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8 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 FOR THE COUNTY OF SAN DIEGO
10

11 GRETCHEN K. NEWSOM,

12 Petitioner,

13 v.

14 MICHAEL VU, in his official capacity as
15 Registrar of Voters for the County of San Diego;
and DOES 1 through 10, inclusive,

16 Respondents.

17 HANEY HONG; JACK HARKINS; CARA A.
18 LACEY; MARY ENYEART; ALLAN
19 ARROLLADO; JOSEPH HUNT; AUGUST F.
20 GHIO; JAMES D. STONE; JACQUELINE
CONSIDINE; and ROBERT CARTER,

21 Real Parties in Interest.
22
23

Case No. 37-2016-00030650-CU-WM-CTL

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PETITION FOR WRIT OF MANDATE**

IMAGED FILE

Date: September 14, 2016

Time: 9:15 a.m.

Judge: Hon. Katherine Bacal

Dept. 69

Petition Filed: September 2, 2016

24 **I. INTRODUCTION.**

25 This actions is brought pursuant to California Elections Code section 9190 to delete or
26 amend several false or misleading statements contained in the "Argument in Favor of Measure A"
27 and the "Rebuttal Arguments In Favor of Measure A" authored by Real Parties in Interest and
28 proposed to be included by Respondent VU in the official election materials for the November 8,

1 2016 election in the County of San Diego. Measure A is the designation given to the Ordinance
2 which, on July 8, 2016, the San Diego Association of Governments (“SANDAG”) voted to place on
3 the November 8, 2016 ballot.

4
5 **II. OVERVIEW OF MEASURE A.**

6 Measure A would levy an additional half-cent sales tax within San Diego County for the
7 next 40 years to fund various infrastructure projects. Section 3.A of the Ordinance states:

8 This Ordinance provides for the implementation of the Expenditure Plan, and
9 imposition and administration of a transactions and use tax. All of the gross
10 revenues generated from the transactions and use tax, plus any interest or other
11 earnings thereon (collectively, “Revenues”), after the deduction for amounts
12 payable to the State Board of Equalization for the performance of functions
13 incidental to the administration and operation of the Ordinance, shall be defined
14 as “Program Revenues” and shall be allocated solely for the purposes described in
15 this Ordinance.

16 Section 3.C, in turn, states:

17 The specific projects and Programs that may be funded by the Ordinance are
18 further described in the document entitled “Expenditure Plan”, which is attached
19 to the Ordinance and hereby incorporated by reference as if fully set forth herein.”

20 Of particular relevance to the present Petition are two portions of Measure A: the Local
21 Infrastructure Projects Program (“LIPP”) described in Section 6 of the Ordinance; and the
22 competitive grant program to fund specialized transportation projects described in Section 11.C of
23 the Ordinance.

24 Section 6 of the Ordinance allocates “a minimum of twenty-four percent (24%) of Net
25 Revenues ... to fund implementation of the [“LIPP”] using the formula specified in this Section, to
26 each Local Agency to supplement other revenues available for those purposes.” The Ordinance
27 further provides six categories of “[e]xamples of Eligible Uses for funding in the [LIPP,]” but
28 explicitly states that eligible uses of LIPP funds are not limited to these six examples. The six non-

1 exclusive example categories provided in the Ordinance are: Transit; Habitat; Roads; Beach Sand;
2 Greenhouse Gas Reduction; and, lastly, Watershed Management. Local Agencies **are not required**
3 by the Ordinance to spend LIPP funds on each and every one of these categories, but instead have
4 complete discretion to spend all their funds on just one or two categories. In fact, SANDAG’s
5 Executive Director has stated that Local Agencies could choose to spend all their LIPP funds on
6 pothole repairs, and in fact he expects many of those Local Agencies to do just that. (Ochoa Decl.,
7 ¶ 3.)

8 Section 11.C of the Ordinance, meanwhile, allocates “a minimum of 3 percent of Net
9 Revenues ... to support a competitive grant program to fund specialized transportation projects[,]”
10 which are defined as “projects that complement traditional transit and paratransit services” and that
11 are “specifically designed to address the needs of transportation disadvantaged populations (seniors,
12 students, disabled, low-income, veterans)[.]” The various types of eligible “specialized
13 transportation projects” which are eligible for these competitive grants are:

- 14 1) “the operations of specialized transportation services serving these population groups;”
- 15 2) “capital projects including related vehicle and technology procurements;”
- 16 3) “coordination efforts among specialized transportation providers;”
- 17 4) “mobility management services for the targeted population groups;”
- 18 5) “funding to support projects that enhance accepts to public transit, including station

19 improvements, Transportation Demand Management programs to incentivize public transit and
20 specialized transportation use;” and

21 6) “parking management programs or strategies to support smart growth and transit oriented
22 development.”

23 Notably, there is nothing in Section 11.C that requires any of the “specialized
24 transportation” grant funds go to “reducing fares for seniors, students, the disabled and veterans[,]”
25 as is claimed by the PRIMARY AUTHORS in their Primary Argument. In fact, because this is a
26 competitive grant program, for which the SANDAG Board of Directors have yet to “establish
27 specific project eligibility criteria[,]” it is impossible to say how likely it is that any of these funds
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1 under Section 11.C of the Ordinance would go toward “reducing fares for seniors, students, the
2 disabled and veterans.”

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4 **III. THE ELECTIONS CODE REQUIRES THE DELETION OF FALSE OR**
5 **MISLEADING BALLOT ARGUMENTS IN ORDER TO PROTECT THE**
6 **VOTERS AND TO ENSURE THE INTEGRITY OF THE ELECTORAL**
7 **PROCESS.**

8 Under Elections Code section 9190, any elector may seek a writ of mandate requiring that
9 any materials proposed to be included in the official ballot pamphlet, including the ballot arguments
10 for or against a measure, be amended or deleted because “the material in question is false,
11 misleading, or inconsistent with this chapter.” The veracity and accuracy of the information
12 presented in the “limited public forum” of the ballot pamphlet is of paramount public importance.
13 (*Patterson v Board of Supervisors* (1988) 202 Cal.App.3d 22, 28-32; see *Gebert v Patterson* (1986)
14 186 Cal.App.3d 868, 873074.) Section 9190’s prohibition on ballot arguments that are either
15 demonstrably false or merely misleading evinces the Legislature’s determination that the State of
16 California “has a strong interest in providing the electorate with accurate information in voter
17 pamphlets.” (*Washburn v City of Berkeley* (1987) 195 Cal.App.3d 578, 585; *Hull v. Rossi* (1993) 13
18 Cal.App.4th 1763, 1768.) Indeed, the State’s interest in assuring that ballot arguments are
19 completely truthful and accurate is even more compelling than its interest in protecting voters from
20 false, biased or unfair campaign literature distributed to them directly by partisans in the campaign.

21 That is because:

22 “the voter’s pamphlet can have a substantial impact on the equality and fairness of
23 the electoral process. Unlike other vehicles for partisan political argument, the
24 pamphlet is printed by a governmental body and distributed to all registered voters.
25 The arguments set forth therein are likely to ‘carry greater weight in the minds of
26 voters than normal campaign literature’”

27 (*Patterson v. Board of Supervisors, supra*, 202 Cal.App.3d at 30, quoting *Knoll v*
28 *Davidson* (1974) 12 Cal.3d 335, 352.)

1 Moreover, “[a]ccuracy in ballot arguments is of additional importance because they are
2 ‘accepted sources from which courts ascertain voters’ intent and understanding of initiative
3 measures.’” (*Washington v. City of Berkeley, supra*, 195 Cal.App.3d at 585, quoting *In re Lance W.*
4 (1985) 37 Cal.3d 873, 888, fn. 8; accord *Patterson v. Board of Supervisors, supra*, 202 Cal.App.3d
5 at 30.) It is for these reasons that it is so critical for the judicial branch to scrutinize ballot
6 arguments and excise any allegation that could mislead the voters and improperly influence the
7 ballots they cast.

8 As demonstrated below, the ballot arguments submitted by the proponents of Measure A
9 contain such glaring inaccuracies and false and misleading implications that they pose a serious
10 threat to the integrity of the electoral process. All Petition seeks by this action is a fair and free
11 election on Measure A, so that the voters of San Diego County may cast their ballots
12 uncontaminated by officially sanctioned misinformation and disinformation. Under the principles
13 of a fair democratic process and the specific dictates of Elections Code section 9190, the challenged
14 statements should be ordered deleted from the Primary Arguments and the Rebuttal Arguments or
15 amended to conform to the requirements of law.

16
17 **IV. THE CHALLENGED STATEMENTS IN THE PRIMARY AND REBUTTAL**
18 **ARGUMENTS IN FAVOR OF MEASURE A ARE FALSE AND/OR**
19 **MISLEADING, AND THEY MUST THEREFORE BE DELETED OR**
20 **AMENDED TO COMPLY WITH THE LAW.**

21 The following statement in the Primary Arguments in Favor of Measure A and Rebuttal
22 Arguments in Favor of Measure A either make or imply statements of fact that are simply not true.

23
24 **A. “Reverse decades of neglect to San Diego’s infrastructure by ... Expanding transit.**
25 **Reducing fares for seniors, students, the disabled and veterans.”**

26 This statement in the Primary Argument is false and is *certainly misleading* in that it
27 unequivocally implies, through the use of what grammaticians call the “imperative mood,” that
28 Measure A will “reduc[e] fares for seniors, students, the disabled and veterans[,]” when there is

1 nothing in Measure A that guarantees any funds raised by this new tax will go to that purpose. (*Cf.*
2 Ordinance, Section 6; Ochoa Decl., ¶ 3.) Rather, Measure A merely allows local jurisdictions to opt
3 to use LIPP funds for discounted student passes, and as SANDAG’s Executive Director has
4 admitted, local agencies are unlikely to use LIPP funds for discounted student transit passes.
5 (Ochoa Decl., .) In fact, it is noteworthy that SANDAG itself has always been careful to phrase the
6 use of LIPP funds for reduced transit passes and other uses in the “conditional mood” (“could be
7 used”) as opposed to the imperative, or declarative, mood (“reduce fares”). (Ochoa Decl., ¶¶ 4-5;
8 see also *id.*, Exh. 1.) Further, the only language in Measure A regarding “seniors, students, the
9 disabled and veterans” is the competitive grants which Measure A would create for “specialized
10 transportation projects” – competitive grants for which no project eligibility criteria currently
11 exists, and which the language of Measure A does not mention, much less guarantee, could be used
12 for reduced fares for these populations. (Ordinance, Section 11.C.) As such, it is demonstrably
13 false, and unquestionably misleading, for the PRIMARY AUTHORS to imply that Measure A will
14 “reverse decades of neglect to San Diego’s infrastructure by ... reducing fares for seniors, students,
15 the disabled and veterans.”

16 Accordingly, this statement must be amended to *properly* reflect the nature of the funding
17 which Measure A *might* make available for these purposes. A lawful amendment to this phrase
18 might read “Reverse decades of neglect to San Diego’s infrastructure by ... Expanding transit.
19 Make funds available for reduced fares for seniors, students, the disabled and veterans.”¹

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27 ¹ To the extent the addition of four words to this phrase causes the Primary Argument to exceed the
28 maximum number of words permitted, Petitioner does not object to PRIMARY AUTHORS deleting the requisite number of words from another section of the Primary Argument – so long as such a deletion does not render another section false or misleading.

1 **B. Reverse decades of neglect to San Diego’s infrastructure by ... Improving water**
2 **quality by treating polluted runoff.**”

3 **C. “IMPROVE WATER QUALITY ... Measure A will clean up millions of gallons of**
4 **toxic roadway runoff.”**

5 These two statements, the first in the Primary Argument and the second in the Rebuttal
6 Argument, are both false and *certainly misleading*. The first statement unequivocally implies, and
7 the second statement unambiguously asserts, that Measure A will “improv[e] water quality” by
8 treating polluted runoff. There is, however, nothing in Measure A that guarantees any funds raised
9 by this new tax will go to that purpose. As more fully set forth above, LIPP funds may be used in a
10 variety of ways, and SANDAG’s Executive Director has admitted that many jurisdictions,
11 including the largest recipient of LIPP funds, are likely to use these funds to fill potholes, not to
12 treat stormwater runoff. (Ochoa Decl., ¶ 3.) SANDAG itself has correctly described the impact that
13 Measure A could have on water quality as: “Local cities could ... clean up polluted stormwater
14 runoff.” (*Id.*, Exh. 1.) (emphasis supplied).

15 Accordingly, these statement must be amended to *properly* reflect the nature of the funding
16 which Measure A *might* make available for these purposes. A lawful amendment to the first phrase
17 might read “Reverse decades of neglect to San Diego’s infrastructure by ... Making funds available
18 to improve water quality by treating polluted runoff.”² A lawful amendment to the second phrase
19 might delete the declarative phrase “IMPROVE WATER QUALITY” and rewrite the remainder of
20 the statement to read “Measure A will make funds available to clean up millions of gallons of toxic
21 roadway runoff.”

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26 _____
27 ² To the extent the addition of four words to this phrase causes the Primary Argument to exceed the
28 maximum number of words permitted, Petitioner does not object to PRIMARY AUTHORS deleting the requisite number of words from another section of the Primary Argument – so long as such a deletion does not render another section false or misleading.

1 **D. “Local Nurses, Fire Fighters & First Responders: Critical Safety Repairs Save**
2 **Lives.”**

3 **E. “Local Nurses, Paramedics/Emergency Room Doctors: Measure A gets first**
4 **responders to accidents/natural disasters quicker to save lives.”**

5 These two statements, the first in the Primary Argument and the second in the Rebuttal
6 Argument, create the misimpression that “local nurses” collectively support Measure A, when in
7 fact the opposite is true. As established by the concurrently-filed declarations of Terry Bunting and
8 Eric Robles, no known organization of “local nurses” is in support of Measure A. To the extent
9 “local nurses” as a cognizable group have expressed any position regarding Measure A, the
10 positions range from seriously concerned (United Nurses Associations of California/Union of
11 Healthcare Professionals or “UNAC”) to participating in the coalition opposed to the measure (the
12 California Nurses Association or “CNA”). The statement in the Primary Argument concerning
13 “local nurses” is therefore designed to mislead electors into erroneously believing that local nurses’
14 organizations are in support of Measure A. The reference to “local nurses” should therefore be
15 deleted from both statements, and the resulting statements should be amended to read “Local
16 Fire Fighters & First Responders: Critical Safety Repairs Save Lives.” and “Local
17 Paramedics/Emergency Room Doctors: Measure A gets first responders to accidents/natural
18 disasters quicker to save lives.”

19
20 **F. “James Stone [¶] The San Diego Environment Coalition.”**

21 This claim of organizational affiliation in the Rebuttal Argument is designed to mislead the
22 public into believing an actually existing and functioning coalition of environmental organizations
23 is in support of Measure A.³ As of the date that the REBUTTAL AUTHORS submitted their
24 Rebuttal Argument to Respondent VU, however, this putative coalition had no presence to speak of
25 in San Diego County. In fact, it was not until the day after the Rebuttal Arguments were submitted,
26

27 ³ To be clear, we do not dispute that there are a few actually existing environmental organizations
28 which support Measure A. Rather, we contend that “The San Diego Environment Coalition” is a
campaign prop with no independent existence or *raison d’etre* other than to mislead voters.

1 and the same day the present Petition was filed, that the “San Diego Environmental Coalition” first
2 appeared, in the form of a press release republished online, and yet to be seen from again. (Ochoa
3 Decl., ¶ 6, Exh. 2.). By all indications, therefore the “San Diego Environment Coalition” is nothing
4 more than an “Astroturf” coalition hastily cobbled together in the style of a Potemkin village to
5 mislead the voters. (Zellner, *Artificial Grassroots Advocacy and the Constitutionality of Legislative*
6 *Identification and Control Measures*, (2010) 43 Conn.L.Rev. 357, 361 [“The above examples
7 highlights a phenomenon more widely known as ‘Astroturfing,’ or fake grassroots advocacy, a
8 practice that has become popular among particular groups and individuals. ... Despite its apparent
9 popularity, though, Astroturfing retains questionable characteristics. ... [I]t relies heavily on
10 misrepresentation, and in many cases does not advance the interests of the general public.”].) The
11 reference to “The San Diego Environment Coalition” should therefore be stricken, and the
12 organizational affiliation of Real Party in Interest JAMES D. STONE should instead be listed as
13 “Circulate San Diego.”

14
15 **V. CONCLUSION.**

16 All that Petitioner seeks is a fair election on Measure A, one that is not tainted by false and
17 misleading statements in the ballot arguments. Petitioner seeks this Court’s assistance in achieving
18 that result, as envisioned by Elections Code section 9190. The offending statements from the
19 Primary and Rebuttal Arguments in Favor of Measure A should therefore be deleted as set forth
20 above.

21
22 DATED: September 8, 2016

Respectfully submitted,

23 **OCHOA|LAW**
24 **RICARDO OCHOA**

25 

26 By: _____
RICARDO OCHOA

27 Attorneys for Petitioner,
28 GRETCHEN K. NEWSOM