

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SACRAMENTO

**TRAVIS ALLEN,
Petitioner,**

v.

**XAVIER BECERRA, in his capacity as
ATTORNEY GENERAL OF CALIFORNIA, and
DOES 1-100, inclusive,
Respondents.**

Case Number: 34-2017-80002643

TENTATIVE RULING

Date: September 22, 2017

Time: 9:00 a.m.

Dept.: 29

Judge: Timothy M. Frawley

Proceeding: Petition for Writ of Mandate and Declaratory Relief

Tentative Ruling: Appearances Required

In this writ proceeding, Petitioner Travis Allen challenges the circulating title and summary for a 2018 ballot initiative measure. Petitioner contends that the title and summary prepared by Respondent Attorney General is confusing and misleading and likely to create prejudice against the proposed measure. Petitioner seeks a writ of mandate ordering Respondent to adopt a revised title and summary that is an accurate, objective, and impartial summary of the chief purposes and points of the initiative. The court's tentative ruling is to grant the petition.

Background Facts and Procedure

In April of 2017, the Legislature enacted Senate Bill 1, the Road Repair and Accountability Act of 2017 (“SB 1”). Among other things, SB 1 imposes various taxes and fees to increase funding for road maintenance, mass transit, and other transportation programs. In enacting SB 1, the Legislature found that, over the next ten years, the State faces a \$59 billion shortfall to adequately maintain the existing state and local roadway system. The Legislature also found that taxes and fees dedicated to maintenance of the system had not been increased in more than twenty years.

SB 1 is expected to raise over \$52.4 billion in new transportation funding over ten years, beginning on November 1, 2017. The key sources of new transportation funding consist of: (i) a \$0.12 per gallon increase of the excise tax on gasoline, beginning November 1, 2017; (ii) a \$0.20 per gallon increase of the excise tax on diesel fuel, beginning November 1, 2017; (iii) a 4% increase of the sales tax on diesel fuel, beginning November 1, 2017; (iv) a new annual “transportation improvement fee” on all vehicles, ranging from \$25 to \$175 based on the vehicle’s market value, beginning on January 1, 2018; (v) a new “road improvement fee” of \$100 for registration/renewal of zero-emission vehicles model year 2020 or later, beginning July 1, 2020.

SB 1 designates the new funding to be used for road maintenance and rehabilitation, transit improvements, and other transportation purposes and programs. According to the Legislative Analyst’s Office, SB 1 is expected to distribute \$2.6 billion in new funding in 2017-18, as follows: \$742 million for repair and maintenance of state highways and local roads; \$550 million for transit; \$450 million for congested/trade corridors; \$400 million for repair and maintenance of state bridges and culverts; \$200 million for local partnership road repair and maintenance projects; \$100 million for bicycle and pedestrian projects; \$71 million for state parks and agricultural programs; \$66 million for other transportation-related programs.

SB 1 creates a number of new programs and funds to distribute the funds, including the Road Maintenance and Rehabilitation Program, the Congested Corridors Program, and the Advance Mitigation Program.

SB 1 also includes a number of other changes in addition to the new programs and new taxes and fees. For example, it provides for the repayment from the General Fund of outstanding transportation loans totaling \$706 million. It establishes new 10-year performance targets for the state highway program. It repeals portions of the Tribal Compact Assets Securitization Act. It requires Caltrans to develop a plan to increase the dollar value of contracts and

procurements awarded to small businesses, disadvantaged business enterprises, and disabled veteran business enterprises. It requires the DMV to confirm, prior to registration/renewal of certain heavy diesel-fueled vehicles, that the vehicle is compliant with applicable air pollution control requirements. And it creates a “useful life” period for commercial trucks, during which truck owners will not be required to replace or modify the vehicle’s engine and emission control systems.

SB 1 also includes new “accountability” provisions, including the creation of an “Independent Office of Audits and Investigations,” with an appointed director to be known as the “Inspector General,” to ensure Caltrans makes efficient, effective, and financially responsible transportation decisions, and spends funds consistent with applicable standards, practices, and requirements.

SB 1 was enacted as urgency legislation, meaning that it took effect immediately upon its approval by the Governor, on April 28, 2017.

On May 3, 2017, Petitioner Allen filed with the Office of the Attorney General a ballot initiative (17-0004) seeking to repeal many of the provisions of SB 1, including the new taxes and fees. Pursuant to Elections Code section 9001, Petitioner requested the Attorney General to prepare a circulating title and summary for the proposed initiative measure.

Pursuant to Elections Code sections 9001, 9004, and 9051, the Attorney General is required to prepare, in 100 words or less, a circulating title and summary of the “chief purposes and points” of the proposed measure. (Cal. Elec. Code §§ 9001, 9004, 9051.) The title and summary cannot be misleading, argumentative, or likely to create prejudice for or against the measure. (*Ibid*; see also *Brennan v. Board of Supervisors* (1981) 125 Cal.App.3d 87, 93; *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal. 3d 208, 243; *Costa v. Superior Court* (2006) 37 Cal.4th 986, 1016.) It must be a “true and impartial statement” that reasonably informs voters of the character and real purpose of the proposed measure in clear and understandable language. (Cal. Elec. Code § 9051; see also *Lungren v. Superior Court* (1996) 48 Cal.App.4th 435, 440; *Widders v. Furchtenicht* (2008) 167 Cal.App.4th 769, 781; *Yes on 25, Citizens for an On-Time Budget v. Superior Court* (2010) 189 Cal.App.4th 1445, 1452.)

On July 7, 2017, Petitioner submitted the following proposed circulating title and summary language to the Attorney General:

REPEALS RECENT LEGISLATION THAT CREATED NEW GAS TAX, DIESEL TAX, VEHICLE REGISTRATION FEE, AND ZERO-EMISSION VEHICLE FEE. INITIATIVE STATUTE. Repeals 12-cent per gallon gas tax and 20-cent per gallon diesel tax that take effect November 1, 2017. Repeals \$25-\$175 vehicle registration fee that takes effect January 1, 2018. Repeals \$100 zero-emission vehicle fee that takes effect July 1, 2020. Repeals transportation spending programs funded by these taxes and fees. Summary of estimate by Legislative Analyst and Director of Finance of fiscal impact on state and local government: **Decreased revenue to state and local governments of about \$5.2 billion annually.** (17-0004.)

On June 23, 2017, the Legislative Analyst's Office (LAO) issued its analysis of Initiative 17-0004. The LAO's analysis indicates that the initiative "would repeal most provisions of SB 1, including all tax and fee increases and all accountability measures contained in the legislation." (Verified Petition, Exh. D.)

On July 10, 2017, Respondent Attorney General issued a circulating title and summary for Petitioner's proposed initiative. It reads as follows:

ELIMINATES RECENTLY ENACTED ROAD REPAIR AND TRANSPORTATION FUNDING BY REPEALING REVENUES DEDICATED FOR THOSE PURPOSES. INITIATIVE STATUTE. Eliminates recently enacted state and local transportation funding for repair and maintenance of streets, highways, bridges, safety projects, and public transportation by repealing portions of the tax on gasoline (\$0.12 per gallon) and diesel fuel (\$0.20 per gallon), sales and excise taxes on diesel fuel (4% per gallon), vehicle registration fees (\$25-\$175, depending on vehicle value), and \$100 zero-emission vehicle fee. Eliminates Independent Office of Audits and Investigations, which is responsible for ensuring accountability in the use of revenue for transportation projects. Summary of estimate by Legislative Analyst and Director of Finance of fiscal impact on state and local government: **Reduced annual state transportation revenues of \$2.9 billion in 2018-19, increasing to \$4.9 billion annually by 2020-21. These revenues would otherwise primarily support state highway maintenance and rehabilitation, local streets and roads, and mass transit.** (17-0004).

On July 17, Petitioner filed his Verified Petition for Writ of Mandate and Declaratory Relief. Petitioner alleges that the Attorney General's circulating title and summary is false, argumentative, and misleading, and does not provide a true and impartial statement of the

chief purposes and points of the measure. Petitioner seeks injunctive and mandamus relief ordering the Attorney General to adopt a revised title and summary that fairly and accurately describes the initiative.

Standard of Review

In recognition that drafting a title and summary can be a difficult task, the courts afford substantial deference to the Attorney General's actions. As a general rule, substantial compliance with the "chief purpose and points" provision is sufficient, and all legitimate presumptions must be indulged in favor of the Attorney General's actions. A petitioner challenging the Attorney General's ballot materials must overcome the presumption that the ballot materials are sufficient. If reasonable minds may differ, the ballot materials prepared by the Attorney General must be upheld. A peremptory writ of mandate shall issue only upon "clear and convincing" proof that the Attorney General's ballot materials are false, misleading, or inconsistent with the requirements of the election laws. (*Yes on 25, Citizens for an On-Time Budget v. Superior Court* (2010) 189 Cal.App.4th 1445, 1452-53; *Lungren v. Superior Court* (1996) 48 Cal.App.4th 435, 439-440; *McDonough v. Superior Court* (2012) 204 Cal.App.4th 1169, 1174.)

Evidentiary Objections & Requests for Judicial Notice

Respondent Attorney General objects to Exhibits 2-8 attached to the Declaration of Garrett M. Fahy, consisting of a press release and news articles, on the grounds the documents are hearsay and irrelevant. The court shall overrule the objection. The press release and news articles are not offered for the truth of the matter asserted, but only to indicate what was in the public realm. While this is of limited relevance, the court is not persuaded that it is irrelevant.

Petitioner's requests for judicial notice, which are not opposed, are granted.

Discussion

Petitioner asserts several challenges to the Attorney General's circulating title and summary. First, he argues that the title is false and misleading because it suggests the chief purpose of the initiative is "eliminating" amorphous transportation "funding" and "revenues," rather than repealing specific "taxes" and "fees." Second, he argues that the title and summary is confusing, misleading, and biased because it does not clearly inform voters what "funding" would be eliminated by the measure. Third, he argues the title and summary is misleading because it improperly suggests the "funding" to be eliminated already exists and is "dedicated"

for transportation purposes. Fourth, he argues the title and summary is false and misleading because it suggests the initiative will “eliminate” the Independent Office of Audits and Investigations, when that office does not yet exist.

Respondent Attorney General argues that the title and summary accurately states that the initiative will repeal “revenues,” rather than taxes or fees, because the initiative would repeal most of the provisions of SB 1, and SB 1 is about more than taxes and fees. In addition, the Attorney General argues that the title must be read in conjunction with the summary, which clearly states that the initiative would repeal taxes and fees, and spells out exactly what taxes and fees would be repealed. The Attorney General disputes that the title and summary must specify when those taxes and fees will take effect, since the taxes and fees will be in effect by the time the initiative appears on the ballot.

The Attorney General also argues that the title and summary accurately states that the funds to be eliminated are “dedicated” for transportation purposes under current laws, and that the initiative would “eliminate” the Independent Office of Audits and Investigations, which was created on April 28, 2017.

The court agrees with Petitioner that the Attorney General’s title and summary is confusing, misleading, and likely to create prejudice against the proposed measure. While the court is mindful of the deference afforded to the Attorney General, it is clear to this court that the Attorney General’s title and summary does not fairly and reasonably inform voters of the real purpose of the measure in clear and understandable language.

The problem with the Attorney General’s title and summary is that an ordinary, reasonable elector, who is otherwise unfamiliar with the initiative, would not be able to discern what the initiative would do.

As both parties seem to agree, and as the LAO stated in its analysis, the purpose of the proposed initiative is to repeal most of the provisions of SB 1. Thus, the purpose of the initiative is tied to the provisions of SB 1 that the initiative seeks to repeal. As summarized by the LAO, the Legislature enacted SB 1 to increase state funding for California’s transportation system. “The legislation (1) raises new revenue through various taxes and fees, (2) dedicates the new revenues to various transportation programs, and (3) includes several accountability and other provisions.” (Verified Petition, Exh. D [LAO Analysis].) The primary purpose of the initiative is to repeal the new taxes and fees authorized by SB 1 and the transportation spending to be funded by them.

This purpose is obscured by the Attorney General's title, which states that the measure eliminates "transportation funding" by "repealing revenues" dedicated for that purpose. This is poor phrasing, as it suggests the goal of the initiative is to eliminate transportation funding, which is to be accomplished by "repealing" the revenues dedicated for that purpose. In fact, the purpose of the initiative is to eliminate the taxes and fees authorized by SB 1 and the transportation spending to be funded by those taxes and fees. "Repealing revenues" is not a means to an end, but an end in itself.

Aside from this issue, there is a more fundamental problem, which is that an ordinary, reasonable voter cannot be expected to understand what the phrase "repealing revenues" means. While taxes and fees may be income to the State, the ordinary voter does not associate taxes and fees with "revenues." Moreover, the term repeal, which means to annul, rescind, cancel, or nullify, is a term generally associated with laws or legislative acts, not "revenues." Thus, it is both unclear and inaccurate to state the initiative will eliminate funding by "repealing revenues." What the initiative would do is to repeal taxes and fees (legislation) expected to raise new revenues. But an ordinary voter reading the Attorney General's title is highly unlikely to understand this. Rather, the ordinary voter would assume that the sole purpose of the measure is to eliminate (reduce) transportation funding. The title appears to be written to focus attention on the elimination of funding and avoid mentioning "taxes" and "fees." This is misleading and is likely to create prejudice against the measure.

The Attorney General argues that the title and summary must be read together, and suggests that any deficiencies in the title are cured by the summary. According to the Attorney General, the summary "clearly" informs voters that the measure would repeal taxes and fees, and "spells out exactly what taxes and fees would be repealed."

While the court agrees that the title and summary must be read together, this does not excuse a misleading title. The ballot title and summary must work together to reasonably inform voters of the character and real purpose of the proposed measure. Here, the title and summary both emphasize that the measure will eliminate "recently enacted . . . funding," but the inconsistent language creates confusion about what is being "repealed."

Moreover, the Attorney General's summary is inadequate to cure the defects in the title. First, the summary repeats the error in the title, confusing ends and means, and thereby suggesting that the sole purpose of the initiative is to eliminate recently enacted transportation funding.

Second, contrary to what the Attorney General argues, the summary is not clear and does not “spell out exactly” what taxes and fees would be affected by the measure. The summary provides, in relevant part:

Eliminates recently enacted . . . transportation funding . . . by repealing portions of the tax on gasoline (\$0.12 per gallon) and diesel fuel (\$0.20 per gallon), sales and excise taxes on diesel fuel (4% per gallon), vehicle registration fees (\$25-\$175, depending on vehicle value), and \$100 zero-emission vehicle fee.

This sentence is rife with ambiguity because it is unclear (1) whether the qualifier “portions of” applies only to the tax on gasoline and diesel fuel or to everything in the series (gas/fuel tax, registration fees, and zero-emission vehicle fee, and as a result it is unclear (2) whether the parenthetical represents the “portion” repealed or the full amount of the tax/fee. The court knows that SB 1 increased the excise tax on gasoline by \$0.12 per gallon, and that the initiative would repeal this tax, but the voter easily could construe the language to mean that the initiative would repeal some unspecified portion of an existing \$0.12-per-gallon tax on gasoline.

This would have been less of a problem if the Attorney General had chosen to place the qualifier “recently enacted” before the description of the taxes and fees, rather than before the phrase “transportation funding.” If this had been done, it might have been clear that the initiative is only repealing recently enacted taxes and fees, rather than some “portion” of existing taxes and fees. However, as written, “recently enacted” only modifies “funding,” supporting Petitioner’s argument that the title and summary obscures the chief purpose of the initiative: repealing the recently-enacted increases in taxes and fees.

By contrast, Petitioner’s proposed summary is clear what the initiative would repeal, namely the “12-cent per gallon gas tax that takes effect November 1, 2017,” the “20-cent per gallon diesel tax that takes effect November 1, 2017,” the “\$25-\$175 vehicle registration fee that takes effect January 1, 2018,” the “\$100 zero-emission vehicle fee that takes effect July 1, 2020,” and the “transportation spending programs funded by these taxes and fees.” The court is not suggesting that the Attorney General was (or is) required to use the Petitioner’s proposed title and summary,¹ but Petitioner’s proposal shows it is not difficult to write a summary of the initiative in clear and understandable language. And this does call into question why the Attorney General used the confusing language that he did.

¹ Neither is the court suggesting that the title must use the word “tax;” that the title or summary necessarily must include the dates when the taxes and fees take effect; or that the title and summary must comprise a verbatim recitation of the initiative. To the extent Petitioner makes these claims, they are rejected.

The Attorney General may argue that Petitioner’s summary and title focuses too heavily on the repeal of the recently-enacted taxes and fees, and downplays the reduction in transportation spending. Yet the Attorney General’s summary and title overcompensates, focusing so heavily on the elimination of funding that it obscures the chief purpose of the initiative: repeal of the recently-enacted taxes and fees.

However, the court agrees with the Attorney General that the title and summary is not misleading because it refers to the funds as “dedicated” for transportation purposes. Under current law, the funds reasonably can be described as “dedicated” for transportation purposes, even if the Legislature legally could change course and use the funds for another purpose.

The court also agrees with the Attorney General that the title and summary does not mislead by including the elimination of the Independent Office of Audits and Investigations as a chief point and purpose of the initiative. Reasonable minds may differ as to whether this is a chief point and purpose of the initiative. And where reasonable minds may differ, the ballot materials prepared by the Attorney General must be upheld.

The court also agrees with the Attorney General that the title and summary does not mislead voters to believe the initiative would completely eliminate “all” transportation funding, though it does mislead by suggesting that the initiative would eliminate *currently existing* funding, as discussed above. Likewise, by failing to inform voters that the Independent Office of Audits and Investigations is a newly created office, the title and summary misleads voters into believing the initiative will eliminate existing audit and investigative functions when, in fact, the Office currently exists only on paper.

To avoid misleading the voters and creating prejudice against the measure, the Attorney General must prepare a “true and impartial statement” that reasonably informs voters of the character and real purpose of the proposed initiative in clear and understandable language. The existing circulating title and summary fails this test. Accordingly, the court grants the petition ordering the Attorney General to revise the circulating title and summary in a manner consistent with this ruling. The Attorney General should be prepared at the hearing to discuss alternative language for the title and summary.

<p>Any party desiring an official record of this proceeding shall make arrangements for reporting services with the clerk of the department where the matter will be heard not later than 4:30 p.m. on the day before the hearing. The fee is \$30.00 for civil proceedings lasting under one hour, and \$239.00 per half day for proceedings lasting more than one hour. (Local Rule 1.12</p>
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and Government Code § 68086.)