitted to the voters . . . [t]he county counsel or district attorney shall prepare an impartial analysis of the measure showing the effect of the measure on the existing law and the operation of the measure," which "shall be printed [in the voter guide] preceding the arguments for and against the measure." Here, County Counsel prepared and filed an impartial analysis of Measure J with the County Registrar of Voters on December 18, 2019. (1AA 113.)

In order to meet the statutory deadlines, including the **January 17, 2020** deadline to mail ballots to military and overseas voters, the County submitted the official ballots for the March 3, 2020 election to the printer on **December 31, 2019**. (1AA 111.)

C. Appellant Delays Filing Suit Challenging the Measure J Ballot Materials

Appellant did not file litigation challenging the County's ballot materials until long after the materials were distributed for public examination. As set forth above, the ballot label for Measure J, originally adopted by CCTA on **October 30, 2019**, was officially put on the March 2020 primary ballot by the County on **November 19, 2019**. The County's ballot letter designation of "Measure J" was randomly selected on **December 12, 2019**, and Measure J's Impartial Analysis was filed on **December 18, 2019**. Yet, Appellant elected to ignore the 10-calendar day challenge periods for these materials. Rather, Appellant opted to transmit three letters to the County on December 16, 2019 and December 24, 2019. (1AA 179-195.)

It was not until **December 30, 2019**, that Appellant filed his Petition for Writ of Mandate ("PWOM") in Contra Costa Superior Court, alleging that the County erred in its Impartial Analysis, Ballot Measure Letter

Designation, and Ballot Label and requesting that the Court order the County to amend and correct the alleged deficiencies in the materials.[1] (1AA 4-34). The next day, Appellant filed an Ex Parte Application seeking to shorten the time for the Court to hold a trial setting conference and to set an expedited briefing schedule, proposing that the Court order any opposing briefs by Respondents and Real Parties in Interest to be filed no later than 3:00 p.m. on January 3, 2020. (1AA 96-101).

Respondent Real Party in Interest CCTA filed its Memorandum of Points and Authorities in Opposition to the PWOM on January 3, 2020, contending that: (1) Appellant's claims were untimely; (2) granting the extraordinary relief sought by Appellant would substantially interfere with the conduct of the election, including but not limited to with respect to the Ballot Label on the ballots, which had already been printed; and (3) even if Appellant's claims were not untimely, they lack any merit given the accuracy and fairness of the ballot materials. (1AA 134-152.)

The Superior Court heard oral argument on Appellant's PWOM on January 6, 2020. After listening to oral argument on both the statute of limitations and the merits, the Superior Court rejected each of Appellant's arguments, concluding that the PWOM suffers from "fatal timing defects" and querying why Appellant did not file suit far earlier, but also expressly considering and denying Appellant's merits arguments that the ballot materials were false, misleading, or biased. (RT 5; 33-34; 45-46.)

[1] Per above, CCTA as the district authorizing the ballot measure, was responsible for preparing the Ballot Label and transmitting it to the County no later than 88 days prior to the election. As such, CCTA defended Appellant's challenge with respect to the Ballot Label and does so again here. The County, as the agency responsible for conducting the election on Measure J, including the ballot letter designation and preparation of the Impartial Analysis, likewise defended those materials and will do so again here.

With respect to timeliness, the trial court found the PWOM untimely on two distinct grounds. First, Appellant did not file suit during the 10-day public inspection period for election materials, as mandated in Elections Code section 9190. (RT 9-17; 45 [the PWOM is "outside the statute of limitations" because it was not "filed within ten days" of relevant events].) Second, the relief sought by Appellant, due to his unnecessary delays, would "unreasonably interfere with the election process," because the County had already submitted election materials to the printer in order to satisfy deadlines in state and federal law and would incur substantial expenses if required to reformat and reprint the materials. (RT 45.) The County estimated that granting the relief sought in the PWOM would require the County to reformat and reprint every ballot for the County, which would result in a cost of $650,000. (*Id.*; 1AA 112)

Despite the PWOM's dual timeliness problem, the Superior Court considered and ruled on Appellant's substantive arguments, rejecting each under the proper "clear and convincing" standard. (RT 33:28; 34:22; 46:1-9 [finding arguments "unconvincing"]; see also Elec. Code § 9190(b)(2) [writ to issue only upon "clear and convincing proof"].) For instance, the Superior Court rejected Appellant's contention that the ballot label's description of taxes in terms of cents would cause voter confusion, finding it absurd that the "average voter would not understand a one-half cent sales tax to mean one half cent per dollar" or that the public does not "know[] how sales tax works." (RT 42:17-28.) In sum, the Superior Court ruled that Appellant did not carry his burden with respect to any of the substantive claims.

On January 9, 2020, Appellant filed a Motion for Reconsideration, arguing that "different law not discussed" in Appellant's papers or at oral argument would mandate a different outcome and explaining counsel's "failure to produce these authorities before this date." (1AA 239.) Appellant

abandoned several arguments in the motion, limiting his challenge to: (1) whether the PWOM was timely; and (2) whether the Impartial Analysis was false and misleading. (1AA 237-251.) On the same day, Appellant moved the trial court by ex parte application for an order to shorten time and hear the motion for reconsideration on either January 9, 2020, or January 10, 2020, requesting that any opposing papers be served "at the first reasonable opportunity." (1AA 234-35). The trial court denied the ex parte motion to shorten time on January 10, 2020, (2AA 278-79) and Appellant eventually withdrew his motion for reconsideration on February 21, 2020. (2AA 281-282.)[2]

D. Measure J Is Defeated by the Voters at the March 3, 2020 Election

At the March 3, 2020 election—without any of the changes to the ballot materials advocated for by Appellant in the Superior Court—Appellant's opposition campaign prevailed and voters rejected Measure J, with Measure falling well short of the 2/3 vote required to take effect. (See Respondent County's Request and Motion for Judicial Notice, Exh. A, p. 11; see also Cal. Const. art. XIII, Sec. 2 [2/3 vote required for special district tax measure].) Of the total 318,749 votes cast in the election, 51.69% of the votes were cast in favor of the Measure (164,748), while 48.31% of the votes were cast in opposition (154,001).[3] (*Id.*) Nevertheless, Appellant has appealed.[4]

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[2] Real Party CCTA notes that it is not entirely clear which aspects of the Superior Court judgement are being appealed. Although the PWOM filed in the Superior Court challenged both the ballot label and the impartial analysis, Appellant's subsequently filed Motion for Reconsideration was limited to just the impartial analysis.

[3] Contra Costa Presidential Primary Election, March 3, 2020, Official Results, https://www.cocovote.us/wp-content/uploads/ElectionSummaryReportRPT-19.pdf (Pg. 11).

[4] On March 4, 2020, Respondents and Real Parties in Interest moved the Court to dismiss the appeal based on mootness. (Dock. Entry 14.) On

III. ARGUMENT

A. The Appeal Is Moot

1. Measure J has been defeated at the ballot box and the Court has no ability to provide Appellant with any practical relief

California courts decide only justiciable controversies. (*County of San Diego v. San Diego NORML* (2008) 165 Cal.App.4th 798, 813.) This is a tenet of common law jurisprudence and embodies the "principle that courts will not entertain an action which is not founded on an actual controversy." (*California Water & Telephone Co. v. County of Los Angeles* (1967) 253 Cal.App.2d 16, 22.) A case that presents a true controversy at its inception becomes moot if, before decision, through the action of the parties or other cause occurring after the commencement of the action, the case has "lost that essential character." (*Wilson v. L.A. County Civil Service Com.* (1952) 112 Cal.App.2d 450, 453.)

"A case is moot when the reviewing court cannot provide the parties with practical, effectual relief." (*City of San Jose v. International Assn. of Firefighters, Local 230* (2009) 178 Cal.App.4th 408, 417; see also *Wilson & Wilson v. City Council of Redwood City* (2011) 191 Cal.App.4th 1559, 1574 ["The pivotal question in determining if a case is moot is [] whether the court can grant the plaintiff any effectual relief"].) This result is required because judicial tribunals are duty bound to "decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it." (*Consol. etc. Corp. v. United A. etc. Workers* (1946) 27 Cal.2d 859, 863.) Thus, when

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May 4, 2020, the Court deferred ruling on the motion until consideration of the merits of the appeal. (Dock. Entry 21.)

an event occurs which "renders it impossible" for the court to grant "any effectual relief whatever," the court "will not proceed to a formal judgment, but will dismiss the appeal." (*Id.*)

Here, because the March 3, 2020 election has been held and Measure J has been defeated by the voters, this appeal is unquestionably moot. The intervening event of the election renders it impossible for the Court to grant Appellant any effectual relief. It would be entirely meaningless for the Court to order the "correction" and/or reprinting of election materials for Measure J. Such relief would serve no purpose, since there no longer remains a contest about whether Measure J should be supported or opposed by the voters. In short, there remains no justiciable controversy or any remedies that the Court could grant that would affect the "matter in issue in [this] case."

Indeed, a long line of decisions has reached the consistent result that pre-election challenges of the type brought by Appellant are mooted by the intervening event of an election. (See *Californians for an Open Primary v. McPherson* (2006) 38 Cal.4th 735, 784 [Werdegar, J., concurring].) For instance, in *Lenahan v. City of Los Angeles* (1939) 14 Cal.2d 128, the Supreme Court held that an action seeking to enjoin the City of Los Angeles from conducting a recall election due to various petition signature irregularities was moot after the election was held. (*Id.* at 132). The Supreme Court dismissed the appeal, reasoning:

> It appears beyond question that every act sought to be enjoined has actually taken place. The election has been held and it is not even intimated that any of the alleged deficiencies or irregularities in the presentation and certification of the recall petition prevented a full and fair vote at the recall election. The result of the election was duly canvassed and declared. The elected mayor assumed his office and has since been functioning as such. A reversal of the order would vest the trial court with no justiciable controversy in this action for the reason that what was sought to be enjoined has already been done. The nature of the action was such that when the

> injunctive relief therein sought was rendered inappropriate and ineffective, any further consideration of the cause as an action in injunction would be unavailing. In other words, when the event which it was sought to enjoin, that is, the election, had taken place, the remedies of the plaintiffs were removed from the field of injunctive relief and were relegated to such remedies, if any, as they might have and avail themselves of subsequent to the election. Certainly they may not, after the election has been held, still urge a court to stop it.

(*Id.*) Likewise, in *Mapstead v. Anchundo* (1998) 63 Cal.App.4th 246, 276-277, the Court of Appeal dismissed as moot an appeal from a judgment directing the Monterey County Registrar of Voters to certify a referendum petition and place it on the ballot, a judgment resulting in the voters rejecting the ordinance at election. Significantly, the court reached this result even though it found the trial court erred in requiring the Registrar to place the petition on the ballot and such error resulted in the rejection of a lawfully adopted ordinance. (*Id.* at 272, 275-77; see also *Mann v. Superior Court* (1986) 181 Cal.App.3d 372, 374-375 [appellate court denied writ petition because ordering trial court to direct the removal of candidate's name from the ballot would serve no purpose after the election had been held]; *Finnie v. Town of Tiburon* (1988) 199 Cal.App.3d 1, 11 [dismissing, as moot, an appeal from trial court's denial of injunction to stop election where election had subsequently taken place]; *Chase v. Brooks* (1986) 187 Cal.App.3d 657, 659-62 ["[o]nce the election is held and the electorate has spoken, it becomes moot whether the referendum petitions failed to comply with requirement[]" that referendum petitions contain entire text of the ordinance].)

The same principles animating this line of cases are present in the current appeal. All issues challenged by Appellant prior to the March 3, 2020 election no longer present a live controversy. In the present circumstances, the alleged defects clearly did not affect the election result, as Measure J was unquestionably defeated by the voters, and even without Appellant's desired

changes to the ballot materials. Moreover, the Court has no ability to grant effective relief of any form sought by Appellant, as all forms of requested relief are entirely irrelevant at this juncture. Not only has the election long passed, but given the defeat of Measure J, Appellant simply has no reason to be aggrieved.

2. The limited exceptions to the mootness doctrine do not apply

Appellant contends that this case presents issues of significant public interest that are likely to recur, but his position rests entirely on baseless new interpretations of what are, in fact, well-established laws governing pre-election challenges to ballot materials. Indeed, the relevant statutes are clear and unambiguous, and are well understood by both litigants and election administrators. Appellant has failed to justify departing from the ordinary strictures of the mootness rule and the Court should decline his invitation to do so. (See AOB at 17 [flatly stating that contentions in the case are of general public interest simply because they concern procedures that affect voters and tax measures].)

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. The statute means what it says: ballot materials (including the text of proposed ordinances, arguments for and against, and impartial and fiscal analyses) "shall [be] available for a period of 10 calendar days," during which time any voter of the jurisdiction may seek a writ of mandate or injunction "requiring any or all of the materials to be amended or deleted." (Elec. Code §§ 9190(a), (b)(1).) Such an action "shall be filed no later than the end of the 10-calendar-day public examination period." (*Id.* § (b)(1).) The 10-day limitations period governs challenges to ballot labels. (*McDonough v. Superior Court* (2012) 204

Cal.App.4th 1169, 1173). Appellant himself cited to *McDonough* as governing challenges to ballot labels. (1AA 5, 7, 22.)

McDonough involved the same question at issue in this proceeding—whether the 10-day limitation period applies to all ballot materials, including the ballot label—answering the question in the affirmative. (204 Cal.App.4th at 1173.) To the extent there ever was a legitimate question, the case resolved the scope of the statute—despite Appellant's bare contention that the "decision was wrongly decided." (AOB at 24.) Further judicial clarification is simply not needed, and certainly not within the context of this moot post-election appeal.[5] 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 (i.e., the one thing that *every voter* is certain to see since the ballot label is printed on the actual ballots themselves *and* must be printed first to meet mandatory election deadlines). (AOB at 22-26.)

[5] Appellant's fact-specific argument—which only applies to the Impartial Analysis filed by County Counsel for public inspection on December 18, 2019, and not to the other challenged ballot materials filed earlier in November and early December—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. (See *Steele v. Bartlett* (1941) 18 Cal.2d 573, 574 [Code of Civil Procedure § 12a does not apply in elections cases].)

Of course, with respect to the ballot label, which was adopted on October 30, 2019, and officially placed on the ballot on November 19, 2019 (i.e., the submission date pursuant to Elections Code sections 10403(a) and 9190), there is no possible way to calculate the 10-calendar-day challenge period such that Appellant's lawsuit, filed on December 30, 2019, was not time barred. Appellant filed well over a *month* after the ballot label was submitted and less than a day before the ballots had to go to the printer to meet the March election deadlines.

Appellant next seeks to muddy the waters by alleging that Elections Code section 13119, which sets forth the basic requirements for the form of the ballot label on a local measure, is a novel, unprecedented statute that requires judicial clarification. (AOB at 16, 18.) This argument is equally inconsistent with well-established precedent, and judicial clarification is not needed. Section 13119(c), which requires local ballot measures to be described on the ballot by a "true and impartial synopsis of the proposed measure," relies on a uniform, long-established standard that is common throughout the Elections Code. (See, e.g., Elec. Code §§ 9051(c) [Attorney General's ballot title and summary for statewide measures "shall give a true and impartial statement of the purpose of the measure"], 9105(a) [county counsel "shall give a true and impartial statement of the purpose" of proposed county initiative measures]; 9203(a) [same requirement/standard for municipal initiatives].) The significance of this standard is clear, and it has been consistently applied by the courts. (See *Becerra v. Superior Court* (2017) 19 Cal.App.5th 967, 974 ["purpose of these requirements is to avoid misleading the public with inaccurate information," quoting *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 243].) This standard has also been in place for decades.

Although the Legislature amended section 13119 in 2017 to *expressly* include the impartiality requirement within that specific section, it fully acknowledged at that time that the requirement was already found elsewhere in the Code. (See Stats. 1994, Ch. 920, § 2; see also A.B. 195 (2017) Leg. Counsel's Digest [noting that legislation would extend existing ballot label requirements][6].) Indeed, long before the Legislature amended section 13119,

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[6] http://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180AB195.

courts applied the Elections Code's widespread "true and impartial" standard to ballot labels for local ballot measures. (See *McDonough v. Superior Court, supra*, at 1172-74 [city charter amendment evaluated under "true and impartial" standard]; *Horneff v. City and County of San Francisco* (2003) 110 Cal.App.4th 814, 820 [correct standard for local ballot measure challenge "is the same as the principles applied to judicial review of challenges to titles and summaries prepared by the Attorney General and Legislative Analyst for statewide initiatives or referenda"]; *Brennan v. Bd. of Supervisors* (1981) 125 Cal.App.3d 87, 93 [applying standard for statewide measures to local digest for municipal rent control proposition]; *Huntington Beach City Council v. Superior Court* (2002) 94 Cal.App.4th 1417, 1428 [similar]; see also Elec. Code § 10403(a)(2) [for a "district, city, or other political subdivision": "The question or proposition to appear on the ballot shall conform to this code governing the wording of propositions submitted to the voters at a statewide election"].)

California courts have therefore subjected challenges to ballot labels for local ballot measures to the same longstanding standard that applies to challenges to ballot labels for statewide measures. In fact, as this Court is likely aware from prior jurisprudence, such challenges occur regularly at the local level, and without any issue or concern as to the relevant legal standard. Thus, there is simply no controversy or uncertainty about the standards for evaluating challenges to local ballot measure materials and, despite Appellant's best efforts to manufacture a novel issue, this appeal in no way offers "matters of first impression." (AOB at 18).[7]

[7] The legislative history of section 13119 discussed by Appellant solely addresses the issue of tax-related disclosures for local ballot measures that raise taxes, which is wholly irrelevant to the current proceeding and certainly has nothing to do with the long-established legal standard requiring impartiality. (See AOB at 33-35.) The 2015 amendment of the statute added

Finally, the cases cited by Appellant for the principle that moot pre-election challenges may warrant attention by appellate courts under exceptions to the mootness doctrine are entirely distinguishable and highlight how inappropriate it would be for the Court to apply such an exception here. Unlike this appeal, none of Appellant's cases involved a dispute regarding statutory deadlines in the Elections Code or entirely fact-specific disputes about how such deadlines were applied by an election administrator.

Rather, the cases cited by Appellant—unlike the present case—involve important substantive questions regarding separation of powers principles, the constitutionality of measures governing elections, recurring issues requiring judicial clarification and explanation, or clear violations of statutory obligations by election administrators. *Fuller v. Bowen* (2012) 203 Cal.App.4th 1476 involved a recurring question central to separation of powers principles: the scope of the Legislature's power to judge the qualifications and elections of candidates for membership in the Legislature and the authority for courts to hear challenges contesting the qualifications of a candidate for office. (*Id.* at 1485-89; see also *Huening v. Eu* (1991) 231 Cal.App.3d 766, 778-80 [court decided to reach issue of whether the

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the requirement that tax-raising ballot measures include in the statement of the ordinance to be voted on "the amount of money to be raised annually and the rate and duration of the tax to be levied." (2015 Cal. Stats. ch. 337.) The 2017 amendment clarified that measures submitted to the voters by a local governing body must include the specific tax information mandated by the 2015 legislation. (See 2017 Cal. Stats. ch. 105 [Legislative Counsel's Digest]; Senate Bill 268 (2019) [10/31/2019 Senate Floor Analysis] [explaining that the 2017 clarifying amendment was prompted by ruling that tax statement was only required for measures qualifying for the ballot through petitions signed by voters].) None of the amendments touched on any ambiguity asserted by Appellant, and nothing in Appellant's PWOM alleged that the County failed to comply with tax-related disclosures required by section 13119.

challenged statute unconstitutionally amended the Political Reform Act]; *Edelstein v. City and County of San Francisco* (2002) 29 Cal.4th 164, 172-74 [resolving constitutional issue likely to recur in elections in charter cities regarding restrictions to write-in voting]; *Howard Jarvis Taxpayers Assn v. Bowen* (2011) 192 Cal.App.4th 110, 126-28 [affirming that the Legislature may not amend the Political Reform Act without a two-thirds vote].)

The other cases cited by Appellant involved clearly recurring issues where clarification was warranted, including to correct error by lower courts that would have substantially altered the requirements for ballot materials. (See *Eblovi v. Blair* (2016) 6 Cal.App.5th 310, 314-15 [clarifying recurring dispute regarding who is eligible to submit arguments in favor or against measures placed on the ballot by petition]; *Horneff, supra*, at 819 [recurring error in which trial courts subjected impartial ballot measure summaries to an unwarranted level of scrutiny]; *Howard Jarvis Taxpayers Assn*, *supra*, at 120 [evaluating practice "used by the Legislature with increasing frequency in recent elections" of drafting promotional ballot labels, titles, and summaries for measures submitted to the voters by the Legislature]; *Vargas v. Balz* (2014) 223 Cal.App.4th 1544 [correcting error by the trial court which would have allowed a city clerk to unilaterally alter arguments for or against a ballot measure, in clear contravention of the Elections Code].)

None of these cases is comparable in any way to the issues Appellant contends are worthy of additional judicial attention here. This case, in contrast, revolved entirely around highly fact-specific—and ultimately baseless—claims about a ballot measure that has now been defeated by the voters at an election. It is, in short, over.

B. The Superior Court Did Not Err in Concluding That Appellant's Lawsuit Was Untimely

1. Section 9190 provides for a 10-day examination period

The Superior Court did not err in concluding that the December 30, 2019 PWOM was untimely. 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:

> During the 10-calendar-day public examination period provided by this section, any voter of the jurisdiction in which the election is being held, or the county elections official, himself or herself, may seek a writ of mandate or an injunction requiring any or all of the materials to be amended or deleted. The writ of mandate or injunction request shall be filed no later than the end of the 10-calendar-day public examination period.

(Elec. Code § 9190(b) [emphasis added]; see also *McDonough*, *supra*, at 1173 [applying the 10-day statute of limitations to a challenge to a ballot label].)

As discussed above, Appellant has effectively conceded that this statute of limitations governs his challenge to the ballot label. Yet, Appellant clearly failed to comply with the statute. (See 1AA 4; 45; 51; 55; 113-114 [Measure J ballot label, adopted on October 30, 2019, was officially submitted to the ballot on November 19, 2019, but Appellant did not file suit until December 30, 2019].) In fact, even if calculated from the absolute last-day legal "deadline for submission" of the ballot label to the County (see Elec. Code § 9190(a)), which was December 6 (88 days prior to the election, per section 10403), Appellant's lawsuit on December 30 was still several *weeks* too late.

Moreover, although perhaps unnecessary to do so, Real Party feels compelled to point out that Appellant's "alternative" to the clear and

unambiguous 10-calendar-day challenge period provided in section 9190 is a chaotic theory that would upset the intent of the Legislature and introduce a standard-less timeline for challenges to ballot materials. That simply cannot be the result, as elections officials and parties alike must not be forced to guess or remain in indefinite limbo when it comes to the conduct of our elections, including ensuring that voters timely receive their ballots.

2. The Superior Court correctly ruled that any revisions to the ballot materials would have substantially interfered with the election

The Elections Code provides a path for electors to challenge ballot materials, but provides, in no uncertain terms, that any challenges must be filed on an urgency basis. Elections Code section 13314(a)(2)(B) provides that a writ of mandate ordering changes to ballot materials may issue if, and only if, "issuance of the writ will not substantially interfere with the conduct of the election." (Emphasis added.) In the same vein, Elections Code section 9190 provides 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 this chapter, and that issuance of the writ or injunction will not substantially interfere with the printing or distribution of official election materials as provided by law." (Emphasis added.) In this way, the Elections Code balances the right of Appellant and others to challenge ballot materials against the County's legal mandate to print the ballots and other ballot materials, and distribute them to County electors pursuant to a strict timeline established by law.

The legal timeline established for the printing and distribution of ballot materials is intended not only to ensure orderly and predictable preparation for County elections officials, but also to ensure that voters—including military and overseas voters—receive their ballots in a timely

fashion and are able to review the relevant materials, cast their ballots, and return those ballots in time for their votes to be counted. The Elections Code's clear mandate that changes to ballot materials may be ordered only in the event that such changes will not interfere with the printing and distribution of ballots or otherwise interfere with the conduct of the election protects from undue interference elections officials' responsibility to conduct, and voters' right to participate in, a fair and orderly election.

Importantly, this mandate of non-interference is understood by elections officials, courts, and attorneys who practice in this area to mean that a challenge to ballot materials is timely only if it can be *decided* before the ballot materials are sent to the printer. (See, e.g., *McDonough*, *supra*, at 1173-74 [finding no substantial interference where the superior court had ruled, and court of appeal had issued a stay, *before materials were sent to the printer*].)

Here, Appellant's challenge to the ballot label and measure letter designation was not even *filed* until the day before ballots were to be sent to the printer, and as such, the ballot printing process had been underway for days—as was required to meet legal deadlines—by the time Appellant obtained a decision. (1AA 112.) Without question, the issuance of a writ ordering changes to the ballot label would have substantially interfered with the printing of the official election materials. (*Id.*) These grounds alone warranted dismissal of Appellant's challenge to the ballot materials.

Overwhelming evidence supports the Superior Court's determination that the relief sought by Appellant "would unreasonably interfere with the election process because [] the matter is already submitted to the printer" and

"it would cost too much to try to fix" the material.[8] (RT 45:16-17.) 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.) Issuing the writ requested by Appellant would have substantially interfered with the printing of the ballots and other official election materials and would have required the Registrar to reformat and reprint every ballot in Contra Costa County, resulting in a cost of at least $650,00. (*Id.*) The Superior Court appropriately evaluated these considerations, questioning why the court "should put the county to $650,000 worth of expense" or how requiring every ballot in the County to be reprinted would not substantially interfere with the March 3, 2020 election. (RT 30-31.) As the Superior Court properly applied the relevant Elections Code provisions and reasonably concluded, based on the elections administrator's declarations and regardless of which specific statute is employed, that issuing the writ would substantially interfere with the election, the Court should affirm the judgment that the PWOM was not timely.

Appellant also erroneously contends, without any support, that section 13314 sets forth an alternative statute of limitations period for writs

[8] The Superior Court's ruling on the fact-intensive question of whether the relief sought by Appellant would have substantially interfered with the printing or distribution of ballots is reviewed for substantial evidence, (see *Haraguchi v. Superior Court* (2008) 43 Cal.4th 706, 711; *Poniktera v. Seiler* (2010) 181 Cal.App.4th 121, 130), but under any standard of review should be affirmed given the uncontroverted, admissible evidence introduced by the County and Real Party showing that the relief would have been costly and jeopardized the County's ability to comply with mandatory obligations to transmit ballots to military and overseas voters, among others.

challenging ballot materials. (AOB at 28 [asserting that statute serves as "emergency break"], 34-35.) This position lacks merit for multiple reasons.

First, the face of section 13314, as a purely general provision utilized to address unspecified "errors or omissions" in the ballot material printing process, simply does not contain an alternative limitations period that would override the express 10-calendar-day filing period in section 9190 and various other parts of the Elections Code. (See Elec. Code §§ 9092 [state voter information guide challenges], 9295(b)(2) [municipal ballot material challenges].) The specification that election-related challenges filed pursuant to section 13314 "shall have priority over all other civil matters" relates to judicial administration and scheduling for these types of cases, not the time periods or deadlines for petitioners to file such cases.

Second, no decided case has embraced Appellant's position that section 9190, including its express limitations period, can simply be ignored in favor of a statute of only general application, as doing so would violate core tenets of statutory interpretation.[9] Nor would doing so even change the result in this or any other case. Although ignored by Appellant as an inconvenient truth, the Superior Court was correct in determining that Appellant was not entitled to relief here because, due to the lateness of his claims, the relief sought—even if warranted (which it was not)—would substantially interfere with the March election.

In short, the inviolable mandate in *both* section 9190 and section 13314 is the same: the relief sought may not interfere with the conduct of the election. Moreover, because Appellant inexplicably sat on his hands for

[9] The same deficiencies mar Appellant's argument that section 1085 of the Code of Civil Procedures sets forth a competing limitations period that overrides section 9190. (AOB at 33-35.)

weeks and waited to file the PWOM until December 30, 2019, he was far too late no matter when one starts, how one calculates, or whether one even imposes, the 10-calendar-day challenge period. Filing "on time" is but one part of the equation, and to be successful, a petitioner must thereafter not only prove up his or her claims, but convince the court that granting the relief sought will not interfere with the conduct of the election. Appellant waited, filed far too late in the process, and unsurprisingly failed to persuade the Superior Court to disrupt the printing of ballots that was already underway.

C. The Trial Court Properly Applied the Correct "Clean and Convincing" Burden of Proof

Section 9190 sets forth a clear and unmistakeable standard of proof: a petitioner challenging ballot materials must show by "clear and convincing proof" that: (1) the materials are false, misleading, or inconsistent with law; and (2) the writ will not substantially interfere with the printing or distribution of the election materials. This burden is clearly recognized in the case law, and there is no ambiguity as to what a petitioner must show to prevail in a pre-election challenge to ballot materials. (See, e.g., *Mission Springs Water Dist. v. Verjil* (2013) 218 Cal.App.4th 892, 909; *McDonough, supra*, at 1173; *Patterson v. Bd. of Supervisors* (1988) 202 Cal.App.3d 22, 31.) The trial court did not err in requiring Appellant to satisfy his burden with respect to both elements. (See RT 36-37, 41-44 [falsity]; 30-31 45:16-22 [interference]; 46:8-9.)

The Court should soundly reject Appellant's baseless contention that a petitioner bringing a pre-election challenge to ballot materials need only satisfy his burden by a "preponderance of evidence." (AOB at 32-33.) *First*, 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. (*McKinney v. Superior Court* (2004) 124 Cal.App.4th 951, 957.) A petitioner relying on the statute must then satisfy his or her burden of proof and meet the pleading elements of the underlying substantive law that has been allegedly violated. (Elec. Code § 13314(a)(2)(A) [petitioner must prove that error "is in violation of this code or the Constitution"]. For this reason, litigants rely on the grant of authority under section 13314 to bring a wide range of pre-election challenges, which must be proved based on the elements and pleading requirements of the underlying alleged error or violation. (See generally *Kunde v. Siler* (2011) 197 Cal.App.4th 518, 528-32 [evaluating challenge to contribution solicitation materials].)

Second, Appellant's position that section 13314 overrides the burden of proof for challenges to ballot materials in section 9190 runs afoul of basic concepts of statutory interpretation and would yield the absurd result that courts must evaluate a single challenge to ballot materials under two conflicting burdens of proof. (*Esther B. v. City of Los Angeles* (2008) 158 Cal.App.4th 1093, 1099 [clauses in statute must be "read in harmony with other clauses and in the context of the statutory framework as a whole"]; *People v. Hawes* (1982) 129 Cal.App.3d 930, 936-37 [specific statutory provision controls over a general one where two relate to the same subject matter but conflict].) Accepting Appellant's view, which is contrary to every reported case in the Elections Code context, would nullify the pleading requirements for actions brought pursuant to the Elections Code and introduce a new, judicially created burden of proof for such actions, without any textual support.

Third, the text of section 13314 clearly does not contain a separate burden of proof, unlike a wide variety of measures of the Elections Code, which authorize litigation or govern election-related proceedings. (See Elec. Code §§ 2209, 9106 ["clear and convincing"]; 14240 ["probable cause"].) In fact, nowhere in the Elections Code does a "preponderance of evidence" standard appear. Naturally, no case supports Appellant's contentions that petitioners in actions pursuant to section 13314 must satisfy "a preponderance of evidence burden of proof" or that the statute displaces the burden of proof established for the underlying violation, and indeed, Appellant cites to no such case to support his position.

Finally, it must be noted that the Superior Court relied on ample, admissible evidence in the form of detailed declarations, including from the County elections official charged with ensuring the ballots and other elections material were timely printed to meet statutory deadlines, to reach its conclusions in this case. Although it is well-established that Appellant bore the burden of clear and convincing evidence here, even assuming a lesser burden for the sake of argument, it is clear that Appellant did not meet it and was not entitled to the relief sought.

D. Even if They Were Not Time-Barred or Moot, Appellant's Claims Lack Any Merit Since the Ballot Materials Were Accurate

Despite the Superior Court's findings that Appellant missed all statutory deadlines *and* sought relief that would have substantially interfered with the printing and distribution of election materials, Judge Treat nevertheless heard and considered Appellant's substantive ballot label challenges, rejecting each as entirely "unconvincing." (RT 33:28; 46:1-10.) As the Superior Court did not err in concluding that Appellant failed to carry

his burden of proving that the ballot label was false, misleading, or biased, this Court should affirm the Super Court judgment if it reaches the merits of the appeal.

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).) The "clear and convincing" evidentiary standard is considerably "more substantial than a mere preponderance of the evidence," (*People v. McKee* (2010) 47 Cal.4th 1172, 1189) mandating that "doubts are to be resolved in favor of [the ballot question's] sufficiency," and that the language should only be altered if there is a clear showing that it does not comply with statutory requirements. (See *Perry v. Jordan* (1934) 34 Cal.2d 87, 94 [emphasis added].) "The standard, as defined by the Legislature, is necessarily a high one." (*Huntington Beach City Council v. Sup. Ct.* (2002) 94 Cal.App.4th 1417, 1432.) As the Court stated in *Huntington Beach*:

> [T]he Legislature went out of its way to emphasize the narrowness of the scope of any proper challenges by appending the word "only" in front of the heightened evidentiary standard. The operative language in section 9295 is: "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 . . . ." (Italics added.)

(*Id.* at 1428.)

Furthermore, "the drafter is afforded 'considerable latitude' in composing the ballot [label], and we must presume its language to be accurate. 'Only in a clear case should a [label] so prepared be held

insufficient. Stated another way, if reasonable minds differ as to the sufficiency of the [label], the [label] should be held to be sufficient.'" (*McDonough*, *supra*, 204 Cal.App.4th at 1174 [internal citations omitted]). "[T]he judiciary is not free to substitute its judgment" for that of the drafter, even if it believes the question should be framed another way." (*Martinez v. Superior Court* (2006) 142 Cal.App.4th 1245, 1248.) As discussed below, the Superior Court faithfully applied this deferential standard of review in rejecting Appellant's contentions that the ballot label was false, misleading, or biased. (RT at 46.)

1. Describing the tax as a ½ ¢ sales tax is clear, accurate, and fully complies with the requirements of the Elections Code

Appellant claims that the ballot label's description of the tax as a "½¢ sales tax" is inconsistent with Elections Code § 13119(b) because it is not described in percentage form. Appellant further claims that use of the cent symbol ("¢") is somehow prejudicial. (AOB at 53-55.) Both of these claims are incorrect.

Elections Code section 13119(b) provides that if a local ballot measure imposes a tax, the ballot label shall include, among other things, "the rate and duration of the tax to be levied." However, nowhere does section 13119 state that the *only* way to describe the rate of tax is in percentage form. Further, contrary to Appellant's contentions, sales tax rates are commonly expressed as the number of cents, or fraction thereof, being added.

The California Attorney General's titles and summaries for statewide measures have long expressed sales taxes in terms of cents or fractions thereof. In November 2012, Proposition 30 appeared on the statewide General Election Ballot. Among other things, Proposition 30 sought to

increase the state sales tax rate for four years. In the impartial title and summary distributed to all registered voters, the Attorney General described the sales tax thusly:

"Increases sales and use tax by ¼ **cent** for four years."

(RPIA 004) [bolding added].)

Similarly, Proposition 133, which appeared on the November 6, 1990 statewide General Election Ballot, sought to increase the state sales tax to fund public safety programs. In the impartial title and summary distributed to all registered voters, the Attorney General described Proposition 133's sales tax increase this way:

"Increases state sales and use taxes ½ **cent** for four years starting July 1, 1991…"

(RPIA 0010 [bolding added].)

"[T]he title and summary prepared by the Attorney General are presumed accurate," and the convention used in CCTA's ballot label simply follows the precedent established by the California Attorney General's titles and summaries for describing sales tax increases. (See *Becerra v. Super. Ct.* (2017) 19 Cal.App.5th 967, 975.) Therefore, 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.

Local governments and the courts also commonly explain sales tax increases in terms of cents rather than percentages. The ballot materials for multiple prior local sales tax measures have described the rate of tax in the context of cents. (See, e.g., *Jarvis v. Padilla* (2016) 62 Cal.4th 486, 534 n. 21 [quoting ballot questions in the City of Richmond and the City of Whittier that each referenced a "*half-cent* sales tax increase" (emphasis added)].)

Multiple judicial decisions similarly refer to sales tax increases in terms of cents rather than percentages. (See, e.g., *Hoogasian Flowers, Inc. v. Bd. of Equalization* (1994) 23 Cal.App.4th 1264, 1268 [describing authorization to impose a sales tax increase of 0.25% under former Rev. & Tax. Code § 7286.1 as a "*quarter-cent* sales tax"]; *Silicon Valley Taxpayers' Assn. v. Garner* (2013) 216 Cal.App.4th 402, 404 [describing Santa Clara County Measure A (Nov. 2012) as "10-year *one-eighth of a cent* sales tax increase" (emphasis added)].)

In Appellant's view, neither Attorney General, nor local governments, nor the California Court of Appeal know how to properly identify and describe the rate of a sales tax increase. This is a ridiculous contention that is apparently based solely upon Appellant's hyper-literal and unsupported reading of Elections Code § 13119(b). There is, however, nothing in that code section requiring the rate of increase to be described in percentage terms. Furthermore, even the dictionary definition of "rate" does not imply such a requirement. To the contrary, the dictionary definition contemplates measurement in terms of *payment or price*—which is exactly what an expression in cents provides.[10] Given the standard way the Attorney General, local governments, and the courts have long described sales tax increases, there is absolutely no risk that voters were misled by describing the tax increase in cent, as opposed to percentage, terms. Of course, the elections results themselves—wherein Measure J was rejected by the voters—is

[10] "Rate" is defined as "a quantity, amount, or degree of something measured per unit of something else; an amount of payment or charge based on another amount; [and] a charge, payment, or price fixed according to a ratio, scale, or standard." (https://www.merriam-webster.com/dictionary/rate)

perhaps the ultimate indication that the Superior Court correctly ruled that voters would not be misled to support of the measure, and that Appellant did not met his burden on this point.

Finally, Appellant's claim that the "¢" symbol is prejudicial is again based on pure conjecture. California courts long ago held that the complete *absence* of a monetary symbol does not invalidate a tax. (*Howard v. Judson* (1948) 86 Cal.App.2d 128, 132 [absence of dollar sign does not invalidate the amount of a tax assessment].) If a tax cannot be invalidated due to a *lack* of a monetary symbol, it is impossible that *inclusion* of such a symbol is somehow misleading.

Furthermore, the Legislative Analyst commonly uses the "¢" symbol when describing the fiscal effects of state ballot measures as part of the state Voter Information Guide distributed to all registered voters. For example, for Proposition 29 (Jun. 2012), the Legislative Analyst described existing state taxes on cigarettes as totaling "**87¢**" with "**10¢**" going to the state General Fund. (RPIA 0015 [bolding added].) Under Elections Code section 9087(b), the Legislative Analyst's analysis of a ballot measure "shall be written in clear and concise terms, so as to be easily understood by the average voter." By making use of the "¢" symbol in multiple impartial analyses included in the state Voter Information Guide, the Legislative Analyst presumably has determined that the "¢" symbol is "easily understood by the average voter." Appellant offered no evidence whatsoever to the contrary on this point,[11] and his argument must be rejected, in accord with the Superior Court's ruling.

[11] A single layperson's declaration filed by Appellant does not contradict 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. (See 1AA 218-219.) Further, the declaration

2. The other statements challenged by Appellant are neither false, misleading, nor biased

As explained in *Martinez, supra,* CCTA has broad discretion to draft its ballot label as it sees fit, so long as it is accurate and conveys the nature of the measure. *Martinez* involved a proposed city charter amendment to increase councilmember term limits from two to three terms. The Los Angeles City Council adopted the following ballot label: "Shall the Charter be amended and ordinance adopted to: change Councilmember term limits to three terms." (*Martinez*, *supra*, 142 Cal.App.4th at 1247). Petitioners in *Martinez* took issue with the word "change," arguing that the word should be changed to "lengthened" to better describe the nature of the charter amendment. (*Id.* at 1247.) The trial court agreed and ordered that the word "change" be replaced with the word "lengthened," reasoning that the latter was "more specific." (*Id*.) The Court of Appeal reversed, explaining:

> The question could be more complete, and thus more informative, by noting that the measure increased the number of terms a council member could serve from two to three; we presume that is the effect the respondent court was trying to reach by inserting what it described as "more specific" language. But the completeness of a ballot question is not the test …To comply with the election statutes, the ballot title need not be the "most accurate," "most comprehensive," or "fairest" that a skilled wordsmith might imagine. The title need only contain words that are neither false, misleading, nor partial. The title adopted by the city council meets that standard, and the judiciary is not free to substitute its judgment given its deferential standard of review.

(*Id.* at 1248 [emphasis added].)

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is not admissible evidence for the way speakers of a foreign language would interpret the ballot materials for Measure J. (Code Civ. Proc. § 437c(d) [layperson declarations "shall be made by a person on personal knowledge"].)

Here, as was the case in *Martinez*, Appellant has provided absolutely no evidence—let alone clear and convincing evidence—that any aspect of the ballot label was false, misleading, or biased. Rather, at the end of the day, Appellant's claim boils down to a quibble that CCTA did not draft the ballot label exactly as Appellant would have written it and that, in his opinion, the ballot label could have been improved by making his suggested changes. This is not the standard, and ordering changes based on such an argument would have been highly improper. CCTA's reasoned judgement as to the content of the ballot label must be given appropriate deference, and the Superior Court correctly concluded that no changes were warranted given that Appellant did not prove by clear and convincing evidence that the ballot question was false, misleading, or biased.

Appellant alleges again here that the statements that Measure J funds were to be used to "Reduce congestion," "Make commutes faster and more predictable," and "Improve air quality" are false. (AOB at 44-53.) However, Appellant acknowledges his arguments rely *solely* on inferences drawn from the Draft Environmental Impact Report (2017 DEIR) prepared for the 2017 Countywide Transportation Plan (2017 CTP), rather than on any analysis of the 2020 Transportation Expenditure Plan (2020 TEP). (AOB at 46-47.) However, Measure J provides that the proceeds of Measure J must be used "solely for the projects and purposes set forth in the 2020 TEP [Transportation Expenditure Plan]." (1AA 43.) While the 2020 TEP is built around the CTP, there are additional strategies in the TEP that were not part of the CTP. These more aggressive strategies are anticipated to further alleviate issues relating to congestion and commute times, and to further improve air quality. (RPIA 0032-0034 [Presentation of Performance

Analysis of the Proposed 2020 TEP, showing significant improvements to vehicle performance and GhG in 2040 in a scenario *with* the 2020 TEP v. a scenario *without* the 2020 TEP].). Therefore, although the Opening Brief argues that the DEIR is relevant because the 2017 CTP and 2020 TEP are "inextricably linked," (AOB at 46), the reality is that DEIR addresses a *different* plan that incorporates *different* strategies for addressing the very issues (congestion, commute times, and air quality) that form the basis for Appellant's challenge to the ballot label language. As such, the 2017 DEIR simply cannot be considered evidence of whether statements about the impact of *Measure J* are accurate. For this reason alone, Appellant fails to carry his burden of proof.

Indeed, the *relevant* supporting documents provide clear, unequivocal support for the accuracy of the challenged statements. The purpose of Measure J was to levy a tax to fund the "transportation projects and programs described in the tax ordinance and county transportation expenditure plan adopted by the Authority on October 30, 2019," i.e., the 2020 TEP. (1AA 53.) Indeed, the measure was put on the ballot *specifically* to "alleviate traffic congestion that threatens the economic viability of the area and adversely impacts the quality of life in the County." (*Id*.) In turn, the 2020 TEP expressly includes specific budget line items related to reducing congestion, improving commutes, and improving air quality. (1AA 64.) Telling voters that this is what the tax proceeds will be used for is therefore completely accurate and entirely beyond reproach. (See Cal. Const., art. XIII C, § 2, subd. (a) ["All taxes imposed by any local government shall be deemed to be either general taxes or special taxes. Special purpose districts or agencies, including school districts, shall have no power to levy general taxes"]; Cal.

Const., art. XIII C, § 2, subd. (d) ["No local government may impose, extend, or increase any special tax unless and until that tax is submitted to the electorate and approved by a two-thirds vote"].)

More specifically, on October 30, 2019, the CCTA adopted Ordinance 19-02, which adopted the 2020 TEP. The Ordinance stated that revenues generated by the half cent sales tax "shall be used for transportation projects and programs countywide as set forth in the TEP." (RPIA 0045-0046.) Moreover, the guiding principles the CCTA used to develop the TEP include that the "CCTA is committed to funding an outcomes-based program that includes thoughtful projects that will relieve congestion countywide," that "[f]unding will focus on making traveling through Contra Costa County faster, more reliable, and more predictable by, for example, reducing travel times and moving more people with fewer cars," and that the "CCTA commits to improving the air quality in our communities by funding projects and programs that relieve congestion, reduce vehicle miles traveled (VMT) per capita, and reduce GHG." (RPIA 0051-00113 [2020 Transportation Expenditure Plan, attached as Exhibit 1 to CCTA Ord. 19-02]; RPIA 0055.)

The 2020 TEP further states that it is committed to "all projects meet[ing] performance targets for reduced traffic" and "shortened commute times," that it "focuses on innovative strategies and new technologies that will relieve congestion, . . . protect the environment," and smooth traffic flow and reduce congestion." (RPIA 0056.) The 2020 TEP therefore includes a budget for specific goals including a broad category of numerous goals, to which 41.1% ($1,484,000,000) of its funds are budgeted for "Relieving Congestion on Highways, Interchanges, and Major Roads." (RPIA 0057.) The TEP further notes that projects implementing the TEP will "serve to . . .

reduce congestion on every major transportation corridor in the county." (RPIA 0064.) An 11-page section of the TEP describes how it would spend $1.48 billion on a variety of specific improvement for "Relieving Congestion on Highways, Interchanges, and Major Roads." (RPIA 0069-0079.) The TEP further describes $1.98 billion that would be invested in projects and programs to "Reduce Emissions and Improve Air Quality." (RPIA 0080.) 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.

However, even assuming *arguendo* that the 2017 DEIR is somehow relevant (which as discussed *supra*, it is not), Appellant's challenges to the ballot label rely on cherry-picked statistics, mischaracterizations, and misstatements regarding the 2017 DEIR.

Appellant first argues that Measure J would fail to reduce congestion because the 2017 DEIR projects increasing congestion in Contra Costa County, increased number of vehicle miles traveled (VMT), and increased vehicle hours of delay (VMT). (AOB at 48-49.) This argument omits a critical component of the analysis.

The 2017 DEIR's findings explain that *total* VMT will indeed increase from 23 million to 28 million by 2040 (the statistic quoted in the Petition)—but the DEIR explains the increase is due to a significant projected increase in the population and jobs in the County. ("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).").) (RPIA 00115 [2017 CTP DEIR findings].)

However, the 2017 DEIR explains that the 2017 CTP would cause improved road conditions, and that the projected 2040 Vehicle Hours of Delay ("VHD") would be *higher* without the proposed improvements described in the 2017 CTP. Specifically, the projected 2040 VHD without the improvements in the 2017 CTP would be 252,584, whereas the projected VHD with the investments would be 190,685. (RPIA 00115; 118].) Further, the DEIR shows, as Appellant alleges, a 166% increase in VHD by 2040 for the Transportation Investment scenario. (RPIA 00115.) However, Appellant once again misleads by failing to provide the full story. As shown on page 2.1-22 in Table 2.1-5, the 2040 VHD *without* the transportation investments (referred to as "No Project" scenario) would be a *252% increase* as compared to baseline. (RPIA 00118.) Therefore, the transportation investments in the CTP, as compared to the No Project scenario, would provide *significant congestion relief* and result in 24.5% reduction in VHD.

Appellant's claims with respect to average freeway and arterial speeds (AOB at 50-51) suffer from the same flaw—the average freeway and arterial speed in 2040 *without* the transportation investments in the CTP or No Project scenario are 51.6 and 33.3 mph, respectively, whereas the average speed with transportation investments in 2040 would result in 54.1 and 33.4 mph for freeways and arterials, which is an of increase 4.8% and 0.3%, respectively. (RPIA 00119.)

Additionally, the 2017 DEIR concluded that the investments made by the 2017 CTP would cause increases in freeway and arterial road speeds.

(RPIA 00119, 00125 [*compare* Table 3.1-4 *with* Table 2.1-6].) In other words, although overall "congestion" will increase due to normal population and job growth, the 2017 CTP improvements studied by the DEIR will reduce that congestion. 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 . . ." (RPIA 00128 [2017 CTP DEIR Findings].)

Similarly, Appellant has misrepresented the findings of the 2017 DEIR with respect to air quality. Appellant alleges that the statement that Measure J funds were to be used to "Improve air quality" is untrue because two air pollutants, PM_{10} and $PM_{2.5}$, are projected to increase over time. (AOB at 51-52.) As with the statements discussed *supra*, the Opening Brief cites the 2017 DEIR as "evidence" that statements made in the Measure J ballot label are false, even though the 2017 CTP DEIR did not analyze the specific improvements identified in the 2020 TEP.

First, with respect to the two cherry-picked pollutants cited in the Opening Brief, the DEIR finds that that although "population and employment growth will contribute to an increase in countywide particulate matter emissions that cannot be fully avoided," measures adopted pursuant to the 2017 CTP in fact "would reduce significant particulate matter emissions from mobile sources." (RPIA 00122 [emphasis added].)

Second, the 2017 CTP DEIR establishes that the 2017 CTP would reduce several other key air pollutant levels from where they otherwise would be if no measures are implemented, including reductions in: reactive organic gases (ROG); oxides of nitrogen(NOx); carbon monoxide(CO); and toxic air contaminants ("TAC," including diesel particulate matter, 1,3-

butadiene, and benzene). (See RPIA 00127 [2017 CTP DEIR Findings] ("relative to the 2040 No Project scenario, the Investment Program would achieve an even greater overall reduction in criteria pollutant emissions."); RPIA 00121; 00120 (definitions); 00123 ("Relative to the 2040 No Project scenario, the Investment Program would achieve an even greater overall reduction in TAC emissions").) In fact, Appellant's PWOM at ¶ 82 actually *concedes* that the DEIR shows that the 2017 CTP will improve air quality, but simply quibbles over the *degree* to which air quality would be improved. (See 1AA 23 at ¶ 82 [conceding that there are "very large air quality improvements from the CTP Investment Program," but arguing that the "CTP Alternative was only responsible for a tiny share of air quality improvements"].)

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.

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. The prohibition on election materials that are false, misleading, or biased does not proscribe ballot labels that accurately describe the true purposes of the measure, as is the case here. (See Elec. Code § 13119(c) [requiring a "true and impartial synopsis of the purpose of the proposed measure" in language that is not "argumentative [or] likely to create

prejudice”].) This is particularly the case for special tax measures, like Measure J, which raise funds for specific, earmarked purposes (here, to make improvements with respect to congestion, public transportation performance, and air quality). (*Cf. McDonough*, *supra*, at 1169 [assessing initiative text, not special tax measure]; *Huntington Beach City Council*, *supra*, at 1417 [same].) For instance, a special tax designed to raise funds to reduce homelessness may be described in ballot materials as a “special tax to reduce homelessness”; it need not be described as a “special tax to reduce homelessness but only if all program funds are administered wisely and no economic downturn occurs during the next five years.” As Appellant has completely failed to demonstrate that the special tax proceeds would not have been allocated and used for the specific purposes outlined in the ballot label, he has not carried his burden of proving that the ballot label text was false, misleading, or biased.

Finally, the March 3, 2020 election results confirm the Superior Court’s reasoned conclusion that the ballot materials would not unfairly bias the voters of Contra Costa County. Measure J fell far short of the two-thirds vote required for the enactment of a special tax. It is unmistakable that the ballot label, letter designation, or other materials did not cause prejudice or harm to Appellant’s ultimate position on the measure. 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.

IV. CONCLUSION

For the reasons discussed herein, Real Party CCTA respectfully requests that the appeal be dismissed as moot or, in the alternative, that the judgment of the Superior Court be upheld.

Dated: July 6, 2020

Respectfully submitted,

NIELSEN MERKSAMER PARRINELLO GROSS & LEONI, LLP

By: Hilary J. Gibson
Attorneys for Real Party in Interest Contra Costa Transportation Authority

DECLARATION OF DAVID J. LAZARUS
IN CERTIFICATION OF BRIEF LENGTH

David J. Lazarus Esq., declares:

1. I am licensed to practice law in the state of California, and am the attorney of record for Real Party in Interest, Contra Costa Transportation Authority, in this action. I make this declaration to certify the word length of REAL PARTY IN INTEREST CONTRA COSTA TRANSPORTATION AUTHORITY'S OPPOSITION BRIEF.

2. I am familiar with the word count function within the Microsoft Word software program by which the OPPOSITION BRIEF was prepared. Applying the word count function to the OPPOSITION BRIEF, I determined and hereby certify pursuant to California Rules of Court Rule 8.204(c) that this OPPOSITION BRIEF contains 13,478 words, and is within the word count limit imposed by Rule 8.204(c).

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and of my own personal knowledge except for those matters stated on information and belief and, as to those matters, I believe them to be true. If called as a witness, I could competently testify thereto.

Executed on July 6, 2020, at San Rafael, California.

David Lazarus, Declarant

PROOF OF SERVICE

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

I am a citizen of the United States employed in the County of Marin. I am over the age of 18 and not a party to the within cause of action. My business address is 2350 Kerner Blvd., Suite 250, San Rafael, California.

On July 6, 2020, I served a true copy of the foregoing **REAL PARTY IN INTEREST CONTRA COSTA TRANSPORTATION AUTHORITY'S OPPOSITION BRIEF** on the following parties in said action, by serving:

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_X_ **BY ELECTRONIC SERVICE**: By electronic transmission to the above parties via the TrueFiling portal.

Clerk of the court Contra Costa County Superior Court 725 Court Street Martinez, CA 94553	Via U.S. Mail

Executed in Novato, California, on July 6, 2020.

I declare under penalty of perjury, that the foregoing is true and correct.

Paula Scott