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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 OPENING BRIEF

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TO BE FILED IN THE COURT OF APPEAL

APP-008

COURT OF APPEAL FIRST APPELLATE DISTRICT, DIVISION THREE	COURT OF APPEAL CASE NUMBER: A159487
ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NUMBER: 225641 NAME: JASON A. BEZIS FIRM NAME: Law Offices of Jason A. Bezis STREET ADDRESS: 3661-B Mosswood Drive CITY: Lafayette STATE: ZIP CODE: 94549-3509 TELEPHONE NO.: (925) 708-7073 FAX NO.: E-MAIL ADDRESS: Bezis4Law@gmail.com ATTORNEY FOR (*name*): Appellant MICHAEL ARATA	SUPERIOR COURT CASE NUMBER: Contra Costa County No. N19-2489
APPELLANT/ PETITIONER: MICHAEL ARATA RESPONDENT/ REAL PARTY IN INTEREST: Deborah Cooper; Sharon Anderson; Contra Costa Transportation Authority; Contra Costa County Bd. of Supvsrs.	

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

(*Check one*): [X] INITIAL CERTIFICATE [ ] SUPPLEMENTAL CERTIFICATE

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1. This form is being submitted on behalf of the following party (*name*): Michael Arata

2. a. [X] There are no interested entities or persons that must be listed in this certificate under rule 8.208.
   b. [ ] Interested entities or persons required to be listed under rule 8.208 are as follows:

	Full name of interested entity or person	Nature of interest (*Explain*):
(1)		
(2)		
(3)		
(4)		
(5)		

[ ] Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: June 3, 2020

JASON A. BEZIS
(TYPE OR PRINT NAME)

Jason A. Bezis
(SIGNATURE OF APPELLANT OR ATTORNEY)

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

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STATEMENT OF THE CASE

On December 30, 2019, Appellant Michael Arata, a Contra Costa County elector, filed a petition for writ of mandate in Contra Costa County Superior Court challenging the ballot label (a.k.a. ballot question or ballot statement), ballot measure letter designation, and County Counsel's impartial analysis for the Contra Costa Transportation Authority (CCTA) sales tax increase measure on the March 3, 2020 ballot. (1 AA 4-27.)[1]

On December 31, 2019, on an ex parte motion, the Superior Court set an expedited briefing and hearing schedule. (1 AA 107-08.) On January 6, 2020, the Superior Court denied Appellant's writ petition by minute order. (1 AA 265.) At the hearing, Appellant requested a written statement of decision pursuant to C.C.P. § 632 (RT 44:20-45:5). The court instead made a verbal statement. (RT 45:6-47:14.)

On January 9, 2020, the Superior Court denied Appellant's application for an order to shorten time to hear a motion to reconsider denial of Appellant's writ petition. (2 AA 278-79.) Following the Superior Court ruling, Appellant's mother unexpectedly died. Appellant's family obligations took precedence over pursuit of immediate appellate review. Appellant withdrew the motion for reconsideration and dismissed unresolved declaratory and injunctive relief claims on January 29, 2020. (2

[1] The Appellant's Appendix is divided into two volumes.

AA 281-86.) Appellant filed Notice of Appeal on January 29, 2020. (2 AA 270.)

STATEMENT OF APPEALABILITY

This appeal is from a Superior Court minute order denying writ petition. An order granting or denying a writ petition that finally determines the rights of the parties is deemed a final judgment from which an appeal can be taken. *Steen v. Board of Civil Service Comm'rs* (1945) 26 Cal.2d 716, 727.

STATEMENT OF FACTS

In 2004, Contra Costa County voters approved Measure J, an extension of an existing half-percent sales tax, imposed by CCTA from 2009 to 2034. (In 2020 during the campaign period for the March election, freeway signs across the county touted "Measure J" projects. (Arata Declaration, 1 AA 216.)) In 2016, voters rejected Measure X, a sales tax increase proposed by CCTA in addition to Measure J. (MJN Exh. D.)

On October 30, 2019, the CCTA Board asked the Contra Costa County BOARD OF SUPERVISORS to place on the March 3, 2020 ballot a half-percent sales tax, to be imposed from 2020 to 2055 in addition to Measure J. (MJN Exhs. A, B.) On November 19, 2019, the BOARD OF

SUPERVISORS placed the additional CCTA sales tax on the March 3, 2020 ballot. (MJN Exh. C.)

On December 10, 2019, County Counsel Sharon ANDERSON filed with the County Elections Division an impartial analysis of CCTA's measure, referring to it as an "additional … tax" in its first sentence. (MJN Exh. E.) On December 12, 2019, then-Acting County Clerk-Recorder Deborah COOPER designated "J" as the ballot letter for CCTA's measure through a "random ... drawing." (Konopasek Declaration, 1 AA 112:28-113:11.)

On December 16, 2019, Appellant's attorney submitted a letter to COOPER and ANDERSON asserting that the ballot label and ballot measure letter designation were inconsistent with the Elections Code. (Schonbrunn Declaration, 1 AA 182-85). On December 18, 2019, ANDERSON filed an amended impartial analysis of 2020 Measure J that deleted the "additional … tax" disclosure. (MJN Exh. F.)

On December 24, 2019, Appellant's attorney submitted letters to COOPER, ANDERSON and the BOARD OF SUPERVISORS stating that the ballot label, the ballot measure letter designation, and the December 18, 2019 impartial analysis were inconsistent with the Elections Code. (Schonbrunn Declaration, 1 AA 187-209).

On January 3, 2020, the County alleged that it sent ballots to the printer on December 31, 2019 and that printing of voter information guides

was scheduled to begin on January 6th. (Konopasek Declaration, 1 AA 111 ¶¶ 5, 8.) The Assistant County Counsel asserted at the January 6, 2020 hearing that ballots were in the process of being printed in Oregon. (RT 20:12-15.) As of January 8, 2020, the County claimed that it had printed 78 percent of the total number of voter information guides that would be printed. (Cooper Declaration, 1 AA 229 ¶ 14.)

ARGUMENT

The Superior Court erroneously denied Appellant's Petition for Writ of Mandate alleging that an error or omission had occurred in the printing of a ballot, county voter information guide, and other official matter, or that any neglect of duty had occurred, or was about to occur, concerning the Contra Costa County Measure J election on the March 3, 2020 ballot. Elections Code § 13314(a).[2]

The Superior Court was in error in holding that Appellant had not timely filed his challenges under § 13314 and C.C.P. § 1085. The errors, omissions, and neglect were in violation of the Elections Code, especially §§ 9160 (impartial analysis), 13116 (ballot measure letter designation), and 13119 (ballot label). The court could have ordered the amending of the impartial analysis, the ballot label and/or measure letter while not

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

"substantially interfer[ing] with the conduct of the election." Section 13314(a)(2)(B).

The Superior Court was in error in holding that Appellant had not timely filed his Impartial Analysis challenge under § 9190. The court could have amended the Impartial Analysis while not "substantially interfer[ing] with the printing or distribution of official election materials." Section 9190(b)(2).

An extensive discussion of the societal significance of the issues raised in this appeal can be found in Section IB, *infra*.

STANDARD OF REVIEW

The proper interpretation of statutory provisions, including the scope and application of §§ 9160, 9190, 13116 , 13119, and 13314, is a question of law, subject to the Court of Appeal's *de novo* or independent review. *Redevelopment Agency of City of Long Beach v. County of Los Angeles* (1999) 75 Cal.App.4th 68, 74; *Mart v. Severson* (2002) 95 Cal.App.4th 521, 530.

A "substantial evidence" standard of review applies to the Superior Court's findings that amendment of ballots or the voter information guide would substantially interfere with the election. *Doe v. Univ. of S. Cal.* (2016) 246 Cal.App.4th 221, 239.

An "abuse of discretion" standard of review applies to the Superior Court's denial of Appellant's ex parte application under § 13314(a)(3) to shorten time to hear Appellant's motion for reconsideration. *People v. Fin. Cas. & Sur., Inc.* (2017) 14 Cal.App.5th 127, 138.

I. MOOTNESS EXCEPTION: THE COURT SHOULD EXERCISE ITS DISCRETION TO DECIDE APPEAL BECAUSE ISSUES ARE LIKELY TO RECUR WHILE EVADING REVIEW.

The legal issues presented in this appeal are justiciable through the election issues mootness exception.

A. Legal Authority Supports Justiciability.

The issues presented are of significant public interest and are likely to recur[3] while evading timely appellate review, given the timeframes applicable to elections. Appellate resolution of these legal issues, especially concerning election procedures, would benefit parties raising future election challenges.

> 'Under certain conditions, disputes concerning election procedures are properly reviewable by an appellate court even though the particular election in question has already taken place.' [Citation.] Even though the relief requested is no longer available, review may be appropriate if the contentions raised are of general public interest 'and are likely to occur in future

[3] Respondent BOARD OF SUPERVISORS and RPI CCTA have offered their support for SB 1349, currently before the Legislature. The bill would authorize additional sales taxes solely in Contra Costa County that exceed the statewide local sales tax cap.

> elections in a manner evasive of timely appellate review.' *Fuller v. Bowen* (2012) 203 Cal. App. 4th 1476, 1483.

See also *Huening v. Eu* (1991) 231 Cal.App.3d 766, 770 (appeal of writ of mandate concerning election materials decided despite defeat of challenged ballot measure by voters); *Edelstein v. City & County of San Francisco* (2002) 29 Cal.4th 164, 172; *Vargas v. Balz* (2014) 223 Cal.App.4th 1544, 1547.

Many "mootness exception" precedents concern pre-election challenges to ballot measures that were not decided by an appellate court until after the elections. See, e.g., *Huening*; *Horneff v. City and County of San Francisco* (2003) 110 Cal.App.4th 814, 818; *Howard Jarvis Taxpayers Assn. v. Bowen* (2011) 192 Cal.App.4th 110, 119-120; *Vargas*; *Eblovi v. Blair* (2016) 6 Cal.App.5th 310, 313.

B. The Issues Raised by this Appeal Are of Significant Public Interest.

Appellant seeks clarification of the scope of Elections Code §§ 9190, 13116, 13119, 13314. The matter before this Court is a legitimate controversy concerning election procedures that will recur in future elections. *Huening* decided nearly 30 years ago that interpretation of Elections Code provisions, especially their "scope," is an exception from mootness:

> Opponents' chief contentions relate to the scope and validity of section 3564.1, issues which are

> likely to recur in future elections. Because of the short period between the publication of ballot pamphlets and the election, it is unlikely such contentions can be reviewed before the election. Therefore, we shall consider opponents' challenge. (231 Cal.App.3d at 770.)

CCTA's attorney implicitly admitted the need for additional statutory interpretation at the writ hearing, "We acknowledge the Elections Code isn't exactly a model of clarity in this area." (RT 7:25-26.)

After CCTA's Measure X failed in 2016, CCTA pursued Measure J in March 2020. Because CCTA's measure failed again, CCTA is likely to propose a similar ballot measure at a future election.[4] Respondents likely would again immediately send election materials to printers if a court challenge were filed and again claim mootness in order to evade judicial review.

The contentions raised in this dispute are of general public interest. They concern county election procedures that affect hundreds of thousands of voters in Contra Costa County, Elections Code provisions that affect tens of millions of voters across California, and many billions of dollars in local tax measures. The first issues presented concern statutory interpretation as regards deadlines for filing challenges to ballot materials. Several more issues involve clarifying the required procedures, tests, and burdens for successfully challenging ballot materials.

[4] See previous footnote.

This appeal also offers matters of first impression. A definitive ruling on the application of § 13119 would provide elections officials with critical guidance as to how this new, far-reaching statute is to be interpreted. Patterned after a similar existing statute concerning statewide measures, § 13119 prohibits partial, argumentative and prejudicial language in local ballot measures. Judicial scrutiny is warranted because local measure sponsors are inherently more self-interested in writing ballot labels for their own measures than is the Attorney General in writing ballot labels and summaries for statewide measures.[5]

The contentions raised in this dispute are likely to occur in future elections in a manner evasive of timely appellate review. In the November 2020 election, COOPER very likely will continue to designate ballot measure letters in a manner that is inconsistent with § 13116 and very likely will persist in contending that challenges to ballot labels and letter designations are subject to public examination periods that do not exist in § 9190 or otherwise in the Elections Code. This appeal seeks to bring election procedures into conformity with election law.

[5] In stark contrast to local measures wherein sponsors prepare ballot labels, for statewide measures "[t]he Attorney General shall invite and consider public comment in preparing each ballot title and summary." § 9051(d).

II. THE TRIAL COURT INCORRECTLY INTERPRETED STATUTES CONCERNING PROCEDURAL CHALLENGES TO ELECTION MATERIALS.

A. The Challenge to Impartial Analysis Was Timely Filed.

The Superior Court erroneously ruled Appellant's challenge to ANDERSON's Impartial Analysis was not timely filed under §§ 9160, 9190. "I am rejecting the petition on multiple grounds. First, I find I that it is outside the statute of limitations because if it was to be filed, it should have been filed within ten days of [December] 18th and it wasn't." (RT 45:11-15.) Appellant asserts the court incorrectly counted the ten days.

> The writ of mandate or injunction request shall be filed no later than the end of the 10-calendar-day public examination period. § 9190(a).

ANDERSON's impartial analysis under § 9160 is subject to the public examination period because § 9160 is specifically listed in § 9190.

Assistant County Registrar of Voters Scott Konopasek asserted that the public examination period for County Counsel's Impartial Analysis ran from December 18 to 28, 2019. (1 AA 113:25-27.) The final day was a Saturday. Appellant filed his action on Monday, December 30, 2019, the next day that the Superior Court was open for business.

In finding the Petition untimely, the trial court misstated long-established statutes of limitations doctrine that permits plaintiffs to file on the next court day following a weekend deadline: "If I'm injured in a car accident on January 31st and my statute of limitation runs January 31st two

years from then, and that's a Saturday, I'd better file on Friday because the following Monday is outside the statute of limitations." (RT 13:19-23). See *Mink v. Superior Court* (1992) 2 Cal.App.4th 1338; *Tran v. Fountain Valley Community Hospital* (1997) 51 Cal.App.4th 1464. The court's error resulted in dismissal, the ultimate prejudice to Appellant.

> If the last day for the performance of any act provided or required by law to be performed within a specified period of time is a holiday, then that period is hereby extended to and including the next day that is not a holiday. For purposes of this section, "holiday" means all day on Saturdays …" Code of Civil Procedure § 12a. (Emphasis added.)

See also C.C.P. §§ 12, 12b, 13, 134, 135.

The Elections Code supports Appellant's argument that he timely filed his impartial analysis challenge on Monday, December 30th. Section 15 expressly defines "the last day for the performance of any act."

> Notwithstanding any other provision of law, if the last day for the performance of any act provided for or required by this code shall be a holiday, as defined in Chapter 7 (commencing with Section 6700) of Division 7 of Title 1 of the Government Code, the act may be performed upon the next business day with the same effect as if it had been performed upon the day appointed.

Government Code § 6700 defines Sundays as holidays. Section 6702 states in part,

> Every Saturday from noon to midnight is a holiday as regards the transaction of business in

> the public offices of the state and political divisions where laws, ordinances, or charters provide that public offices shall be closed on holidays.

It defines Saturdays as half-holidays, an artifact of the bygone era when government offices were open on Saturday mornings. Appellant respectfully requests that the Court harmonize G.C. § 6702 with C.C.P. § 135, which clearly states, "Every Saturday … is a judicial holiday."

By County ordinance, the Elections Division generally is closed for "transaction of business with the public" on Saturdays. Government Code § 24260 says,

> In all counties county officers shall keep their offices open for the transaction of business during such hours and on such days as are fixed by the board of supervisors by ordinance or resolution.

Contra Costa County Code § 22-2.202 (Office hours) says, "[A]ll county offices and departments shall be open for the transaction of business with the public … except Saturdays, Sundays and holidays …" (MJN Exh. R.)

Nothing in the record shows that the Elections Division was open for business on Saturday, December 28, 2019. Even if that office had been open on that date for public examination of files, the Superior Court was closed to accept filings. Appellant brought the trial court's error to its attention through a motion for reconsideration on January 9th (1 AA 231-

62), but the court denied Appellant's ex parte motion to shorten time and refused to give the motion priority, which was itself prejudicial error under § 13314(a)(3). (2 AA 278-79.)

Perhaps most significantly, CCTA admitted in its opposition brief that when the end of a public examination period "falls on a Saturday … the deadline to file is extended to the next business day." (1 AA 143:24.)

Therefore, Appellant respectfully requests that the Court apply E.C. § 15 and construe Government Code § 6702 in a manner consistent with contemporary working hours and C.C.P. § 135, and on that basis overrule the finding of untimeliness for his challenge to the Impartial Analysis.

B. The Challenge to Ballot Label Was Timely Filed.

1. Elections Code does not contain a public examination period for ballot labels for local measures.

The Elections Code in § 9190 or otherwise does not contain a public examination period that would govern the timeliness of challenge to a local measure ballot label (a.k.a. ballot question).[6] Opposing parties misled the court by claiming that the 2020 Measure J ballot label was subject to a public examination period that already had lapsed. When the court questioned at the hearing why COOPER sent the ballots to the printer the

[6] "'Ballot label' means that portion of the ballot containing the names of the candidates or a statement of a measure." E.C. § 303. Measure J (2020) is a "county measure" because it is submitted to voters at an election held throughout an entire single county. § 312.

day after Appellant filed his petition, County Counsel replied, "So the reason we sent it to the printer is the public exam period has already ended for the official the [sic] ballot cards. And so then we sent it." (RT 20:7-9.) However, "the public exam period" for ballot labels referred to by County Counsel does not exist in statute.

In its memorandum opposing the writ petition, CCTA repeatedly mis-cited § 9190 to argue that the ballot label was subject to a "statute of limitations" under § 9190. (1 AA 138:22-139:15.) CCTA asserted:

> The CCTA adopted the ballot label on October 30, 2019 … As such, Petitioners' challenge was required to be filed no later than November 11, 2019. (Elec. Code § 9190…) … Petitioners' lawsuit, however, was not filed until December 30, 2019. This action is, without question, untimely. (1 AA 142:17-143:3.)

CCTA referred to *McDonough v. Superior Court* (2012) 204 Cal.App.4th 1169 as authority for the claimed public examination period for ballot labels for local measures. CCTA characterized *McDonough* as "applying the 10-day statute of limitations to a challenge to a ballot label." (1 AA 142:10-11.) CCTA's attorney alleged at the Superior Court hearing:

> We acknowledge the Elections Code isn't exactly a model of clarity in this area. 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. (RT 7:25-8:1.)

Appellant asserts that this aspect of the Sixth Appellate District's *McDonough* decision was wrongly decided, perhaps a casualty of the pressured circumstances of issuing an opinion before an impending election. *McDonough* found a public examination period where none exists in statute. The text of §§ 9190 and 9295 do not support the statement in *McDonough* relied on by CCTA:

> When a measure is to be placed on the ballot for an upcoming municipal election, it must be subjected to a 10-day public examination period, during which any voter in the jurisdiction may seek a writ of mandate to delete or amend the language of the measure. (§ 9295, subd. (b)(1).) … see also §§ 9092 [same writ review procedure and standard for statewide election materials], 9190 [same writ review procedure and standard for county election materials].) 204 Cal.App.4th at 1173.[7]

Section 9190 is explicit as to the ballot materials that have public examination periods:

> The county elections official shall make a copy of the materials referred to in Sections 9119, 9120, 9160, 9162, and 9167 available for public examination in the county elections official's office for a period of 10 calendar days immediately following the deadline for submission of those materials. [§ 9190(a)] (Emphasis added.)

[7] In another casualty of the time pressure, McDonough erroneously cited § 9295(b)(1) as authority for judicial review of "the language of the measure," including the "ballot question." 204 Cal.App.4th at 1173. Careful analysis of § 9295 and its term "material" do not support such a holding.

None of the five sections cited in § 9190 concerns the ballot label, as Appellant's attorney explained during the January 6th hearing. (RT 5:15-6:13, 9:5-8.) Measure J is not an initiative, as the County conceded in its January 3rd brief, so §§ 9119 and 9120 do not apply (1 AA 164:21-23). Section 9160 concerns County Counsel's impartial analysis and §§ 9162 and 9167 concern voter information guide arguments and rebuttals. Therefore, there is no statutory public examination period for local measure ballot labels.

2. Courts cannot insert a public examination period for a ballot label into § 9190.

> In the construction of a statute or instrument, the office of the Judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all. (Code of Civil Procedure § 1858)
>
> "It is ... against all settled rules of statutory construction that courts should write into a statute by implication express requirements which the Legislature itself has not seen fit to place in the statute." *In re Rudy L.* (1994) 29 Cal.App.4th 1007, 1011

Requirements for ballot labels (also called "ballot questions" and "ballot statements") for local measures are set forth in §§ 9051 and 13119. While § 9051 was written for state ballot measures, it applies to local measure elections that are consolidated with statewide elections (e.g., 2020

Measure J) through §§ 10403[8] and 13247. Neither §§ 9051 nor 13119 are included in the list of required public examination sections within § 9190.

The relevant provisions of § 13119 were added by Stats. 2015, Chapter 337 (AB 809) and Stats. 2017, Chapter 105 (AB 195), which were subsequently enacted after the Sixth Appellate District handed down *McDonough* in 2012. The Legislature did not place explicit time limits on the filing of challenges to local measures under §13119.

No Elections Code provisions exist for public examination periods for ballot labels for local (county, city, special district or school district) measures. Ballot labels for state ballot measures have a 20-day public examination period, as explicitly stated in § 13282, which refers to § 9092. Section 10403 says nothing about applying the statewide procedures in § 13282 to local measures.

The *expressio unius est exclusio alterius* statutory interpretation canon applies. *Kunde v. Seiler* (2011) 197 Cal.App.4th 518, 531 ("the expression of one thing in a statute ordinarily implies the exclusion of other things"). If the Legislature had intended for the ballot label requirements for local measures to be subject to a "public examination period," then the Legislature expressly would have said so in §§ 9190, 9295, 9380, 9509, 13119 or otherwise.

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[8] Section 10403(a)(2) says in part, "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."

Assuming *arguendo* that a public examination period applied to the 2020 CCTA Measure J ballot label, CCTA circumvented the strictures of § 9190. CCTA provided no evidence that October 30, 2019 was "the deadline for submission" of the ballot label. CCTA and the County provided no evidence that COOPER actually made "available for public examination" in her office the ballot label for "10 calendar days immediately following" the purported October 30, 2019 "deadline."

In short, CCTA misled the Superior Court with dubious legal authority to induce the court to find Appellant's ballot label challenge untimely and to dismiss Appellant's writ petition. (1 AA 142:17-143:3.) Appellant respectfully requests that the Court distinguish *McDonough,* determine that the Elections Code does not subject ballot labels for local ballot measures to public examination periods, and rule that the ballot label challenge had been timely filed.

C. The Challenge to Ballot Measure Letter Designation Was Timely Filed.

The Elections Code in § 9190 or otherwise does not contain a public examination period that would govern the timeliness of challenge to a ballot measure letter designation.

Respondents misled the Superior Court by positing that the letter designation for 2020 Measure J was subject to an examination period that already had lapsed. Assistant Registrar Konopasek asserted in his

declaration: "The 10-calendar-day public examination period for the letters assigned to local measures was December 12, 2019, through December 22, 2019." (1 AA 113:23-24.) That assertion is not supported by the Elections Code or by any known adopted County Elections Division policy.

None of the five sections cited in § 9190 concerns ballot measure letter designation, as Appellant's attorney explained at the January 6th hearing. (RT 5:15-6:13, 9:5-8.) If the Legislature had intended for letter designations to be subject to a "public examination period," then the Legislature expressly would have stated so in §§ 9190, 13116, or otherwise.

Therefore, Appellant respectfully requests that the Court determine that the Elections Code does not subject ballot measure letter designations to public examination periods, and further find that this writ claim was timely filed.

D. The Court Should Reject the Trial Court's Narrow Interpretation of Elections Code § 13314.

Section 13314 has tremendous importance to California election law as it not only provides a remedy with broad scope, but also entitles challenges to "priority over all other civil matters." Section 13314 was intended to serve as an "emergency brake" remedy with wide scope to correct all forms of errors or omissions in printing of ballots and voter information guides and to correct any neglect of duty by elections officials. (RT 17:7-21, 18:1-4, 28:5-7, 29:2-3.)

1. The trial court too narrowly interpreted § 13314.

The Superior Court wrongly dismissed all of Appellant's arguments concerning § 13314:

> This is literally the first I have heard or read about that statute, but just from hearing you read it no, that doesn't work. That means like if they put in the name Smith when they should have put in the name Brown, that's a printing error. Something that deals with the alleged unfairness of the ballot description is squarely under 9190. (RT 17:22-28.)

The court erroneously held multiple times that § 13314 is limited to mere correction of "printing" or "typographical" errors: "That's unfairness. That's not a printer's error" (RT 18:7-8). "This is not a printing error. You don't get 11314 [sic]" (RT 18:15-16). "Letter J is not a typographical error of the type addressed in 13314" (RT 28:24-25.) This narrow interpretation of § 13314 is erroneous.

The plain text of Section 13314(a)(1) demonstrates its wide scope, which includes not only "printing of … official matter," but also "any neglect of duty":

> An elector may seek a writ of mandate alleging that an error or omission has occurred, or is about to occur, in the placing of a name on, or in the printing of, a ballot, county voter information guide, state voter information guide, or other official matter, or that any neglect of duty has occurred, or is about to occur.

Frequently citing § 13314 in his writ petition, Appellant alleged that errors or omissions had occurred, or were about to occur, in the printing of a ballot and county voter information guide and that neglect of duty had occurred or was about to occur by elections officials. (1 AA 4-26.) The court's misinterpretation resulted in dismissal of Appellant's claims, thereby prejudicing him.

The County respondents stressed a restrictive interpretation, later adopted by the Superior Court, in their opposition brief concerning the applicability of § 13314, "Elections Code section 13314, cited throughout the petition … does not apply to this case." (1 AA 164:24.) Without citing any legal authority, County respondents asserted,

> An example of an error or omission would be leaving a qualified candidate's name off the ballot or misspelling a candidate's name. An example of an error applicable to this case would be calling this measure a "parcel tax" measure, not a "sales tax" measure … The petition does not allege that any errors are contained in the ballot language or that any omissions have occurred. (1 AA 164: 25-28.)

2. Case law supports a much broader interpretation of § 13314.

McDonough, which also concerned challenges to a ballot label and impartial analysis, is similar to the case at bar.[9] Based partially upon §

[9] "Citing Elections Code sections 9295 and 13314, Appellants sought a writ of mandate in superior court, alleging that the ballot question and the city clerk's 'Impartial Analysis' were misleading and biased in favor of passage,

13314, the *McDonough* court found that the ballot label was impermissibly partisan. 204 Cal.App.4th at 1172.

Other case law has applied § 13314 broadly to substantive challenges of contents of ballots and voter information guides. In *Independent Progressive Party v. County Clerk of Alpine County* (1948) 31 Cal.2d 549, the California Supreme Court ruled that a political party could use the then-contemporary equivalent of § 13314 (§ 2900) to challenge county clerks' exclusion from the ballot of that party's county central committee candidates. *McKinney v. Superior Court* (2004) 124 Cal.App.4th 951 stated that qualification of a write-in candidate in a runoff election for mayor was an issue appropriate for pre-election review under § 13314. *Pope v. Superior Court* (2006) 136 Cal. App. 4th 871, 874-75 permitted use of § 13314 to review a challenge to a city council candidate's inclusion on a ballot. *Kunde v. Seiler* (2011) 197 Cal.App.4th 518, 528-29 held that a political party's proposed insert in the County Voter Information Guide pursuant to § 13305 could be reviewed under § 13314.

Consistent with these precedents, Appellant respectfully requests the Court to overrule the Superior Court's assertion that § 13314 is limited to mere correction of typographical errors and affirm that its text expansively provides grounds for electors to challenge substantive errors or omissions

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rather than neutral as required by sections 10403, 9051, and 9280." 204 Cal.App.4th at 1172.

in the printing of elections materials and to challenge neglect of duty by elections officials.

E. Superior Court Reviewed Appellant's Ballot Label and Ballot Measure Letter Designation Challenges With Wrong Burden of Proof.

The court mistakenly applied a heightened "clear and convincing" burden of proof to Appellant's ballot label and letter designation challenges. The court erroneously and summarily dismissed them: "And the other arguments made in the papers but not argued here this morning I simply find unconvincing." (RT 46:8-9). Appellant was prejudiced by the misapplication of this burden, to the extent that this error is considered to be a judicial finding of fact.

Appellant's challenges to the ballot label and ballot measure letter designation were based on § 13314, which has a preponderance of evidence burden of proof. Section 13314(a)(2) states:

> A peremptory writ of mandate shall issue only upon proof of both of the following: (A) That the error, omission, or neglect is in violation of this code or the Constitution. (B) That issuance of the writ will not substantially interfere with the conduct of the election.

In stark contrast to § 13314's mere "proof," § 9190 has a heightened "clear and convincing" burden of proof:

> 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. [§ 9190(b)(2).] (Emphasis added.)

"'Clear and convincing' evidence requires a finding of high probability." *In re Angelia P.* (1981) 28 Cal.3d 908, 919.

Appellant would have had a lower evidentiary burden to prove that issuance of the writ would not substantially interfere with the conduct of the election if the Superior Court had correctly ruled that § 13314 was applicable. Clarifying the scope of § 13314, as requested *supra*, will instruct lower courts as to the proper burden of proof to apply.

F. Challenges to Elections Materials Under E.C. §§ 13116 and 13119 May Proceed Via C.C.P. § 1085.

To promote transparency in local ballot measures, the Legislature enacted strong ballot label substantive law in § 13119. The legislative history of Stats. 2017, Chapter 105 (AB 195) demonstrates that this amendment was enacted to apply these ballot label requirements to county transportation agencies like CCTA.

The Senate Floor Analysis dated June 27, 2017 for AB 195 observed that in 2016, Los Angeles County Superior Court ruled against a ballot label challenge to the County Transportation Authority's Measure M because § 13119 then applied only to initiative measures that qualify for the

ballot through a petition signed by voters of the local jurisdiction. That Senate Floor Analysis quoted the bill author, Assemblymember Obernolte:

> [D]ue to a drafting error, AB 809 was not as comprehensive as it needed to be because it did not apply to [measures] placed on the ballot by local government entities. It has been interpreted to only apply to [measures] brought forward by citizens via signature petition. AB 195 corrects this discrepancy and ensures that this important information is included in the ballot label for all local tax measures. (MJN Exh. S.)

Governor Newsom vetoed 2019's SB 268 that would have weakened § 13119. His veto message dated October 13, 2019 stated:

> This bill makes modifications to the ballot label requirements and notification requirements to voters for a local measure that imposes or increases a tax with more than one rate or authorizes the issuance of bonds. I am concerned that this bill as crafted will reduce transparency for local tax and bond measures. (MJN Exh. T.)

By their actions, both the legislative and executive branches have underscored the importance of § 13119. The instant case, in which the lower court refused to enforce § 13119 either through the application of § 13314 or of C.C.P. § 1085, is one of first impression to the judiciary.

Assuming *arguendo* that E.C. § 13314 does not permit Appellant's challenges to the ballot measure letter designation and ballot label under E.C. §§ 13116 and 13119, then Appellant alternatively argued that these challenges may proceed under C.C.P. § 1085 traditional writ of mandate.

(1 AA 24-35, Petition, Fifth Cause of Action). Appellant respectfully requests the Court to confirm that electors may enforce §§ 13116 and 13119 through C.C.P. § 1085 as a supplement to or an alternative to enforcement through E.C. § 13314.

G. Substantial Evidence Did Not Support the Court's Findings of Unreasonable Interference with the Election and That All Relevant 2020 Measure J Materials Had Already Been Submitted to the Printer.

The Superior Court ruled:

> I find that the petition must be denied because it would unreasonably interfere with the election process because the printing time -- because the matter is already submitted to the printer, and I am convinced that the time for that is not reasonable in the sense that I think they have timely given it to the printer and it would cost too much to try to fix it. (RT 45:16-22.)

Substantial evidence does not support the court's findings that "the matter is already submitted to the printer" and "I think they have timely given it to the printer." Substantial evidence does not support the court's related finding that the petition "would unreasonably interfere with the election process." The court failed to distinguish between ballots and voter information guides.

First, Respondents misled the Superior Court into believing that the voter information guides had already been submitted to the printer as of January 6, 2020 hearing. No facts in the record show the actual status of the voter information guide printing as of the time of the hearing, including

the printer location. The Konopasek Declaration of January 3rd asserted: "Printing of the voter information guides is scheduled to begin on January 6, 2020." (1 AA 111:27-28.) "All voter information guides are ready to be printed upon final signoff by the Elections Division." (1 AA 112:6-7.) As the Impartial Analysis appeared only in the voter information guide, the court plausibly could have ordered its amendment on January 6, 2020 and not substantially interfered with the printing.

Second, Respondent COOPER and the County misrepresented key facts during the January 6th hearing concerning the printing of the ballots:

> THE COURT: Did you need to send it that early?
>
> MR. GEIGER: Yes, we did because it's being printed in a printer in Oregon.[10] They are printing 3.6 million official ballots, and that's not the only county that this printer is printing. They're printing L.A. County up there too. So there are all kinds of counties are being printed up there too. So there's all kinds of counties that are being printed up there. So there's kind of a line so we need to get in line to make sure they're printed in a timely manner. (RT 20:12-22.)

Then CCTA's counsel asserted that January 17, 2020 was a deadline:

> MS. GIBSON: And they go to the military and overseas voters beginning on that date, and

[10] All ballot printers for California elections must be certified by the California Secretary of State. Cal. Code Regs. tit. 2, § 20220. Elections Code § 13004. The Court may take judicial notice of the Secretary of State's approved ballot printer list as of December 18, 2019, which does not include any printer in Oregon. (MJN Exh. U.)

> that's ten days from now. And so to get this massive amount of printing done by that date it's actually very little time that they have to do that. (RT 20:26-21:2.)

Mr. Geiger added:

> MR. GEIGER: I think we were proceeding under business as usual, and we wanted to make sure that they got printed in time so that they could be sent off to the military and they would be in line along with the other ballots that the printer prints. (RT 21:20-24.)

As unsworn testimony by individuals lacking personal knowledge of the facts, Mr. Geiger's and Ms. Gibson's assertions and the Court's ruling based on these assertions were not supported by substantial evidence. CCTA's attorney provided no factual basis for her "massive amount of printing" and "actually very little time" assertions. She did not speak with personal knowledge of facts. Appellant's attorney's objection at the January 6th hearing was ignored:

> [Y]ou're hearing testimony essentially through a lawyer … We have no idea how many military and overseas, so it's possible that it could be done in the next ten days or they could send it to a local printer if that's what the holdup is … it looks like they were intentionally mooting the case. (RT 22:6-23.)

Public entities and challengers to ballot measures have asymmetric information about existing election procedures and practices. The County Elections Official has greater material knowledge, including nonpublic facts, about printing schedules and costs, than challengers. In many

circumstances, the County Elections Official and ballot measure sponsors share common interests in opposing election materials challenges. Prematurely sending materials to printers in order to justify claims that challenges would substantially interfere with the printing of election materials or conduct of elections would be a nefarious but successful strategy to oppose challenges. Such tactics should not be condoned by the Court.

The Superior Court should have required written or live testimony, under penalty of perjury, from persons most knowledgeable about the actual status of (1) ballot printing and (2) voter information guide printing as of the hour of the hearing.

A deeper question is raised that pertains to all future election law challenges: Exactly what would a petitioner need to prove to show that the resolution of the case would "not substantially interfere with the printing or distribution of official election materials" § 9190(b)(2) and/or "not substantially interfere with the conduct of the election"? § 13314(a)(2)(B). It is clear that the trial court proceeded without having an objective test in the case law. If the Court were to provide a brightline test for "substantial interference," it would greatly aid in the adjudication of election material challenges. The facts of the instant case may be instructive in helping the Court identify the substantial evidence needed to meet the burden of "not

substantially interfere with the printing or distribution of official election materials" or "not substantially interfere with the conduct of the election."

Appellant respectfully requests the Court, as part of elucidating the requirements to disprove "substantial interference," rule that substantial evidence in the record did not support the court's dispositive finding concerning the voter information guide, "[T]he matter is already submitted to the printer." (RT 45:19), and the related finding that amendment of the Impartial Analysis as of January 6, 2020 would have substantially interfered with the election.

H. The Trial Court Abused Its Discretion in Not Shortening Time to Hear Appellant's Motion for Reconsideration.

Appellant's writ petition had an express right to priority in the Superior Court under § 13314(a)(3): "The action or appeal shall have priority over all other civil matters." Appellant attempted to bring the trial court's prejudicial errors concerning statutes of limitations to its attention through an ex parte application to shorten time to hear a motion for reconsideration. (1 AA 237.) The trial court denied that application to shorten time summarily, without hearing, on January 9th. (2 AA 275.) As the motion for reconsideration was set for February 21st, six weeks later, Appellant withdrew that motion on January 29th in order to pursue this appeal. Appellant respectfully requests a ruling from this Court that the trial court abused its discretion by not granting Appellant's ex parte motion

on January 9th to shorten time to hear the motion for reconsideration, as statutorily required by § 13314(a)(3).

I. COOPER Violated Elections Code § 13116 and Abused Her Discretion in Designating Ballot Measure Letters.

1. COOPER designated ballot measure letters that did not continue in alphabetical order.

Because letter designations for the seven local ballot measures on the March 2020 ballot were not "continuing in alphabetical order," Elections Official COOPER abused her discretion in designating the 2020 "Measure J" ballot letter.

> All county, city, or other local measures shall be designated by a letter, instead of a figure, printed on the left margin of the square containing the description of the measure, commencing with the letter "A" and continuing in alphabetical order, one letter for each of these measures appearing on the ballot. § 13116(a).
>
> An elections official may commence designating local measures with any letter of the alphabet following the letter "A," and continuing in alphabetical order, in order to avoid voter confusion that might result from different local measures carrying the same letter designation in successive elections. § 13116(b).

Section 13116(a) says "shall," which under § 354 is "mandatory." COOPER designated the seven local measures on the March 2020 ballot: A, J, L, M, R, T and Y. (MJN Exh. K.) These seven letters are not "continuing in alphabetical order." COOPER abused her discretion by

failing to commence with a letter and continue in alphabetical order in accordance with Section 13116.

2. COOPER selected ballot measure letters in an unapproved manner.

COOPER through the Konopasek Declaration admits that a random drawing was used to designate ballot measure letters. She therefore did not assign the ballot measure letter designations in accordance with Section 13116. (1 AA 112:28-113:11.) A purported random draw of letters is inherently inconsistent with Section 13116.[11] Even if "Letters are assigned based upon a random draw" were an adopted policy, such policy would be inconsistent with § 13116.

3. Measure "J" ballot letter designation was an abuse of discretion because COOPER presented no evidence of an adopted county policy.

COOPER provided no evidence to the trial court that a policy adopted by the County authorized her ballot measure letter designation process. The Konopasek Declaration asserts, "The drawing was held in accordance with the Elections Division's policies" (1 AA 113:8-9) and cites the "Guide to Filing Measure Arguments 2020," which says "Assignment of Letters. Letters are assigned based upon a random draw." (1 AA 125.)

However, the "Disclaimer" in the preface to the guide says,

[11] Appellant notes the improbability of a random drawing resulting in CCTA's measure being labeled with the same "J" as its existing measure, Lafayette's measure being labeled "L," and Moraga's measure being labeled "M."

> This informational guide was developed in an effort to provide answers to questions frequently asked concerning the filing of measure arguments. It contains general information only and does not have the force or effect of law, regulations, or rule." (1 AA 118.)

4. Measure "J" ballot letter designation was an abuse of discretion because it created voter confusion with existing Measure J.

Even if COOPER had designated the 2020 CCTA measure with letter "J" through a process consistent with the Elections Code, Appellant contends that COOPER had a duty to select a different letter than "J" due to voter confusion with CCTA's existing 2004 "Measure J," which remains in effect until 2034. Voters might incorrectly assume that a "yes" vote on 2020 "Measure J" merely extends an existing tax at the same rate, when it actually imposes an "additional" tax and doubles the CCTA sales tax rate.

CCTA's Transportation Expenditure Plan (TEP), published in the County Voter Information Guide, includes approximately twenty-five references to "Measure J," none of which referred to 2020 Measure J. (MJN Exh. G.) The "Timeline of Local Funding" says "MEASURE J revenue ends" in 2034 (p. 9). The TEP refers to "Measure J TEP funding" and "Measure J TLC funding." (p. 46). All of these references are to 2004 "Measure J," but voters were likely to confuse those references with the 2020 "Measure J" that was before them.

Numerous official highway signs standing along freeways and major roads across the county tout "Measure J Funds." (Arata Declaration, 1 AA

211-17.) Appellant's concern was that voters would incorrectly assume that a "no" vote on 2020 Measure J would cause construction on current projects using "Measure J Funds" to be disrupted. Therefore, the use of letter "J" created voter confusion and prejudice in favor of passage of 2020 "Measure J."

Appellant concedes that "may" in § 13116(b) is "permissive" (§ 354) in the application of the clause "... in order to avoid voter confusion that might result from different local measures carrying the same letter designation in successive elections." Nevertheless, Appellant respectfully requests a determination from the Court that "successive elections" in § 13116(b) can be interpreted to include ballot measures by the same sponsor with the same ballot letter that are still in effect at the time of a succeeding election, even if it is many years later. Use of the plural in "successive elections" indicates that the Legislature's intent was to include more than one election. Despite the argument and evidence presented in two letters to her (1 AA 182-189), COOPER did not change her decision to designate letter "J" for the CCTA measure.

Unless there is direction from the Court, COOPER likely will continue to violate § 13116. Appellant respectfully requests a ruling that COOPER abused her discretion, acted in an arbitrary and capricious manner, and did not proceed according to law in designating ballot letters. Appellant requests that the Court remand with direction to the Superior

Court to issue a writ of mandate ordering COOPER and the County Elections Division to conform their ballot measure letter designation procedures to the requirements of E.C. § 13116 henceforth in future elections.

III. 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).

Appellant asserts that the 2020 Measure J Ballot Label violated Section 13119(c), which states:

> 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.

The text of § 13119(c) is relatively new, first enacted in 2017, with no published cases. The case at bar is one of first impression. The Superior Court erroneously rejected all of Appellant's 13119(c) arguments as untimely and "unconvincing." (RT 46:9.)

McDonough v. Superior Court (2012) 204 Cal.App.4th 1169 interpreted a similar statute, § 9051. *McDonough* defined the term "partial":

> We understand 'partial' to mean [that] the council's language signals to voters the council's view of how they should vote, or casts a

> favorable light on one side of the [issue] while disparaging the opposing view. (at 1174.)

McDonough held that a ballot label using the term "pension reform" was impermissibly argumentative. The court ordered,

> The title should be altered to read "PENSION MODIFICATION" to eliminate the use of the argumentative word "reform."…
>
> [I]t promotes Measure B by implying that if voters do not endorse pension reform by passing the measure, the public will lose fire and police protection and be deprived of popular community resources.
>
> [T]he advocacy inherent in the introductory language of the ballot question is partisan and prejudicial. Consequently, the ballot question must be amended … (at 1175-76.)

In *Huntington Beach City Council v. Superior Court* (2002) 94 Cal.App.4th 1417, the court of appeal also struck down a ballot label, replacing the "insufficiently neutral" word "exemption":

> The word ["exemption"] is a form of advocacy in what is necessarily a neutral forum. (at 1423.)
>
> ([S]ee also *Stanson v. Mott* (1976) 17 Cal. 3d 206, 219 [130 Cal. Rptr. 697, 551 P.2d 1] ["the First Amendment precludes the government from making public facilities available to only favored political viewpoints"].) These guarantees mean, in practical effect, that the wording on a ballot or the structure of the ballot cannot favor a particular partisan position. ... The question in this case, then, is whether the word "exemption" is insufficiently neutral to appear in the title of the measure on the ballot. (at 1433. Emphasis added)

> The word, in this context, is advocacy by other means. ... Not only is [the ballot title] advocacy in the description of the measure on the ballot itself, it is substantively misleading. (at 1434.)

In determining whether the 2020 Measure J ballot label is a "true and impartial synopsis," the only known admissible evidence is the Environmental Impact Report (EIR) for CCTA's 2017 Countywide Transportation Plan (CTP), a quantitative analysis of CCTA's plans at a systemic level. The Transportation Expenditure Plan (TEP) for 2020 Measure J (MJN Exh. G) is inextricably linked with the 2017 CTP:

> ACHIEVING INTENDED OUTCOMES … CCTA will ensure funding in the TEP will achieve the outcomes identified in the 2017 Countywide Transportation Plan (CTP). (MJN Exh, G, p. 12.)
>
> IMPLEMENTING GUIDELINES … Funds Only Projects and Programs in the TEP … the Authority may amend or delete Projects and Programs … to maintain consistency with the current Contra Costa Countywide Transportation Plan (CTP) … (MJN Exh. G, p. 42.)
>
> The Authority shall also use the CTP to convey the Authority's investment priorities … (MJN Exh. G, p. 45.)

Key to a § 13119(c) analysis is determining "the purpose of the proposed measure." According to CCTA Ordinance 19-03, the purpose of 2020 Measure J was to impose an additional sales tax in order to fund implementation of a Transportation Expenditure Plan. [MJN Exh. A §§ 3

(Purpose), 14 (Use of Proceeds).] Because of the close linkage between the TEP and the CTP, the EIR for the CTP offers the best available evidence of the effects of 2020 Measure J's funding of the TEP.

In light of *Huntington Beach* and *McDonough,* three phrases in the 2020 Measure J ballot label violate § 13119(c) because they are partial, argumentative, prejudicial in favor of the measure, objectively untrue and/or "insufficiently neutral."

1. "Reduce congestion" in the 2020 Measure J ballot label is untrue, partial, argumentative and prejudicial in favor of the measure.

It was improper for COOPER to allow the phrase "[r]educe congestion" to be used in the 2020 Measure J ballot label. (MJN Exh. V.) COOPER ignored two demand letters challenging this phrase as impermissible under 13119(c). (1 AA 178-210, Exhs. L, M, N.) Since COOPER failed to remove this phrase, the Superior Court should have granted Appellant's writ petition to strike "[r]educe congestion."

The phrase "[r]educe congestion" is partial and argumentative, because it promotes Measure J by touting claimed benefits, where a neutral presentation would state the specifics of what the tax would fund. This is advocacy, since almost all voters likely find roadway "congestion" disagreeable. As *Huntington Beach* held, "wording on a ballot … cannot favor a particular partisan position." 94 Cal.App.4th at 1433.

"Reduce congestion" is prejudicial in favor of the measure, because measure sponsors made the political calculation to emphasize it, rather than the objective purpose of the measure, which was to impose a tax in order to fund projects and programs. To claim that the purported results of those projects and programs would "[r]educe congestion" is "insufficiently neutral." The phrase is argumentative and partial and was obviously intended to sway voters. Akin to the impermissible phrase "pension reform" in *McDonough*, "[r]educe congestion" promotes Measure J by implying that if voters do not endorse congestion reduction by passing the measure, the public will suffer worse congestion.

CCTA's own quantitative analysis disproves the claim that the measure would "[r]educe congestion." The 2017 CTP Draft EIR[12] explained, "As congestion increases, the number of hours spent driving at slower speeds increases, which is captured in the VHD [Vehicle Hours of Delay] metric." (MJN Exh. I, p. 2.1-18.)

The report concluded that, after implementation of the plan, by the year 2040, "[T]he total number of VMT [Vehicle Miles Travelled, or the total amount of driving] is expected to increase, resulting in a reduction in average travel speeds on freeways and arterials, and thereby increasing VHD." (*Id*.) It projected a 166 percent increase in Vehicle Hours of Delay

[12] Because no revisions to the chapter cited herein were made in the Final EIR (MJN Exh. X, p. i), these DEIR findings became the FEIR findings.

in the year 2040 from the 2013 baseline. (MJN Exh. I, Table 2.1-3, p. 2.1-19.)

The report then stated, "Travelers on major roadways throughout Contra Costa County would experience an appreciable increase in total VHD as compared with the baseline condition." (MJN Exh. I, pp. 2.1-21.) In other words, in the year 2040, congestion would more than double from current levels, even after implementation of CCTA's projects and programs.

CCTA's trial court Opposition Brief admitted that "overall 'congestion' will increase due to normal population and job growth …" (1 AA 151:2. Emphasis added.) The Brief asserted that the 2017 Countywide Transportation Plan improvements would "reduce that congestion." (1 AA 151:3. Emphasis in original.) However, that assertion referred to a reduction in congestion compared to not constructing the improvements, not to an overall reduction in congestion as compared to the present day. The average voter reading the phrase "reduce congestion" in the ballot label would understand it to mean a reduction in congestion compared to current conditions. Using this phrase to mean "reducing congestion so that is not as bad as it would be if nothing were done" misleads the voters.

For these reasons, consistent with the § 13119(c), *McDonough* and *Huntington Beach* standards, COOPER or the court below should have stricken the phrase "[r]educe congestion" from the 2020 Measure J ballot

label as untrue, partial, argumentative, and/or prejudicial in favor of the measure.

2. "Make commutes faster and more predictable" in the 2020 Measure J ballot label is untrue, argumentative, partial and prejudicial in favor of the measure.

It was improper for COOPER and the court below to allow the phrase "[m]akes commutes faster and more predictable" to be included in the Measure J ballot label. (MJN Exh. V.) The phrase is argumentative, because it promotes Measure J by touting claimed benefits, instead of neutrally stating the specifics of what the tax would fund. Because it is likely that almost all voters would appreciate faster, more predictable travel, this is advocacy, rather than a neutral presentation. "Makes commutes faster and more predictable" is prejudicial in favor of the measure because, even though the purpose of the measure was to fund projects, claiming the purported results of those projects is "insufficiently neutral" and is obviously intended to sway voters.

In addition, CCTA's own quantitative analysis shows the claim that the measure would "[m]ake commutes faster and more predictable" is false. The 2017 Countywide Transportation Plan Draft EIR[13] 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.) The EIR calculated a 2.7

[13] This chapter of the DEIR was not revised in the FEIR. See FN 12.

percent reduction in Average Freeway Speeds and a 2.3 percent reduction in Average Arterial Speeds. (MJN Exh I., Table 2.1-3 on p. 2.1-19.) Therefore, consistent with the § 13119(c), *McDonough,* and *Huntington Beach* standards, COOPER or the Superior Court should have stricken the phrase "[m]ake commutes faster and more predictable" from the 2020 Measure J ballot label as untrue, partial, argumentative, and/or prejudicial in favor of the measure.

3. "Improve air quality" in 2020 Measure J ballot label is untrue, partial, argumentative and prejudicial in favor of the measure.

It was improper for COOPER and the court below to allow the phrase "[i]mprove air quality" to be used in the Measure J ballot label. (MJN Exh. V.) It is argumentative. "Improve air quality" is prejudicial in favor of the measure because it is not a neutral, impartial explanation of how the tax proceeds would be used. Instead, this "motherhood and apple pie" claim is advocacy, analogous to *McDonough*'s impermissible "pension reform" and *Huntington Beach*'s "insufficiently neutral" ballot label. After all, how many voters would not want an improvement in air quality?

In addition, CCTA's own quantitative analysis shows the claim that the measure would "[i]mprove air quality" to be untrue. The 2017

Countywide Transportation Plan Draft EIR[14] concluded that by the year 2040:

> New or expanded transportation facilities pursuant to the 2017 CTP would result in a net increase in emissions of PM_{10} from on-road mobile sources (including entrained dust) as well as a net increase in emissions of $PM_{2.5}$ entrained dust, as compared with the baseline condition. (MJN Exh I, p. 2.3-23.)

In 2040, because of the increased driving after implementation of the plan, the PM_{10} pollutant was projected to increase by 20.7 percent over the 2013 baseline, which the EIR demonstrates would be worse than doing nothing (the No Project Alternative). (MJN Exh I, Table 2.3-5, p. 2.3-25.)

While it is true that other pollutants analyzed in the EIR decreased by 2040, the fact is that PM_{10} and $PM_{2.5}$ increased. Therefore, the ballot label as a whole is untrue when it claims that 2020 Measure J would "[i]mprove air quality." Thus, consistent with the § 13119(c), *McDonough,* and *Huntington Beach* standards, COOPER or the Superior Court should have stricken the phrase "[i]mprove air quality" from the 2020 Measure J ballot label as untrue, partial, argumentative, or prejudicial in favor of the measure.

Because untrue, partial, argumentative or prejudicial ballot labels are likely to be repeated in the future, Appellant respectfully requests the Court

[14] Because the DEIR citation was not revised in the Final EIR, this DEIR finding became the FEIR finding. (Exh. X, p. 7- 6 to 10.)

interpret § 13119(c) to conclude that the three phrases discussed *supra* were impermissible in the ballot label for 2020 Measure J. As a case of first impression, a definitive ruling would clarify the scope and application of § 13119(c).

4. The Ballot Label Does Not Correctly State the Rate of the Tax To Be Levied in Violation of Section 13119(b).

> If the proposed measure imposes a tax or raises the rate of a tax, the ballot shall include in the statement of the measure to be voted on the amount of money to be raised annually and the rate and duration of the tax to be levied. § 13119(b)

This sub-section first was enacted via Stats. 2015, Chapter 337. Stats. 2017, Chapter 105, made it directly applicable to measures placed on the ballot by local agencies. As such, this is a case of first impression to a Court of Appeal. The Court should give due deference to this legislative command.

a. English and Spanish Ballot Labels Incorrectly State the Rate of the Tax To Be Levied as "½ ¢."

All of the legal authorities authorizing the proposed CCTA tax refer to the tax rate in terms of "percent." (MJN Exhs. A-C.) The BOARD OF SUPERVISORS refers to the tax rate as "an additional one-half of one percent" in Ordinance No. 2019-33 calling for this election. (MJN Exh. C, §1.) In CCTA's unsuccessful Measure X in 2016, the ballot label referred to "½%." (MJN Exh. D.)

Yet the English and Spanish language ballot labels for 2020 Measure J erroneously state the tax rate as "½ ¢." (MJN Exh. V.) The "¢" and "%" symbols convey different meanings and are not equivalent to each other. Younger and foreign-born voters likely do not understand what "¢" means, creating voter confusion. Because the symbol does not appear on computer keyboards or phones, these groups tend to not use it in their daily lives.

California statutes generally use the term "cent" only the context of excise taxes. See, e.g., Rev. and Tax. Code § 7360(a)(1) ("A tax of eighteen cents ($0.18) is hereby imposed upon each gallon of fuel …"); § 32151 ("On all beer, sixty-two cents ($0.62) for every barrel"). The "cents" are imposed upon each unit, not upon the value of the item.

In stark contrast, transactions and use tax statutes universally refer to the tax rate in terms of "percent." See Rev. and Tax. Code §§ 6051, 6201, 7202; Cal. Const. art. XIII § 35(b); Cal. Const. art. XIII § 36(f)(1). Public Utilities Code § 180202, which generally authorized CCTA to propose this measure, states, "The tax rate may be in 1/4 percent increments and shall not exceed a maximum tax rate of 1 percent." Rev. and Tax. Code § 7291, which specifically authorized this measure, says, "… Contra Costa Transportation Authority may impose a transactions and use tax for the support of countywide transportation programs at a rate of no more than 0.5 percent …"

The "¢" symbol is inaccurate in the 2020 Measure J ballot label in light of the term "percent" in the legal authorities that authorized it. Furthermore, "¢" conveys a "cent" monetary unit or coin, not a rate. "Black's Law Dictionary with Pronunciations, Sixth Edition" defines:

> Cent. A coin of the United States, the least in value of those now minted. It is the hundredth part of a dollar.
>
> Per cent. An abbreviation of the Latin "*per centum*," meaning by the hundred, or so many parts in the hundred, or so many hundreds.

Use of the "¢" symbol (or "cent") instead of "%" (or "percent") could give the voter the erroneous impression that the tax rate is a flat half-penny for each purchase. For example, the tax increase on a $1,000 computer, actually $5.00, would seem to be a modest "½ ¢."

The Superior Court erroneously interpreted § 13119(b) and concluded concerning the use of the "½ ¢" instead of "½ %" in the ballot label: "That's unfairness. That's not a printer's error." (RT 18:7-8.) "This is not a printing error. You don't get 11314 [sic E.C. 13314]." (RT 18:15-16.) "I think that's preposterous." (RT 41:21.) "[T]he cent versus percentage … I regard as a preposterous distinction." (RT 46:5-7.) Appellant respectfully requests that the Court independently interpret § 13119(b) and determine that "½ ¢" is not an accurate statement of 2020 Measure J's "rate … of the

tax to be levied." A cent symbol is not equivalent to "percent" in a tax rate.[15] This Court should not condone the blurring of that distinction.

b. Chinese Language Ballot Label Does Not Correctly State the Rate of the Tax To Be Levied in Violation of Section 13119(b)

The violation of § 13119(b) is especially egregious in the Chinese language translation of the tax rate. The phrase "½ ¢" was replaced in the Chinese language ballot label with three Chinese characters: "bàn měi fēn." The Declaration of Xiebing Cauthen states that "bàn měi fēn" translates into "one-half cent (American coin)" or "one-half penny," and not a percentage. (1 AA 219:13-18).

The Superior Court erroneously refused to consider the Chinese language ballot label issue (RT 40:16-21). First, Appellant's writ petition directly challenged the "½ ¢" phrase in the English language ballot label. (1 AA 19:27-21:20.) As the Chinese translation derived from this text, a challenge to the Chinese translation arguably is within the writ petition's scope.

Second, just as plaintiffs are permitted to verbally amend their complaints to conform to proof during trials [C.C.P. §§ 473(a)(1), 576],

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[15] Use of the "¢" symbol enabled CCTA to superficially appear to comply with the 75-word limit for the ballot label imposed by §§ 9051(b), 10403 and 13247. E.C. § 9 defines the counting of words. "Punctuation is not counted." § 9(a)(1). Appellant contends that the cent symbol is not "punctuation," especially in this context. If the "¢" symbol were replaced with a word, that word would be the 76th word and therefore exceed the limit.

petitioners theoretically are permitted via C.C.P. § 1109 to verbally amend their writ petitions at merits hearings, especially when the amendment arguably is within an existing cause of action. (1 AA 20:27-21:20.) Appellant respectfully requests a ruling that the Chinese language ballot label violates § 13119(b) because it does not accurately state the rate of CCTA's proposed tax increase.

c. Erroneous Tax Rate in 2020 Measure J Ballot Label Violates 13119(c) As Untrue, Partial, and Prejudicial In Favor of CCTA Measure.

CCTA accurately represented the tax rate as "½ %" in the ballot label for its unsuccessful Measure X in 2016. (MJN Exh. D.) There is no evidentiary basis to conclude that CCTA re-characterized the tax rate from "½ %" to "½ ¢" for its 2020 measure for any reason other than boosting its chance of passage. As discussed in the sections *supra*, the "½ ¢" tax rate in the English and Spanish ballot labels and the "bàn měi fēn" tax rate in the Chinese language ballot label do not accurately state the rate of CCTA's proposed tax increase. These inaccurate statements violate § 13119(c) as they are partial and prejudicial in favor of 2020 Measure J.

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

Elections Code § 9190(b)(2) says in part:

> 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.

County Counsel's Impartial Analysis is among the specified ballot materials subject to review under § 9190 via § 9160. *Huntington Beach*, Cal.App.4th at 1432, elucidates the "false or misleading" standard:

> In determining whether statements are false or misleading, courts look to whether the challenged statement is subject to verifiability, as distinct from "typical hyperbole and opinionated comments common to political debate." (citation omitted) An "outright falsehood" or a statement that is "objectively untrue" may be stricken. (*Ibid*.) We need only add that context may show that a statement that, in one sense, can be said to be literally true can still be materially misleading …

Although *Huntington Beach* was a challenge to a city measure under § 9295, the same principles apply to a challenge to a county measure under § 9190, which has substantially similar text.

ANDERSON's Impartial Analysis of 2020 Measure J includes several contentions that are partial, "false," "misleading," or inconsistent with this code chapter. MJN Exhibit V is the Impartial Analysis as it appeared in the County Voter Information Guide.

1. Phrases from the ballot label proven by the Countywide Transportation Plan EIR to be objectively untrue should have been stricken from the Impartial Analysis as "partial," "false" and/or "misleading."

Respondents claim that the phrases "reduce congestion," "make commutes faster and more predictable," "improve air quality," and "relieve congestion" were appropriate in the Impartial Analysis because they were based upon the ballot label and the Transportation Expenditure Plan. The

County Respondents claimed in their opposition brief, "If the TEP complies with state law and the impartial analysis describes the purpose of the TEP, then there is no legal basis for changing the description of the TEP in the impartial analysis." (1 AA 170:3-5.)

First, Appellant believes that these assertions should have been removed from the Impartial Analysis as false and/or misleading for the reasons set forth in his challenge to the ballot label under § 13119(c), set forth *supra*.

Second, Appellant believes that they should have been stricken from the Impartial Analysis because they are objectively untrue under the *Huntington Beach* "verifiability" standard, using CCTA's own quantitative data.

The 2017 CTP EIR contains quantitative analyses of CCTA's projects and programs that demonstrate that these four claims in ANDERSON's Impartial Analysis are objectively untrue.

a. CCTA's own quantitative analysis demonstrates that 2020 Measure J would not "reduce congestion" or "relieve congestion."

As discussed in the ballot label section *supra*, the phrases "reduce congestion" and "relieve congestion" are objectively untrue because the CTP EIR shows a 166 percent increase in Vehicle Hours of Delay in 2040 if the Countywide Transportation Plan were implemented. (MJN Exh. I, Table 2.1-3, p. 2.1-19.)

b. CCTA's own quantitative analysis demonstrates that 2020 Measure J would not "make commutes faster and more predictable."

As discussed in the ballot label section *supra*, the phrase "make commutes faster and more predictable" is objectively untrue because the DEIR shows a 2.7 percent reduction in Average Freeway Speeds and a 2.3 percent reduction in Average Arterial Speeds in 2040 if CTP improvements were built. (MJN, Table 2.1-3 on p. 2.1-19.).

c. CCTA's own quantitative analysis demonstrates that 2020 Measure J will not "improve air quality."

As discussed in the ballot label section *supra*, the phrase "improve air quality" is objectively untrue because the CTP EIR found that the PM_{10} pollutant is projected to increase by 20.7 percent in 2040 if CTP improvements were implemented.

Therefore, Appellant requests a ruling that the phrases "reduce congestion," "relieve congestion," "make commutes faster and more predictable," and "improve air quality" should have been deleted from the Impartial Analysis under the § 9190 "false and/or misleading" and *Huntington Beach* "verifiability" standards.

2. "Of the tax proceeds" references in the Impartial Analysis are false and misleading and should have been amended because their omission of bond financing expenditures made them objectively untrue.

References to "of the tax proceeds" in the third paragraph of the Impartial Analysis are impermissibly false and misleading under the *Huntington Beach* "verifiability" and "objectively untrue" standards. The

four components "of the tax proceeds" cited by the Impartial Analysis add to 100.0%, giving the voter the false and misleading impression that 100.0% of the sales tax revenues would be spent exclusively on those four components (MJN Exh. G, pp. 4-5). Yet none discloses bond interest expenditures or other debt service expenditures**.** The "of the tax proceeds" references are objectively untrue and should have been stricken from the Impartial Analysis unless the percentages were recalculated to include bond interest payments.

The CCTA Board approved a "Debt Policy" in 2015 as Resolution 15-03-A to "reflect changes in federal law and regulations arising from the Dodd-Frank Wall Street Transparency and Accountability Act of 2010." It says on Page 2 of 24, "Long-Term Capital Projects … Inherent in its long-term debt policies, the Authority recognizes that future taxpayers will benefit from the capital investment and that it is appropriate that they pay a share of the asset cost." Consistent with CCTA's "Debt Policy," Appellant asserts that County Counsel's "of the tax proceeds" analysis should inform voters of estimated interest expenditures associated with projects funded by this tax increase (because they represent a significant fraction of future taxpayers' share of asset costs).

CCTA's fiscal year 2018-19 "Comprehensive Annual Financial Report" discloses that CCTA has $693 million of long-term debt, which will require $204 million of interest payments through 2034, necessitating

average annual interest payments exceeding $10 million. (MJN Exh. H, p. 45.) Unless CCTA were to change its bonding practices, bond interest expenditures for 2020 Measure J would be a substantial portion "of the tax proceeds." Thus ANDERSON must disclose them in her "of the tax proceeds" analysis.[16] ANDERSON's "Impartial Analysis" misleads voters by giving the mistaken impression that none (0.0%) "of the tax proceeds" would be used to pay debt service interest.

Legislative intent strongly supports Appellant's assertion that anticipated bond financing expenditures should be disclosed to voters. Public Utilities Code § 180200, which authorized this measure (MJN Exhs. A-C.), states in part,

> The Legislature further intends that transportation authorities utilize "pay-as-you-go" financing as the preferred method of funding transportation improvements and operations authorized by Section 180205 , and that bond financing be utilized as an alternative method of funding, where the scope of the planned expenditures makes "pay-as-you-go" financing unfeasible. (Emphasis added.)

ANDERSON should have disclosed bond financing expenditures in her Impartial Analysis, as well as explain why bond financing was chosen over "the preferred method."

[16] Bond interest expenditures likely would be substantially larger than the "transportation planning" ($108 million) and "administrative costs" ($36 million) components "of the tax proceeds" discussed in the Impartial Analysis.

Therefore, Appellant requests that the Court find that the "Impartial Analysis" should have been amended to include the following (or an equivalent) statement: "If CCTA's historic pattern of bond financing is followed with this measure, a substantial percentage of the tax proceeds would be spent on interest payments."

3. ANDERSON's deliberate removal of the phrase "additional … tax" made her impartial analysis misleading to voters.

Substantial evidence does not support the Superior Court's ruling concerning the Impartial Analysis, "I do not believe that additional as opposed to supplemental is sufficiently misleading to call for statutory correction." (RT 46:2-4.) The Court should engage in *de novo* review of that interpretation of § 9190 and overturn it.

CCTA's and the BOARD OF SUPERVISORS' ordinances and resolutions approving placement of this measure on the March 2020 ballot stated that the proposed tax was "additional" to an existing CCTA sales tax (MJN Exhs. A-C), as did ANDERSON's first submission of the Impartial Analysis. (MJN Exh. E.) As admissions by Respondents, these exhibits constitute clear and convincing admissions that 2020 Measure J is an "additional" tax. Because the drafters of these official acts had clearly believed the word "additional" to be necessary for the tax increase to become legally effective, it is shocking that the final version of the

Impartial Analysis, printed in the Voter Information Guide, deleted that essential disclosure. (MJN Exh. V.)

CCTA's Board adopted Ordinance 19-03 (MJN Exh. A) on October 30, 2019. Section 5, "TRANSACTIONS TAX RATE" states "a tax is hereby imposed upon all retailers … at the rate of an additional one-half of one cent until June 30, 2055 …" (Emphasis added.) Section 7, "USE TAX RATE," states, "An excise tax is hereby imposed … at the rate of an additional one-half of one cent until June 30, 2055 …" (Emphasis added.)

CCTA Resolution 19-55-P "Requesting the Contra Costa County Board of Supervisors to Call and Consolidate a Special Election" (MJN Exh. B), declares in the third "WHEREAS" clause, "The Authority … wishes to increase such tax for special governmental purposes at an additional rate of one-half of one cent …" (Emphasis added.)

BOARD OF SUPERVISORS Resolution 2019-33 (MJN Exh. C), adopted November 19, 2019, asserts in its first section that it is "for the purpose of submitting to the voters for approval an additional one-half of one percent sales tax ..." (Emphasis added.)

ANDERSON's Impartial Analysis of CCTA's unsuccessful Measure X discloses in its first sentence that CCTA had proposed "an additional one-half of one percent (0.5%) retail transactions and use tax." (MJN Exh. D.)

MJN Exhibit E is ANDERSON's original Impartial Analysis for 2020 Measure J, submitted to the County Elections Division on or about December 10, 2019. The first sentence disclosed that CCTA had proposed "an additional one-half of one percent (0.5%) retail transactions and use tax."

Yet at the eleventh hour on December 18, 2019, after Appellant's attorney had transmitted a demand letter to her (1 AA 181-85), ANDERSON mysteriously removed the word "additional" not only from the first sentence of her analysis of 2020 Measure J, but also from her entire analysis. (MJN Exh. F.)

ANDERSON failed to provide a declaration or any other explanation in the Superior Court for her deliberate and intentional removal of the phrase "additional … tax." When the court asked at the January 6th hearing who deleted the word "additional," Deputy County Counsel Geiger replied, "I don't know." (RT 34:11.)

Appellant contends that the omission of a material term from the Impartial Analysis violates § 9190 because it fails to adequately disclose "the effect of the measure on the existing law and the operation of the measure." § 9160(b)(1). That makes the Impartial Analysis misleading to voters. Omission of "additional … tax" violates the *Huntington Beach* standard because it is readily verifiable from MJN Exhibits A through C –

the very legislative body enactments that placed the additional tax on the ballot – that 2020 Measure J would impose an "additional … tax."

The December 18th deletion of "additional … tax" can best be understood as an effort to manipulate voters into approving the measure by eliminating from the first paragraph the most directly observable indication that the measure would be a tax increase. The word "supplement," a novel and stilted euphemism for a tax increase, in the second paragraph inadequately expresses the "effect of the measure on the existing law":

> State law authorizes CCTA to adopt an ordinance proposing a one-half of one percent (0.5%) sales tax. The sales tax would be collected in the incorporated and unincorporated areas of Contra Costa County from July 1, 2020, until June 30, 2055. The proceeds from this sales tax would supplement CCTA's existing one-half of one percent (0.5%) sales tax, which will continue to be collected until March 31, 2034. (MJN Exh. V, Emphasis added.)

This is misleading and therefore does not satisfy the §§ 9160, 9190 and *Huntington Beach* standards. Voters reading the paragraph cited *supra* could interpret the first sentence as referring to the existing 0.5% sales tax and that 2020 Measure J merely extended that existing tax from 2034 until 2055. Here "supplement … existing … tax" could be interpreted by voters to signify an extension of the existing tax duration to 2055, rather than an increase in the tax rate.

The verb "supplement" does not adequately disclose to the voter "the effect of the measure on the existing law and the operation of the measure." § 9160(b)(1). "Supplement" is not a direct synonym of "additional." The *American Heritage Dictionary, 5th Edition* defines "supplement" as "[s]omething added to complete a thing." The verb "supplement" gives voters the erroneous impression that 2020 Measure J would add a small portion of revenue to CCTA rather than *double* the revenue. The verb "double" would more accurately describe the effect of the measure on existing law than "supplement."

ANDERSON should have disclosed the tax increase in a straightforward manner in her Impartial Analysis because the increase in the sales tax rate is the most significant effect of the measure on existing law. Appellant requests that the Court interpret §§ 9160, 9190 and determine that ANDERSON's removal of the word "additional" (compare MJN Exhs. E and F), not only from the prominence of the first paragraph, but also from the entire Analysis, made her Impartial Analysis misleading.

4. Failure to disclose project uncertainty made the Impartial Analysis misleading.

County Counsel's Impartial Analysis (MJN Exh. F) did not meet the Elections Code §§ 9160, 9190 standards because the Impartial Analysis omits disclosure of the TEP's lack of certainty as to how sales tax proceeds would be spent. The project funding categories for 2020 Measure J (MJN

Exh. G, p. 4) are vague and undefined, essentially a blank check for the CCTA Board to exercise discretion over.

CCTA's 2020 Measure J is extremely unusual compared to other counties' TEPs in that it is not a defined list of projects to be funded by the tax. Instead, the TEP contains at least thirteen examples of "may include" or "may consider," as well as examples of "could include" and "could also be funded." The TEP did not provide voters with an assurance of how their taxes would actually be spent, or whether the selections to be made in the future by CCTA would be effective in achieving the purported outcomes (e.g., "reduce congestion").

At a minimum, ANDERSON had a duty in her Impartial Analysis to inform voters that the TEP did not provide a defined project list, but rather that the CCTA Board would have great discretion in determining most of the projects and programs to be funded.

The TEP is ambiguous as to whether selection of projects would require a simple majority vote of the CCTA Board or whether the allocation of funding to specific projects would constitute a TEP "amendment" requiring a 66 percent Board vote (MJN Exh. G, p. 42). The Impartial Analysis should have informed voters as to whether a majority or supermajority vote of the Board would be required to determine how and where to spend these billions of discretionary dollars. Appellant requests

the Court rule that failure of the Impartial Analysis to identify the lack of project certainty made it misleading under § 9190.

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 specified *supra*, including but not limited to the following:

On procedural issues subject to a *de novo* standard of review, Appellant respectfully requests that:

- The Court issue a ruling that, when Elections Code ten-day public examination periods end on a Saturday, Sunday or other court holiday, petitioners may file challenges on the next court day.
- The Court determine that neither ballot labels for local measures nor ballot measure letter designations are subject to public examination periods under § 9190 or otherwise under the Elections Code.
- The Court determine that the scope of § 13314 is broader than mere typographical errors, and that it may be applied to remedy neglect of duty and other Elections Code violations.

- The Court determine that COOPER's "random draw" of ballot measure letter designations is inconsistent with the "continuing in alphabetical order" mandate of § 13116.
- The Court remand and direct the Superior Court to issue a writ of mandate directing COOPER to henceforth conform the County's ballot measure letter designation process to § 13116.

On a procedural issue subject to a "substantial evidence" standard of review, Appellant respectfully requests that:

- The Court overrule the Superior Court's finding that "the petition must be denied because it would unreasonably interfere with the election process because … the matter is already submitted to the printer" was not supported by substantial evidence, and clarify the burden of proof needed to establish that a challenge will not substantially interfere with the conduct of an election.

On a procedural issue subject to an "abuse of discretion" standard of review, Appellant respectfully requests that:

- the Court determine that Appellant's January 9, 2020 ex parte application to shorten time to hear a motion for reconsideration was entitled to priority under § 13314(a)(3) and therefore the Superior Court abused its discretion in denying it.

On substantive issues, Appellant respectfully requests that:

- The Court, in a case of first impression, determine that the Measure J ballot label violated recently-enacted §§ 13119(b) and (c) because the ballot label text is untrue, partial, argumentative, and/or prejudicial in favor of 2020 Measure J and the tax rate is inaccurate.
- The Court rule that the December 18, 2019 version of ANDERSON's Impartial Analysis (MJN Exh. F) was partial, false, misleading, and/or inconsistent with the Elections Code.

Dated: June 3, 2020

Respectfully submitted,

/s/ Jason A. Bezis

_____
JASON A. BEZIS
Attorney for Appellant Michael Arata

CERTIFICATE OF WORD COUNT

Pursuant to Rule 8.204(c) of the California Rules of Court, I hereby certify that this brief contains 13,997 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: June 3, 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 June 3, 2020, I served a true copy of the following document:

APPELLANT'S OPENING BRIEF

on the following parties in said action:

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I declare, under penalty of perjury, that the foregoing is true and correct. Executed on June 3, 2020, in Lafayette, California.

/s/ Jason A. Bezis

JASON A. BEZIS