NIELSEN MERKSAMER
PARRINELLO GROSS & LEONI LLP
Kurt R. Oneto (S.B. No. 248301)
Arthur G. Scotland (S.B. No. 62705)
Richard D. Martland (S.B. No. 33162)
1415 L Street, Suite 1200
Sacramento, California 95814
Telephone: (916) 446-6752
Facsimile: (916) 446-6106
E-mail: koneto@nmgovlaw.com
E-mail: ascotland@nmgovlaw.com
E-mail: rmartland@nmgovlaw.com

NIELSEN MERKSAMER
PARRINELLO GROSS & LEONI LLP
Sean P. Welch (S.B. No. 227101)
Christopher E. Skinnell (S.B. No. 227093)
2350 Kerner Boulevard, Suite 250
San Rafael, California 94901
Telephone: (415) 389-6800
Facsimile: (415) 388-6874
E-mail: swelch@nmgovlaw.com
E-mail: cskinnell@nmgovlaw.com

Attorneys for Petitioner
DAVIS WHITE

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SACRAMENTO

DAVIS WHITE,

Petitioner,

vs.

ALEX PADILLA, in his official capacity as Secretary of State of California,

Respondent.

XAVIER BECERRA, in his official capacity as Attorney General of California; GABRIEL PETEK, in his official capacity as Legislative Analyst of California; and JERRY HILL, in his official capacity as State Printer for the State of California; and DOES I through X, inclusive,

Real Parties in Interest.

Case No.

MEMORANDUM OF POINTS & AUTHORITIES IN SUPPORT OF PETITION FOR WRIT OF MANDATE

DATE:
TIME:
DEPT:
JUDGE: Hon.

ELECTION CASE - CALENDAR PREFERENCE REQUIRED BY STATUTE (ELEC. CODE § 13314(a)(3))

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I. INTRODUCTION

This case challenges the false, misleading, and prejudicial ballot materials drafted by the Attorney General for Proposition 22, which is to be voted on at the November 3, 2020 election.

The Attorney General's title and summary was not always false and misleading. As written by him for the petition circulated to obtain voters' signatures qualifying the measure for the ballot, the title and summary was a true and impartial statement of the purpose of the measure and was not an argument nor likely to create prejudice for or against the proposed initiative. (Elec. Code, § 9004 and 9051.) Thereafter, however, the Attorney General sued two of the measure's largest supporters and sponsors, Uber and Lyft, for allegedly misclassifying drivers as independent contractors; denounced Proposition 22 as an attempt at "enshrining [Uber and Lyft's] ability to mistreat workers;" and publicly condemned Uber and Lyft for supporting Proposition 22. (See Petitioner's Request for Judicial Notice ("Pet. RJN"), filed herewith, at Exhibit F [pg. 4, ln. 19-20].) Then, the Attorney General reworded the ballot title and summary in a false, misleading, prejudicial, and political way obviously calculated to create voter bias against Proposition 22. As neutral observers have noted, for "Proposition 22, the Attorney General's description all but cries out for voters to reject it." (John Diaz, Editorial Page Editor, San Francisco Chronicle, "*California Attorney General Loads Language On 2 November Measures*," Jul. 26, 2020.[1])

While courts generally give deference to the Attorney General's authority to prepare titles and summaries of proposed initiatives, that power is not absolute. This Court must ensure that the ballot label and ballot title and summary for Proposition 22 comply with the requirements of the Election Code, which are critical to protecting the integrity of our elections.

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[1] https://www.sfchronicle.com/opinion/diaz/article/California-attorney-general-loads-language-on-2-15434094.php

The facts of this case are not complicated. Over the past three decades, the courts and the Legislature have modified the factors used to determine whether a worker qualifies as an employee or an independent contractor, which is the subject of Proposition 22. Following the courts' and Legislature's lead, Petitioner filed an initiative statute—Proposition 22—that clearly and plainly does two things: (1) establishes an updated set of factors to be used on a case-by-case basis when determining whether an individual performing rideshare or delivery services through a network company's online platform is an employee or independent contractor; and (2) for drivers that qualify as independent contractors, provides a new, enhanced suite of earnings, insurance, and discrimination/harassment protection benefits. Just as important is what Proposition 22 does not do: for drivers that qualify as employees, it makes no changes to the current benefits structure they must be provided under existing law. In addition to the more than 980,000 Californians who signed the petition to place Proposition 22 on the ballot, a broad and diverse coalition supports the measure. Proposition 22 counts among its chief supporters multiple chapters of the NAACP, Si Se Puede, National Asian American Coalition, Hispanic 100, California Urban Partnership, Black American Political Association, California Senior Advocates League, the California Chamber of Commerce, California Peace Officers Association, California Police Chiefs Association, California State Sheriffs' Association, Crime Victims United of California, Crime Survivors, Inc., and Fathers Against Drunk Driving (along with many others). Its financial sponsors include the network companies Uber Technologies, Inc. and Lyft, Inc.

As explained in more detail below, by falsely stating Proposition 22 creates an "exemption" for app-based transportation delivery companies "from providing employee benefits to certain drivers," the Attorney General's reworded title and summary misrepresent the contents of the measure, improperly and unlawfully creating prejudice against Proposition 22. The second sentence of the ballot label

also is false and must be corrected because it incorrectly states that the benefits to independent contractor drivers are conditional. Courts cannot allow the Attorney General to use his position as the drafter of the ballot label and title and summary to improperly influence the outcome of an election. (*Stanson v. Mott* (1976) 17 Cal.3d 206, 217 ["A fundamental precept of this nation's democratic electoral process is that the government may not 'take sides' in election contests or bestow an unfair advantage on one of several competing factions"].)

Petitioner also challenges the fiscal impact summary the Legislative Analyst prepared for Proposition 22, not on the ground that it is a political description designed to create prejudice against the measure, but because as described below, it contains technical defects that violate the Elections Code and Government Code provisions designed to avoid voter confusion. Petitioner does not ask this court to change the Legislative Analyst's fiscal analysis or projections for Proposition 22. Petitioner only asks that the Court require his conclusions to be presented to voters in a format that is consistent with the Elections Code and Government Code so that voters receive accurate and understandable information.

On behalf of the nearly one million voters who signed the petition to qualify Proposition 22 for the ballot, Petitioner turns to this Court to ensure a fair election and the preservation of the constitutional right of initiative. This Court should issue a writ requiring Defendants to revise the ballot label and title and summary so that it accurately and neutrally describes Proposition 22.

II. FACTUAL BACKGROUND

A. The Classification Definition for Employees and Independent Contractors has Changed Over Time.

Employee versus independent contractor classification status has always been made on a case-by-case basis. "The determination of employee or independent-contractor status is one of fact." (*S.G. Borello & Sons, Inc. v. Dept. of Industrial Rel.*

(1988) 48 Cal.3d 341, 349.) For decades, the California Supreme Court's *Borello* decision governed whether a worker was an employee or independent contractor. The *Borello* test focused primarily on whether the business had the "right to control" the activity of the worker. *Borello* remained the standard until the Supreme Court adopted an entirely new test, known as the "ABC test," in 2018. (*See Dynamex Operations West, Inc. v. Super. Ct.* (2018) 4 Cal.5th 903.) The ABC test under *Dynamex* applied only to Industrial Welfare Commission wage orders and looked at (A) whether the worker is free from control of the hiring entity; (B) whether the worker performs work outside the usual course of the hiring entity's business; and (C) whether the worker is engaged in an independently established trade, occupation, or business. Last year, the Legislature exercised its lawmaking authority to codify and extend the *Dynamex* ABC test in Assembly Bill 5 ("AB 5"), Stats. 2019, ch. 296. (Lab. Code § 2750.3(a)(1)).)

B. Proposition 22 Proposes to Establish a 4-Factor Test for Classifying App-Based Rideshare and Delivery Drivers.

Earlier this year, following on the precedent established by *Borello, Dynamex,* and AB 5, the voters exercised their lawmaking power by qualifying an initiative statute for the November 2020 ballot, Proposition 22, that establishes the following test for determining whether an individual working as a driver with an app-based delivery network company or transportation network company (collectively "network companies")[2] qualifies as an independent contractor or employee: (a) whether the network company unilaterally prescribes the specific dates, times of day,

[2] "App-based delivery network companies" facilitate app-based (via smartphone, tablet, or computer) delivery services for food, medicine, and other goods and services. Transportation network companies provide prearranged transportation services for compensation using an online-enabled application or platform (such as smartphone apps) to connect drivers using their personal vehicles with passengers. (See Cal. Public Util. Code §§ 5430 *et seq.*)

or minimum hours during which the driver must be logged into the network company's platform; (b) whether the network company requires the driver to accept any specific rideshare or delivery service as a condition of maintaining access to the company's platform; (c) whether the network company restricts the driver from performing rideshare or delivery services for other network companies; and (d) whether the network company restricts the driver from engaging in other lawful occupations or businesses. (Pet. RJN at Ex. D [Prop. 22, proposed § 7451].)

Just as the Supreme Court explained over three decades ago in *Borello,* under Proposition 22 the "determination of employee or independent-contractor status is [still] one of fact." Under the 4-part Proposition 22 test, many drivers may demand to remain independent contractors by maintaining absolute control over when, what time, where, how much, and for whom they provide services. Alternatively, market demands and changing consumer habits may lead some companies to ultimately demand driver exclusivity, set availability or hours, or specific tasks, thereby converting drivers to employees under the Proposition 22 test.

Once a case-by-case factual determination is made using Proposition 22's 4-factor test, there are only two options under the measure. First, if the driver qualifies as an employee, nothing changes. Whatever rights, privileges, benefits, or obligations existing law affords continue unaffected. Second, and on the other hand, if the driver qualifies as an independent contractor under the 4-factor test, the driver is entitled to protections and benefits that are unprecedented for independent contractors in this state: an earnings guarantee of 120% of the state or local minimum wage for engaged time, whichever is higher, exclusive of tips, with no upper limit on earnings; an additional contribution towards expenses of 30 cents per engaged mile; a healthcare coverage contribution equal to 50% of the average monthly Covered California bronze plan premium at 15 hours of engaged time worked per week, and 100% at 25 hours of engaged time worked per week; occupational accident insurance to cover medical expenses and lost income resulting

from injuries and illnesses suffered on the job; accidental death insurance for on-the-job injuries that result in death; automobile liability insurance; protection from discrimination based on a protected status; and protection from sexual harassment. (Pet. RJN at Ex. D [Prop. 22, proposed §§ 7453-57].)

The benefits provided to independent contractors under Proposition 22 are not discretionary and apply to all California network companies; no additional conditions or criteria must be satisfied before an independent contractor driver is entitled to them. (See *id*. [Prop. 22, proposed § 7453(a) [network company "*shall* ensure" earnings guarantee is satisfied]; § 7454(a) [network company "*shall* provide" quarterly healthcare subsidy; § 7455 [no network company "*shall* operate" unless it provides occupational accident, accidental death, and automobile liability insurance]; and § 7457 [network company "*shall* develop" sexual harassment prevention policies].)

In addition to establishing a classification test for app-based drivers and providing new benefits for drivers who qualify as independent contractors, Proposition 22 contains protections for members of the public who utilize app-based transportation and delivery services. These include protection from sexual harassment, criminal background checks of drivers, mandatory safety training for drivers, zero tolerance policies for impaired driving by drivers while performing rideshare or delivery services, mandatory driver rest to prevent sleepy driving, and criminalization of impersonating an app-based driver. (*Id*. [Prop. 22, proposed §§ 7457-62].)

C. Proposition 22's Circulating Title and Summary was Issued After *Dynamex* was Published, and After AB 5 Went into Effect.

The proponents of Proposition 22 filed the measure with the Attorney General on October 29, 2019. A circulating title and summary, to be printed on the petition reviewed and signed by California voters, was requested for the measure pursuant to Elections Code § 9001. The Attorney General issued the circulating title and

summary for Proposition 22 on January 2, 2020. (Pet. RJN at Ex. E.) The circulating title and summary was issued more than 18 months after the *Dynamex* 3-factor test became enforceable,[3] more than three months after AB 5 was chaptered into law, and a day after AB 5 went into effect. (*Dynamex, supra*, 4 Cal.5th 903; AB 5, Stats. 2019, ch. 296 [Lab. Code § 2750.3(a)(1)].)

With the current legal landscape already in place, and in obvious recognition that Proposition 22—like *Borello*, *Dynamex*, and AB 5 before it—simply established a new set of factors to be used in the factual "determination of employee or independent-contractor status"[4] for app-based drivers, the Attorney General's circulating title and summary read fairly and impartially:

> ***CHANGES EMPLOYMENT CLASSIFICATION RULES FOR APP-BASED TRANSPORTATION AND DELIVERY DRIVERS.*** **INITIATIVE STATUTE**. *Establishes different criteria for determining whether app-based transportation (rideshare) and delivery drivers are "employees" or "independent contractors."* Independent contractors are not entitled to certain state-law protections afforded employees—including minimum wage, overtime, unemployment insurance, and workers' compensation. Instead, companies with independent-contractor drivers will be required to provide specified alternative benefits, including: minimum compensation and healthcare subsidies based on engaged driving time, vehicle insurance, safety training, and sexual harassment policies. Restricts local regulation of app-based drivers; criminalizes impersonation of such drivers; requires background checks.

(Pet. RJN at Ex. E [emphasis added].)

This is the neutral title and summary presented to the nearly one million California voters who signed the Proposition 22 petition.

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[3] *Dynamex* was issued on April 30, 2018.

[4] *Borello, supra*, 48 Cal.3d at 349.

D. After Issuing the Circulating Title and Summary, the Attorney General Filed a Lawsuit Against the Chief Sponsors of Proposition 22.

Once it became clear Proposition 22 would be placed on the November ballot, the Attorney General took drastic steps to both bring suit against Uber and Lyft and change the title and summary for the measure. The lawsuit followed quickly on the heels of signature petitions being submitted for Proposition 22, but came months after AB 5 became effective and years after *Dynamex* was decided. (See Pet. RJN. at Ex. F [Complaint cover page].) In his lawsuit, the Attorney General accuses Uber and Lyft of violating California's Unfair Competition Law ("UCL," Bus. & Prof. Code § 17200 et seq.) and AB 5 by failing to classify drivers as employees under the AB 5 three-part test. (*Id*. [Comp. pg. 22].) On the same day Proposition 22 was officially qualified for the ballot by Respondent Secretary of State, the Attorney General filed a motion for preliminary injunction. The Attorney General seeks injunctive relief, restitution, and penalties against Uber and Lyft. (*Id*.) Half of any penalties obtained in that lawsuit will be paid over to the Attorney General's Office. (Bus. & Prof. Code § 17206.) Uber and Lyft are vigorously opposing the Attorney General's UCL lawsuit. No final ruling in the case has been issued and a final determination on the merits is many months, if not years, away.[5]

In his complaint, the Attorney General repeatedly asserts that Uber and Lyft owe employee benefits to app-based drivers:

- "Uber and Lyft owe their drivers these *benefits* and protections. (*Id*. [Comp. at pg. 2, ln. 18-19].)
- "Uber and Lyft...do[] not...strip drivers of their fundamental *rights as employees*." (*Id*. [Comp. at pg. 4, ln. 11-12].)

[5] Petitioner's Petition for Writ of Mandate does not ask, and does not require, this Court to wade into the controversial issue of classification status that is currently before the San Francisco County Superior Court.

- "[T]his action to ensure...drivers...receive the full compensation, protections, and *benefits*..." (*Id*. [Comp. at p. 5, ln. 16-18].)

- "Defendant[]...denies these very same Drivers the protections and *benefits* they rightfully earned *as employees*..." (*Id*. [Comp. at p. 18, ln. 4-5.])

- "Defendants...[are]...circumventing the protections and *benefits* that the law requires employers to provide to their *employees*." (*Id*. [Comp. at p. 18, ln. 14-16].)

- "The law required Drivers to be provided paid sick leave *benefits*..." (*Id*. [Comp. at p. 20, ln. 26].)

(Emphasis added.) These are merely unproven assertions as this stage in the proceeding.

E. The Attorney General's UCL Lawsuit Also Accuses Uber and Lyft of Immoral Conduct, Denounces Their Exercise of First Amendment Rights in Support of Proposition 22, and Excoriates Proposition 22 Itself as Nothing More Than a "Scheme" to "Mistreat Workers."

In his UCL lawsuit, the Attorney General does far more than allege violations of the Business and Professions Code and Labor Code. He lays bare his opinions of Proposition 22 and its chief sponsors, as well as his views on the sponsors' and proponents' exercise of First Amendment and direct democracy rights in support of the measure—allegations unbecoming of a statewide elected public servant. Apparently concerned that Proposition 22 might undermine his UCL lawsuit and jeopardize his ability to collect substantial penalty revenues for his office, the Attorney General attacked Proposition 22 and its sponsors as follows:

- Ignoring the fact that at least four other initiative petitions were either circulated or submitted after the onset of the Covid-19 pandemic, the Attorney General attempts to shame Uber and Lyft for "going to

extraordinary lengths" to qualify Proposition 22 "*even amid a once-in-a-century pandemic*." (Pet. RJN at Ex. F [Comp. pg. 4, ln. 16-17].)

- The Attorney General accuses Uber and Lyft of "*peddling...lie*[*s*]." (*Id*. [Comp. pg. 4, ln. 20].)

- The Attorney General describes Uber and Lyft's First Amendment-protected support of Proposition 22 as "*an aggressive public relations campaign*." (*Id*. [Comp. pg. 4, ln. 19].)

- The Attorney General characterizes Proposition 22 not as an exercise of the voters' precious right of initiative under the reserved powers of the California Constitution, but instead belittles it as a "*scheme*" aimed at "enshrining their [Uber and Lyft's] ability to *mistreat their workers*." (*Id*. [Comp. pg. 4, ln. 18-20].)

(Emphasis added.)

F. The Attorney General's Ballot Title and Summary and Ballot Label Bear No Resemblance to the Circulating Title and Summary, and Now Read as an Argument Straight Out of His UCL Lawsuit.

On July 21, 2020, Respondent Secretary of State publicly posted Real Party Attorney General's ballot title and summary and ballot label for Proposition 22. The ballot title and summary now reads as follows:

> ***EXEMPTS*** **APP-BASED TRANSPORTATION AND DELIVERY** ***COMPANIES FROM PROVIDING EMPLOYEE BENEFITS*** **TO CERTAIN DRIVERS. INITIATIVE STATUTE.**
>
> - Classifies drivers for app-based transportation (rideshare) and delivery companies as "independent contractors," not "employees," unless company: sets drivers' hours, requires acceptance of specific ride or delivery requests, or restricts working for other companies.
> - Independent contractors are not covered by various state employment laws—including minimum wage, overtime, unemployment insurance, and workers' compensation.

- Instead, independent-contractor drivers would be entitled to other compensation—including minimum earnings, healthcare subsidies, and vehicle insurance.
- Restricts certain local regulation of app-based drivers.
- Criminalizes impersonation of drivers.

(Pet. RJN at Ex. A [italics and underscoring added].)

Similarly, the Proposition 22 ballot label states:

> ***EXEMPTS*** **APP-BASED TRANSPORTATION AND DELIVERY *COMPANIES FROM PROVIDING EMPLOYEE BENEFITS* TO CERTAIN DRIVERS. INITIATIVE STATUTE.** Classifies app-based drivers as "independent contractors," instead of "employees," and provides independent-contractor drivers other compensation, unless certain criteria are met.

(Pet. RJN at Ex. B [italics and underscoring added].)

G. The Ballot Title and Summary/Label Adopts the Vocabulary of the Opposition Ballot Arguments Against Proposition 22.

Although the Attorney General's new ballot title and summary and ballot label read nothing like his circulating title and summary, they are strikingly similar to the ballot arguments Proposition 22's opponents submitted for inclusion in the ballot pamphlet. The Attorney General's entirely new title, that Proposition 22 "EXEMPTS" network companies from "providing EMPLOYEE BENEFITS," dovetails perfectly with the oft-repeated theme of the campaign arguments against Proposition 22, which state:

- "Uber, Lyft, and DoorDash paid to put Proposition 22 on the November ballot...[t]o create a *special exemption*... that will...deny their drivers' basic *rights and protections*...or unemployment *benefits*."

- "Only these companies would profit from this *special exemption*."

- "Prop. 22 creates a *special exemption* that eliminates basic workplace *benefits*..."

(Pet. RJN at Ex. H [emphasis added].)

Likewise, the 50-word summary submitted by Proposition 22's opponents echoes the same theme: "No on 22 stops billion-dollar app companies like Uber, Lyft, and DoorDash from writing their own *exemption* to California law..." (Pet. RJN at Ex. I [emphasis added].)

H. The Legislative Analyst's Fiscal Impact Summary for Proposition 22 Strays from Both Statutory Requirements and the other Eleven Statewide Measures on the Same Ballot.

Also on July 21, 2020, Respondent Secretary of State publicly posted Real Party Legislative Analyst's impartial analysis and fiscal impact summary for Proposition 22. The "Fiscal Effects" section of the impartial analysis states that, under Proposition 22 "drivers as a group would *earn more income*," and that Californians who own network company stock "also may *earn more*" as well. (Pet. RJN at Ex. G [LAO Analysis, p. 4; emphasis added].) The "Fiscal Effects" section also acknowledges that "[*w*]*hether rideshare and delivery drivers are employees or independent contractors [under AB 5] is still being decided by the courts.*" (*Id.* [emphasis added].)

The fiscal impact summary prepared by the Legislative Analyst—which appears with the ballot title and summary and ballot label, and is printed on the actual ballots, reads as follows:

> Minor increase in state income taxes paid by rideshare and delivery company drivers and investors.

(Pet. RJN at Ex. C.) The form, format, and language of the fiscal impact statement is inconsistent with the requirements of the Elections Code and Government Code and, further, creates a false and/or misleading implication that Proposition 22 increases income tax rates on drivers and investors, setting it apart from the fiscal

impact summaries for all other eleven ballot measures appearing on the November ballot.

III. ARGUMENT

A. The Right of Initiative is Rooted in a Reservation of Power for the People to Propose and Consider Laws Free from Government Interference, and This Court Must Jealously Guard That Right.

The California Supreme Court recently affirmed that the initiative power, which was reserved for the people in order to empower voters "to propose and adopt provisions that their elected public officials had refused or declined to adopt," is "a paramount structural element of our Constitution." (*California Cannabis Coalition v. City of Upland* (2017) 3 Cal.5th 924, 934, 946 ["The Constitution speak[s] of the initiative and referendum, not as a right granted the people, but as a power reserved by them. . . . [C]ourts have consistently declared it their duty to jealously guard and liberally construe the right so that it be not improperly annulled" (internal quotations omitted)] [emphasis added]; see Art. II, § 8, subd. (a).) The breadth of the people's power is unquestionably a defining feature of our State's Constitution:

> The amendment of the California Constitution in 1911 to provide for the initiative and referendum signifies one of the outstanding achievements of the progressive movement of the early 1900's. Drafted in light of the theory that all power of government ultimately resides in the people, the amendment speaks of the initiative and referendum, not as a right granted the people, but as a power reserved by them. Declaring it 'the duty of the courts to jealously guard this right of the people' [citation], the courts have described the initiative and referendum as articulating 'one of the most precious rights of our democratic process' [citation]. '[I]t has long been our judicial policy to apply a liberal construction to this power whenever it is challenged in order that the right be not improperly annulled.' [Citations.]

(*Associated Home Builders v. City of Livermore* (1976) 18 Cal.3d 582, 591 [emphasis added; fns. omitted]; see also *Perry v. Brown* (2011) 52 Cal.4th 1116, 1140; *Carlson v. Cory* (1983) 139 Cal.App.3d 724, 728.)

Recently, the California Supreme Court once again recognized that these principles apply with extraordinary force when, as here, government officials attempt to interfere with the citizens' exercise of their initiative power:

> [T]he enactment of the initiative power was sparked by 'dissatisfaction with the then governing public officials and a widespread belief that the people had lost control of the political process.' Its purpose, in effect, was empowering voters to propose and adopt provisions 'that their elected public officials had refused or declined to adopt.'

(*Cannabis, supra*, 3 Cal.5th at 934 [emphasis added; *quoting Perry, supra*, 52 Cal.4th at 1140 [recognizing "the unique nature and purpose of the initiative power, which gives the people the right to adopt into law measures that their elected officials have not adopted and may often oppose"].)

Petitioner, one of the official proponents of Proposition 22, as well as the many sponsors of the measure, have acted in reliance on the California Constitution, *including the guarantee of a ballot free from interference by government insiders*, in expending tremendous energy and substantial resources qualifying their initiative for the ballot. Proposition 22 is a direct response to the views of many that the Legislature and other California officials are not doing enough to address the unique needs of app-based drivers in our modern economy and, in fact, have failed to provide adequate solutions to protect not only those drivers, but the public at large, as well as the health of the California economy. This is precisely why voters have the right of initiative in the first place: to propose new laws that may be unpopular with government insiders and would otherwise be rejected out of hand.

As set forth in more detail in Section B, below, California law expressly requires the ballot label and title and summary to be unbiased, accurate, fair, and impartial in order to safeguard the initiative right and maintain the integrity of our elections:

> A fundamental precept of this nation's democratic electoral process is that the government may not "take sides" in election contests or bestow an unfair advantage on one of several competing factions. A principal danger feared by our country's founders lay in the possibility that the holders of governmental authority would use official power improperly to perpetuate themselves, or their allies, in office (citations); the selective use of public funds in election campaigns, of course, raises the specter of just such an improper distortion of the democratic electoral process.

(*Stanson v. Mott* (1976) 17 Cal.3d 206, 217; see also *Huntington Beach City Council v. Sup. Ct.* (2002) 94 Cal.App.4th 1417, 1433 [holding these principles applicable to the official ballot materials for a ballot measure, prepared by the government for distribution to voters].) The ballot label and official title and summary the Attorney General prepared for Proposition 22 are the antithesis of fair and impartial, which is alarming, but unsurprising given his clear animus toward the measure, its sponsors, and the exercise of their First Amendment rights.

The Attorney General, in his UCL lawsuit, does not even attempt to conceal his disdain for Proposition 22 and its proponents and sponsors. Ignoring the fact that several other initiative measures were actively engaged in qualifying for the ballot at the same time, he criticizes Uber and Lyft for "going to extraordinary lengths" to qualify Proposition 22 "*even amid a once-in-a-century pandemic*" (Pet. RJN at Ex. F [Comp. pg. 4, ln. 16-17]), and repeatedly maligns Proposition 22 and the campaign in favor—which is unquestionably core First Amendment-protected activity under the reserved powers of the California Constitution—as a mere "*scheme*" aimed at "enshrining [network companies'] ability to *mistreat their workers.*" (*Id.* at pg. 4, ln. 18-20; see also *id.* at pg. 4, ln. 19, [calling Prop. 22 "*an aggressive public relations campaign*" (emphasis added)].) The Attorney General even directly accuses sponsors Uber and Lyft of "*peddling…lies*[*s*]." (*Id.* at pg. 4, ln. 20.)

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To be clear, Petitioner is not saying that the Attorney General must support Proposition 22, or that he cannot take a public position, free from any unlawful expenditure of public funds, on the measure. However, it has been the law for over 100 years that "it is the duty of the courts to jealously guard" the right of initiative and to "prevent any action which would improperly annul that right." Petitioner's rights—and the rights of all California voters—to a direct up or down vote on Proposition 22, free from the interference, animosity, and personal prejudices of the Attorney General, must be upheld. (See, e.g., *Martin v. Smith* (1959) 176 Cal.App.2d 115, 117.)

B. The Government and Elections Codes Authorize Issuance of a Writ of Mandate to Correct and Amend the Prejudicial and Misleading Ballot Title and Summary, Ballot Label, and Fiscal Impact Summary.

The ballot label, which is to be printed on the actual ballots to be voted, and the official title and summary to be printed in the Voter Information Guide, must not be false and/or misleading, and must not be biased or "partial to one side." (*McDonough v. Sup. Ct. (City of San Jose)* (2012) 204 Cal.App.4th 1169, 1174; Elec. Code §§ 9051(b), (c).) They "must reasonably inform the voter of the character and real purpose of the proposed measure." (*Tinsley v. Sup. Ct.* (1983) 150 Cal.App.3d 90, 108 [citing *Boyd v. Jordan* (1934) 1 Cal.2d 468, 472]; *see also Costa v. Sup. Ct.* (2006) 37 Cal.4th 986, 1015-1016.) "The Attorney General's statement must be true and impartial, and not argumentative or likely to create prejudice for or against the measure." (*Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 243.) The ballot title and summary and ballot label are widely and correctly understood to be "official" statements of the government, conveying the authority of the state. (*See, e.g.*, Elec. Code § 9086(a)(2).)[6]

[6] *Compare* Elec. Code § 9086(g), requiring arguments submitted by proponents and opponents to include a statement that such arguments are opinions of the authors and "have not been checked for accuracy by any official agency."

In addition to the prohibitions on being false or misleading, the Legislative Analyst's impartial analysis must include a "fiscal analysis of the measure showing the amount of any increase or decrease in revenue or cost to state or local government." (Elec. Code 9087; *Calif. Gillnetters Assn. v. Dept. of Fish & Game* (1995) 39 Cal.App.4th 1145, 1164.) The fiscal impact summary shall be a "condensed summary" of the fiscal analysis. (Elec. Code § 9087(b).) Furthermore, the Legislative Analyst "shall use a uniform method in each analysis to describe the estimated increase or decrease in revenue or cost of a measure, so that the average voter may draw comparisons among the fiscal impacts of measures." (*Id.*) Finally, the fiscal impact summary shall be written in "clear and concise terms," so as to be "*easily* understood by the average voter." (Elec. Code § 9087(b) & Gov. Code § 88003 [emphasis added]; *Jones v. Bates* (9th Cir. 1997) 127 F.3d 839, 862, overruled on other grounds 131 F.3d 843, [§ 9087 requires Leg. Analyst to set forth information "the average voter needs to adequately understand" the measure].)

Given the critical importance of these requirements, Government Code § 88006 and Elections Code § 9092 compel this Court to issue a peremptory writ of mandate to delete or amend ballot materials that are biased, prejudicial, false, misleading, or otherwise inconsistent with statutory requirements. Both provisions require that a peremptory writ of mandate issue "upon clear and convincing proof that the copy in question is false, misleading, or inconsistent with the requirements" of the Elections Code or Chapter 8 (commencing with § 88000) of Title 9 of the Government Code, and "that the issuance of the writ will not substantially interfere with the printing and distribution of the ballot pamphlet as required by law." These provisions are made applicable to ballot labels as well, by Elections Code § 13282.

Elections Code § 13314 is even broader, requiring the Court to issue a peremptory writ upon proof that the "error, omission or neglect" of duty violates the Elections Code or the Constitution, and that "issuance of the writ will not substantially interfere with the conduct of the election."

These statutes are unambiguous on their face and unmistakable in their intent, which is to protect the electorate from deceptive copy in the official ballots and official ballot pamphlet, which are prepared and issued *by the government* at taxpayer expense.

To preserve the integrity of the election process and recognizing that the essential purpose of the official ballot pamphlet is to give voters truthful information concerning ballot measures because they can have a "*substantial impact on the equality and fairness of the electoral process*" since they are assembled, published and distributed by the state, California courts have been extremely attentive to claims under these provisions. (*Patterson v. Board of Supervisors* (1988) 202 Cal.App.3d 22, 30 [emphasis added]; *Brennan v. Board of Supervisors* (1981) 125 Cal.App.3d 87, 91 [the law "clearly empowers trial courts to examine the content of a ballot digest to determine if it *fairly* represents the measure it summarizes" and noting that a court has "broad powers of review" in determining whether the ballot materials are accurate and unbiased (emphasis original)]; *see also Lungren v. Sup. Ct.* (1996) 48 Cal.App.4th 435, 440.) The California Supreme Court has acknowledged that government-provided ballot materials have the "imprimatur of official approval" and that it is "quite likely" such documents "would carry greater weight in the minds of the voters than normal campaign literature . . . ." (*Knoll v. Davidson* (1974) 12 Cal.3d 335, 352.)

Given the importance of the ballot pamphlet materials produced and distributed by the government, it is critical that this Court exercise its mandatory duty to delete or amend all biased, prejudicial, misleading, and false statements, as well as those that are inconsistent with statutory requirements. The law requires the state to provide impartial, accurate, and informative material to the electorate, and a peremptory writ of mandate is the only remedy available to ensure Proposition 22 is accurately and fairly presented in the Voter Information Guide and on the ballots,

which are "the last thing the voter sees before he makes his choice." (*Cook v. Gralike* (2001) 531 U.S. 510, 532 [Rehnquist, C.J., concurring].)

C. The First Sentence of the Ballot Title and Summary and Ballot Label is Prejudicial and Biased Against Proposition 22 and also False and Misleading.

1. The First Sentence of the Ballot Title and Summary and Ballot Label is Biased and Prejudicial Because it Parrots Unproven Allegations from the Attorney General's UCL Lawsuit and Mirrors the Campaign Statements of Proposition 22's Opponents.

By using not only false and misleading but also loaded wording, the ballot title crosses a very bright line painted by the courts. Courts have routinely ordered the revision of ballot labels containing biased information, like the ballot materials here. In *McDonough, supra*, 204 Cal.App.4th 1169, plaintiffs challenged the phrase "pension reform," in the title of a measure that proposed to amend the San Jose City Charter to modify retirement benefits of city employees. The court found that the word "reform," as used in the title of the ballot label, was impermissibly biased:

> The word "reform" in both definition and connotation evokes a removal of defects or wrongs. By combining this charged word with "pension" in the title, all in capital letters, the city council has implicitly characterized the existing pension system as defective, wrong, or susceptible to abuse, thereby taking a biased position in the very titling of the measure itself. The title should be altered to read "PENSION MODIFICATION" to eliminate the use of the argumentative word "reform."

(*Id.* at 1174-75.)[7]

[7] At the local level, the "ballot label" is sometimes referred to as a "ballot question" because it is required by Elections Code section 13119 to be worded in the form of a question. The 75-word limit for the ballot language, as well as the legal standard requiring an accurate and impartial summary of the chief purpose and points of the measure, are exactly the same as the requirements for state initiative measures. (See *id.* at .1173 and 1174-75 [relying on Elec. Code § 9051 and state initiative case law].)

Likewise, the court in *Citizens for Responsible Government v. City of Albany* (1997) 56 Cal.App.4th 1199 considered a ballot label prescribed by the Albany City Council for a development agreement ordinance that would have permitted a card room to be sited in the City, and included the following language at the end: ". . . in order to provide revenue for the City of Albany, create jobs, provide for an Albany Bay Trail, and allow Albany waterfront access." (*Id*. at 1224-25.) The measure's supporters argued that the measure would have the favorable impacts identified in the ballot question, and therefore, it was appropriate to include these benefits in the ballot question. (*Id*. at 1226.) The measure's opponents disagreed, maintaining that the new cardroom would just as likely bring with it certain negative impacts, and thus, including the sweet without the bitter resulted in an illegal ballot question. (*Id*.) The court sided with opponents:

> [B]y selectively mentioning two favorable impacts without mentioning possible adverse impacts, the ballot language had the effect of stating a partisan position favoring proponents of the measure. The language in fact reflected the arguments in favor of the measure which immediately followed in the official ballot pamphlet, giving them added credence. . . . By describing the measure as a means to "provide for an Albany Bay Trail, and allow Albany waterfront access," the ballot language favored the perspective of the proponents of the measure.

(*Id*. at 1226-27 [emphasis added].)

Here, the Attorney General is within his rights to prosecute a UCL lawsuit against the sponsors of Proposition 22. Moreover, just as the sponsors and proponents of Proposition 22 have a First Amendment right to support the measure, the Attorney General has a First Amendment right, in his individual capacity, to level as many scathing recriminations against Proposition 22 and its supporters as he likes. However, courts do not permit government attorneys to carry over their prosecutorial or personal advocacy into their ballot title-writing responsibilities,

resulting in a ballot title that favors the campaign perspective of one side.[8] When reviewing the ballot label and ballot title and summary against the nearly identical statements made in the Attorney General's UCL lawsuit (not to mention the Prop. 22 *opposition* ballot arguments), it is unmistakable that this is precisely what has happened here. "Californians should agree that it's the job of the campaigns, not the attorney general, to make their arguments. The attorney general's neutrality is especially critical because the title and summary may be the extent of some voters' exposure to a proposition." (*See* John Diaz, Editorial Page Editor, San Francisco Chronicle, "*California Attorney General Loads Language On 2 November Measures,*" Jul. 26, 2020.)

Before he became an unabashed adversary of Proposition 22 and its sponsors, the Attorney General characterized the initiative as one that "CHANGES EMPLOYMENT CLASSIFICATION RULES FOR APP-BASED TRANSPORTATION AND DELIVERY DRIVERS" and "Establishes different criteria for determining whether app-based transportation (rideshare) and delivery drivers are 'employees' or 'independent contractors.'" (Pet. RJN. at Ex. E.) Not coincidentally, *after* the Attorney General put Proposition 22 and its chief sponsors in his crosshairs, his characterization of the measure suddenly changed. Even though the text of the measure remains unchanged between January and July, the Attorney General now frames Proposition 22 as an entirely different measure altogether—one that "EXEMPTS" transportation and delivery network companies from "PROVIDING EMPLOYEE BENEFITS"— a 180-degree reversal from fair and impartial to pejorative and biased.

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[8] Although courts, mindful of the challenges sometimes associated with distilling a proposed measure into a 75-word (ballot label) or 100-word (title and summary) summary, afford the Attorney General considerable deference with respect to the Attorney General's determination of the chief points of the measure, it is axiomatic that no such "deference" is due where a ballot label or title and summary are false, misleading, or prejudicial to one side or the other. Deference under such circumstances, as we have here, would not only undermine the legal standard, but the critical objective of that standard as well.

Whereas the city officials in *McDonough* attempted to dramatize the positive effects of the city charter measure, here the Attorney General is attempting to paint the measure in as negative a light as possible. While the specific words used by the city officials in *McDonough* and in *City of Albany* and the Attorney General here are different, their purpose is the same: to put the government's thumb on the scale in an effort to influence the election. (*See also* Section III, C, 2, below [Court of Appeal: use of "**exempt**" in ballot title is prejudicial and inappropriate].)

Just the same, the opponents of Proposition 22 have landed on their preferred political argument against Proposition 22—that the measure creates an "exemption" from existing laws requiring employee "benefits." (See Pet. RJN. at Ex. H [Argument Against Prop. 22].) This argument is mere political rhetoric that is strongly disputed by the coalition supporting Proposition 22. In fact, the nonpartisan Legislative Analyst even expressly acknowledges the current state of the law is entirely unsettled: "[w]hether rideshare and delivery drivers are employees or independent contractors *is still being decided by the courts*." (Pet. RJN at Ex. G.) Yet, the entirely new ballot label and ballot title and summary now echo the exact same untrue opposition attack; i.e., that Proposition 22 "exempts" network companies from providing "employee benefits."

City of Albany commands that ballot titles must avoid wading into fundamental disagreements between competing political coalitions and staking out a campaign position in favor of a particular side. Further, *City of Albany* is especially critical of ballot titles that mimic statements made in ballot arguments submitted by the respective campaign factions. The Proposition 22 ballot label and title and summary fail the *City of Albany* standard in both respects. Instead of summarizing the contents of Proposition 22 for the voters, they adopt as gospel—and disseminate it as widely and officially as possible via the ballot title—the unproven and hotly contested campaign allegation that Proposition 22 "exempts" network companies from providing "employee benefits." Even worse, the ballot label and title and

summary are carbon copies of the opposition's ballot arguments against Proposition 22.

2. The Court of Appeal Has Already Held that "Exempt" is a Prejudicial Term Inappropriate for Use in a Ballot Title; in Addition, Proposition 22 Does Not Contain Any "Exemptions."

The Attorney General's decision to describe Proposition 22 as an "exempt[ion]" is all the more inappropriate given that prior judicial decisions have specifically rejected the use of that word in ballot titles on the grounds that it is inherently biased. In *Huntington Beach, supra,* 94 Cal.App.4th at pp. 1425-26, petitioners challenged the following ballot label, in relevant part, for containing false, misleading, and biased statements:

> "Amendment of Utility Tax by Removing Electric Power Plant **Exemption**. Shall the ordinance requiring an electric power plant to pay the same Utility Tax as do residents and businesses of the City of Huntington Beach by amending the Huntington Beach Municipal Code...be adopted?"

(Emphasis added.)

Noting the constitutional basis for the requirement that the ballot label be neutral and accurate, the court first struck the word "exemption," stating that "[e]xemptions" connote "unfair influence and special treatment" and therefore the word was "insufficiently neutral to appear in the title of the measure on the ballot." (*Id.*, at pp. 1433-34 ["Ballots . . . are hemmed in by the constitutional guarantees of equal protection and freedom of speech. These guarantees mean, in practical effect, that the wording on a ballot or the structure of the ballot cannot favor a particular partisan position" (emphasis added, internal citations omitted)].)

The *Huntington Beach* court further held that the phrase, "*pay the same Utility Tax as do residents and businesses of the City of Huntington Beach,*" was both improper advocacy and substantively misleading even if not necessarily false:

> 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." An "outright falsehood" or a statement that is "objectively untrue" may be stricken. 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; hence, the Legislature did not indulge in redundancy when it used both words.

(*Id*., at p. 1432 [internal citations omitted].)

The Attorney General's use of the word "Exempts" in the Proposition 22 ballot materials flies in the face of *Huntington Beach,* which held that the term "connotes unfair and special treatment." Given his on-the-record view of Proposition 22 and its supporters, this is undoubtedly the exact connotation the Attorney General seeks to convey about the measure. The Attorney General's personal and unproven legal opinions aside, the phrase "Exempts App-based Transportation and Delivery from Providing Employee Benefits" is legally ineligible for use in the title and summary and ballot label.

Beyond the improperly biased connotations associated with the word "Exempts," the first sentence of the ballot title and summary and ballot label is also materially misleading and objectively untrue, in further contravention of *Huntington Beach*. It is materially misleading because it states and implies that all app-based drivers have conclusively been deemed to be employees when in fact the Legislative Analyst has correctly and unequivocally established that they have not. (Pet. RJN at Ex. G [LAO: "Whether rideshare and delivery drivers are employees or independent contractors *is still being decided by the courts*"].) More than that, the ballot title's reference to "exempts" is misleading in that it leaves the impression that some drivers will get zero benefits under Proposition 22. Nothing could be farther from the truth. Drivers that qualify as employees will get benefits required to be provided to employees under state law. Drivers that qualify as independent contractors will receive the new benefits provided under Proposition 22—which in

some respects are greater than those provided to employees (i.e., compensation guarantee and healthcare subsidy).

It is objectively untrue because, by its own terms, Proposition 22 does not provide any exemptions from the obligations of any employer to provide presently-required benefits to any employee. As stated above, Proposition 22 does not predetermine whether any driver is an employee or independent contractor. It simply provides a 4-factor test to be used in making that determination on a case-by-case basis. (See Pet. RJN at Ex. D [Prop. 22, proposed § 7451].) Indeed, Proposition 22 does not "exempt" any employer from the obligation to "provide employee benefits" to employees any more than *Borello, Dynamex,* or AB 5 did. To the contrary, all app-based drivers must be evaluated under the same 4-part standard for determining whether they are employees or independent contractors. (*Id*. [Prop. 22, proposed § 7451].) Moreover, Proposition 22 makes no prejudgments of whether a driver will qualify as an employee or an independent contractor, requiring that determination to be made on a case-by-case basis. (*Id*.)

There is no way to save or defend the first sentence in the ballot title and summary. To prevent bias and prejudice, protect free and fair elections, and ensure the neutrality and accuracy required by the Elections Code and the Government Code, this Court should amend the ballot title and summary by inserting the title from the circulating title and summary, so the ballot title and summary reads as follows:

> ***CHANGES EMPLOYMENT CLASSIFICATION RULES FOR APP-BASED TRANSPORTATION AND DELIVERY DRIVERS*. ~~EXEMPTS APP-BASED TRANSPORTATION AND DELIVERY COMPANIES FROM PROVIDING EMPLOYEE BENEFITS TO CERTAIN DRIVERS~~. INITIATIVE STATUTE.**
>
> - Classifies drivers for app-based transportation (rideshare) and delivery companies as "independent contractors," not "employees," unless company: sets drivers' hours, requires acceptance of specific ride or delivery requests, or restricts working for other companies.

- Independent contractors are not covered by various state employment laws—including minimum wage, overtime, unemployment insurance, and workers' compensation.
- Instead, independent-contractor drivers would be entitled to other compensation—including minimum earnings, healthcare subsidies, and vehicle insurance.
- Restricts certain local regulation of app-based drivers.
- Criminalizes impersonation of drivers.

D. The Ballot Label Further Falsely States that Proposition 22 Provides Additional Compensation to Independent Contractor Drivers Only If "Certain Criteria are Met."

Just as Proposition 22 provides no "exemptions" from any laws requiring benefits to be provided to workers who qualify as employees, it also provides zero exemptions from the benefits required to be provided to drivers who qualify as independent contractors under the measure. The earnings guarantee; healthcare subsidy; occupational accident, accidental death, and vehicle insurance policies; protected-status discrimination protection; and sexual harassment safeguards are provided in proposed sections 7453-57 of Proposition 22. Each is expressed in a manner that the benefit "shall" be provided. (Pet. RJN at Ex. D.) "There is a presumption that the word 'shall' imposes a mandatory statutory directive, while 'may' is permissive." (*Common Cause v. Bd. of Supervisors* (1989) 49 Cal.3d 432, 443.)

Notwithstanding the mandatory directive that the benefits created by Proposition 22 must be provided to *every* app-based driver that qualifies as an independent contractor, the second sentence of the ballot label incorrectly states that these benefits are uncertain and conditional: "Classifies app-based drivers as 'independent contractors,' instead of 'employees,' and provides independent-contractor drivers other compensation, *unless certain criteria are met*." (Emphasis added.)

As presently written, the phrase "unless certain criteria are met" modifies the preceding phrase "and provides independent-contractor drivers other compensation." There are no criteria that must be met under Proposition 22 for an independent contractor to be entitled to the benefits identified above. In this way, the second sentence of the ballot label is false. Even assuming *arguendo* that the clause "unless certain criteria are met" modified both of the preceding phrases—or just the first phrase—it would still be materially misleading. As is the case here, "context may show that a statement that, in one sense, can be said to be literally true can still be materially misleading." (*Huntington Beach, supra*, 94 Cal.App.4th at p. 1432.)

Similar to the ballot title and summary, there is no way to save or defend the first sentence in the ballot label. Moreover, the second sentence of the label must be edited to eliminate its false and/or materially misleading structure. To prevent bias and prejudice, protect free and fair elections, and ensure the neutrality and accuracy required by the Elections Code and the Government Code, this Court should amend the ballot title and summary by inserting the title from the circulating title and summary and editing the second sentence thereof, so the ballot label reads as follows:

> ***CHANGES EMPLOYMENT CLASSIFICATION RULES FOR APP-BASED TRANSPORTATION AND DELIVERY DRIVERS.*** ~~**EXEMPTS APP-BASED TRANSPORTATION AND DELIVERY COMPANIES FROM PROVIDING EMPLOYEE BENEFITS TO CERTAIN DRIVERS.**~~ **INITIATIVE STATUTE.** Classifies app-based drivers as "independent contractors," instead of "employees," *unless certain criteria are met*, and provides independent-contractor drivers other compensation~~, unless certain criteria are met~~.

E. The Fiscal Impact Summary Fails to Comply with the Elections Code and Government Code.

While the Legislative Analyst is responsible for determining the fiscal impact

of each initiative measure appearing on the ballot, the Elections Code and Government Code tightly control the manner in which the fiscal impact is presented to voters on ballots and in the ballot. Petitioner does not quarrel with the Legislative Analyst's *conclusions* regarding Proposition 22's fiscal impact, which are set forth in the more detailed fiscal analysis. The way those conclusions are *presented to voters* in the fiscal impact summary, however, fails to meet the statutory standards in several respects. As currently structured, the fiscal impact summary for Proposition 22, which is to be printed on voters' ballots, states as follows:

> Minor increase in state income taxes paid by rideshare and delivery company drivers and investors.

There are multiple problems with this language and how it is presented to voters.

First, the fiscal impact summary must be a "condensed summary" of the fiscal analysis. (Elec. Code § 9087.) Page 4 of the fiscal analysis states that under Proposition 22 "drivers would earn more income" and "investors may earn more." (Pet. RJN at Ex. G.) *Due to these higher earnings*—as opposed to higher income tax *rates*—the fiscal analysis states that income taxes paid by drivers and investors would increase. (*Id.*) This crucial aspect of the fiscal analysis—that drivers and investors will pay more in taxes as a result of higher earnings and not from higher state income tax rates—is omitted from the fiscal impact summary, which renders it misleading and prevents it from being a "condensed summary" of the full analysis.

Second, the fiscal impact summary must show "the amount of any increase or decrease in *revenue or cost* to *state or local government*." (Elec. Code § 9087; *Cal. Gillnetters Assn., supra*, 39 Cal.App.4th 1164; emphasis added.) Thus, the Proposition 22 fiscal impact summary is defective in that it only refers to "state taxes paid" by drivers and investors but does not specify the "revenue or cost" associated with the measure, or which state or local governments will experience those additional revenues or costs.

The combination of the omission that drivers and investors earn more under Proposition 22 (but do not pay higher income tax rates), along with the failure to clarify that there will be increased "state *revenues*" (as opposed to increases in "state income taxes") makes the fiscal impact summary read like Proposition 22 imposes a state income tax rate increase on drivers and investors. Because this is the most plausible reading of the fiscal impact summary, the summary falls short of the requirement to be "easily understood by the average voter." (Elec. Code § 9087 & Gov. Code § 88003; see also Declaration of William McInturff, filed herewith [voter research: 68% of voters believe the fiscal impact summary states that Prop. 22 increases income tax rates on drivers and investors; while only 22% of voters believe that fiscal impact summary does not mean that income tax rates increase under Prop. 22].)

Third, the fiscal impact summaries are supposed to be written using a "uniform method" so that the "average voter may draw comparisons among the fiscal impacts of measures." (Elec. Code § 9087(b).) On this point, the Proposition 22 fiscal impact summary bears no resemblance to the other fiscal impact summaries prepared for the other eleven measures appearing on the ballot:

i. Prop. 14 – "Increased state *costs*..."
ii. Prop. 15 – Increased property taxes...providing...new *funding to local governments and schools*."
iii. Prop. 16 – "No direct *fiscal effect on state and local entities*..." and "Possible *fiscal effects...by state and local entities*..."
iv. Prop. 17 – "Increased *county costs*...Increased *one-time state costs*..."
v. Prop. 18 – "Increased *costs for counties*...Increased *one-time costs to the state*..."
vi. Prop. 19 – "Local governments could gain...Schools could gain...*Revenue...for both state and local governments*..."

vii. Prop. 20 – "Increased *state and local correctional costs*...Increased *state and local court-related costs*...Increased *state and local law enforcement costs*..."

viii. Prop. 21 – "...a potential reduction in *state and local revenues*..."

ix. Prop. 23 – "Increased *state and local government costs*..."

x. Prop. 24 – "Increased *state costs*...Increased *state costs*...Unknown impact on state and local tax *revenues*..."

xi. Prop. 25 – "Increased *state and local costs*...decreased *county jail costs*...unknown net impact on state and local tax *revenues*..."

(Pet RJN at Ex. J [fiscal impact summaries for Props. 11-25; emphasis added].)

In contrast, the Proposition 22 fiscal impact summary impermissibly makes no mention of the "revenues or costs" to state or local governments. (Pet. RJN at Ex. C.) While the fiscal impact summary does refer to "state," that word is surrounded by the phrase "increase in state income taxes paid" so that it sounds like a reference to an *increase* in state income tax *rate* rather than an *increase* in state *revenues.* By drafting the Proposition 22 fiscal impact summary in a manner incomparable to the other eleven fiscal impact summaries appearing on the same ballot (and incomparable to how such statements have traditionally been prepared), the Legislative Analyst has deprived voters of the opportunity to draw comparisons among the fiscal impacts of all twelve measures on the November 2020 ballot.

To ensure the neutrality and accuracy required by the Elections Code and the Government Code, and to prevent widespread voter confusion, this Court should amend the fiscal impact summary in both the ballot title and summary and ballot label to read as follows:

> Minor increase in state <u>*revenues from*</u> income taxes paid <u>*due to higher earnings*</u> by rideshare and delivery company drivers and investors.

F. Relief Must Be Granted to Preserve the Integrity of the Official Ballot Materials.

California courts fully appreciate that the ballot materials presented to voters have a "substantial impact on the equality and fairness of the electoral process" since they are assembled, published and distributed—and therefore will appear to the public to be approved—by the government. (*Patterson, supra,* 202 Cal.App.3d at 30.) Hence, courts have not hesitated to act to protect the ballot materials from the inclusion of false and misleading information, or improperly partial official materials. The court in *Patterson* explained the rationale for the requirements contained in Elections Code § 9092 and Government Code § 88006:

> [T]he voter's pamphlet can have a substantial impact on the equality and fairness of the electoral process. "Unlike other vehicles for partisan political argument, the pamphlet is printed by a governmental body and distributed to all registered voters. The arguments set forth therein are likely to "carry greater weight in the minds of the voters than normal campaign literature...."

(202 Cal.App.3d at 30 (emphasis added) [quoting *Knoll v. Davidson,* 12 Cal.3d at 352].) As the California Supreme Court stated in *Knoll*:

> The voters' pamphlet, which accompanies the sample ballot, purports to be an authoritative document that appears to give an imprimatur of official approval to statements of qualifications included therein....

(*Id.* at 352.)

In addition, voter pamphlets are extremely significant to the judicial process as they may constitute the "only legislative history of an initiative measure adopted by the voters." (*Board of Supervisors v. Lonergan* (1981) 27 Cal.3d 855, 866, *cert. denied,* 450 U.S. 918 [where ballot pamphlets constitute the only legislative history of an initiative measure adopted by voters, they may properly be resorted to as a construction aid to determine probable meaning of uncertain language].)

Given the importance of the ballot label and ballot pamphlet to the election process, this Court must exercise its mandatory duty to grant relief against the

publication of biased, prejudicial, false, misleading, and/or partial statements in the official ballot and Voter Information Guide for Proposition 22. Even more so than ballot arguments, these materials bear the "imprimatur of official approval." As such, defects in the ballot label, ballot title and summary, and fiscal impact summary are all the more likely to negatively impact the integrity of the election. (*Huntington Beach, supra,* 94 Cal.App.4th at 1433-34 [ordering changes to official ballot materials to ensure their neutrality].) Official election materials "are hemmed in by the constitutional guarantees of equal protection and freedom of speech. ... These guarantees mean, in practical effect, that the wording on a ballot or the structure of the ballot cannot favor a particular partisan position." (*Id.*) Because the ballot materials do so here, the Court must amend them.

IV. CONCLUSION.

In January of this year, the Attorney General rightfully informed voters that Proposition 22 "changes employment classification rules for app-based transportation and delivery drivers." That is, indeed, what the measure did in January. That is what the measure does now. Only after very publicly taking sides against Proposition 22 has the Attorney General sought to perpetrate a falsehood that Proposition 22 is an entirely different measure which instead "exempts app-based transportation and delivery companies from providing employee benefits." This new posture overflows with well-documented bias and prejudice, misrepresents the actual text of the initiative, and is politically designed to defeat Proposition 22. Voters cannot freely exercise their franchise rights unless this Court (1) deletes the title of ballot label and ballot title and summary and replaces it with the title prepared for the circulating title and summary—written before the Attorney General was overwhelmed with bias against Proposition 22; (2) amends the second sentence of the ballot label to eliminate its false and misleading structure; and (3) conforms the fiscal impact summary to the wording used in the Legislative Analyst's full impartial analysis.

For these reasons, Petitioner respectfully requests that the Court grant his Petition for Writ of Mandate.

Respectfully submitted,

Dated: July 29, 2020

NIELSEN MERKSAMER
PARRINELLO GROSS & LEONI LLP

By: _____

Kurt R. Oneto
Arthur G. Scotland
Richard D. Martland
Sean P. Welch
Christopher E. Skinnell
Attorneys for Petitioner
DAVIS WHITE