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7
8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 COUNTY OF SACRAMENTO

10
11 JON COUPAL, an individual; HOWARD
JARVIS TAXPAYERS ASSOCIATION, an
12 incorporated California Association,

13 Petitioners,

14 v.

15 DEBRA BOWEN, as the Secretary of State of
California,

16 Respondent.

17 _____
18 KEVIN HANNAH, in his official capacity as
interim State Printer; EDMUND G. BROWN, in
19 his official capacity as ATTORNEY GENERAL
OF THE STATE OF CALIFORNIA,

20 Real Parties In Interest.
21

Case No.

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

[ELEC. CODE, §§ 13314; 9092]

**STATEWIDE ELECTION MATTER
IMMEDIATE ACTION REQUESTED**

Date:

Time:

Dept:

Judge:

Petition Filed: 07/26/10

[Proposition 23]

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1 I.

2 INTRODUCTION

3 Real Party in Interest ATTORNEY GENERAL opposes Proposition 23. He has made his
4 opposition very public from the very inception of the initiative late last year, continuing through
5 today. He has even publicly referred to supporters of Proposition 23 as “Neanderthals.” It is
6 regrettable that the ATTORNEY GENERAL has let his personal political views and agenda as a
7 candidate for Governor interfere with his trusted duty to provide a fair and impartial ballot label
8 and title and summary for Proposition 23 under the Elections Code.

9 This Court’s duty is to protect the interest of voters – not the supporters of Proposition 23,
10 not the opponents of Proposition 23, and not the ATTORNEY GENERAL. Therefore, Petitioners
11 JON COUPAL and HOWARD JARVIS TAXPAYERS ASSOCIATION (“Petitioners”) seek a
12 Writ of Mandate compelling Respondent DEBRA BOWEN in her official capacity as California
13 Secretary of State (hereinafter “Respondent” or “Secretary of State”) to amend the ballot label
14 and title and summary for Proposition 23, authored by Real Party In Interest ATTORNEY
15 GENERAL, and the issuance of a Peremptory Writ of Mandate commanding Respondent to
16 amend the ballot label and title and summary for Proposition 23 as set forth herein, and to
17 conform any translations of these materials to the changes ordered by this Court.

18 II.

19 THE PROPOSED BALLOT LABEL AND TITLE AND SUMMARY
20 SUBJECT TO THIS PETITION FOR WRIT OF MANDATE

21 A. Ballot Label

22 The ATTORNEY GENERAL has proposed the following ballot label for Proposition 23:

23 **SUSPENDS AIR POLLUTION CONTROL LAWS REQUIRING MAJOR**
24 **POLLUTERS TO REPORT AND REDUCE GREENHOUSE GAS EMISSIONS**
25 **THAT CAUSE GLOBAL WARMING UNTIL UNEMPLOYMENT DROPS TO 5.5**
26 **PERCENT OR LESS FOR FULL YEAR. INITIATIVE STATUTE.** Fiscal Impact:
27 Likely modest net increase in overall economic activity in the state from suspension of
28 greenhouse gases regulatory activity, resulting in a potentially significant net increase in
state and local revenues.

(Petition for Writ of Mandate, Exhibit C, emphasis in original).

1 The accuracy and impartiality of the ballot label is critical because it is the information
2 that every voter will see -- as it is printed on every ballot. (Elec. Code, § 13247)

3 **B. Title and Summary**

4 The ATTORNEY GENERAL has proposed the following as the title and summary for
5 Proposition 23:
6

7 **SUSPENDS AIR POLLUTION CONTROL LAWS
8 REQUIRING MAJOR POLLUTERS TO REPORT AND
9 REDUCE GREENHOUSE GAS EMISSIONS THAT
10 CAUSE GLOBAL WARMING UNTIL UNEMPLOYMENT
11 DROPS TO 5.5 PERCENT OR LESS FOR FULL YEAR.
12 INITIATIVE STATUTE.**

- 13 • Suspends State law that requires greenhouse gas emissions
14 be reduced to 1990 levels by 2020, until California's
15 unemployment drops to 5.5 percent or less for four
16 consecutive calendar quarters.
- 17 • Requires State to abandon implementation of
18 comprehensive greenhouse-gas-reduction program that
19 includes increased renewable energy and cleaner fuel
20 requirements, and mandatory emissions reporting and fee
21 requirements for major polluters such as power plants and
22 oil refineries, until suspension ends.

23 **Summary of Legislative Analyst's Estimate of Net State and
24 Local Government Fiscal Impact:**

- 25 • The suspension of AB 32 could result in a modest net
26 increase in overall economic activity in the state. In this
27 event, there would be an unknown but potentially
28 significant net increase in state and local government
 revenues.
- Potential loss of a new source of state revenues from the
 auctioning of emission allowances by state government to
 certain businesses that would pay for these allowances, by
 suspending the future implementation of cap-and-trade
 regulations.
- Lower energy costs for state and local governments than
 otherwise.

(Petition for Writ of Mandate , Exhibit D, emphasis in original).

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III.

FACTUAL BACKGROUND

A. Proposition 23

In 2006, the Legislature passed the “California Global Warming Solutions Act of 2006” (also known as “AB 32”). AB 32 established a goal of reducing California’s emission of greenhouse gases (“GHGs” principally CO2 and methane) to 1990 levels by the year 2020. It gave broad power to the California Air Resources Board (“CARB”) to achieve the goal. (Health & Saf. Code §§ 38500 et. seq.) AB 32 also included a provision for its temporary suspension in “extraordinary circumstances” or if implementation might “threat[en] significant economic harm.” (Health & Saf. Code § 38599.)

At the time AB 32 was enacted, the California economy was humming and unemployment in the state was below five percent. California is now mired in an extended recession, second only to the Great Depression, and unemployment has been above twelve percent for an extended period of time. Proposition 23 simply seeks to temporarily suspend the implementation of AB 32 until the California economy recovers, as measured by employment rate. The operative text of Proposition 23 is less than 100 words and reads as follows:

§38600(a) From and after the effective date of this measure, Division 25.5(commencing with section 38500) of the Health and Safety Code is suspended until such time as the unemployment rate in California is 5.5% or less for four consecutive calendar quarters. (b) While suspended, no state agency shall propose, promulgate, or adopt any regulation implementing Division 25.5(commencing with section 38500) and any regulation adopted prior to the effective date of this measure shall be void and unenforceable until such time as the suspension is lifted.

Indeed, the ATTORNEY GENERAL could have simply used the actual words of Proposition 23 in his ballot label and title and summary (perhaps substituting the popular name of AB 32 in place of the statutory reference) and fully complied with the Elections Code. (*Lungren v. Superior Court* (1996) 48 Cal. App. 4th 435, 441 [“In so far as relevant here, the title, and summary and label provided by the Attorney General are essentially verbatim recitations of the operative terms of the measure. The Attorney General has added nothing, omitted nothing and

1 the words used are all subject to common understanding. The electorate can hardly be deceived
2 by this essentially verbatim recital of the straightforward text of the measure itself.”]

3 Perhaps the ATTORNEY GENERAL thought it would be useful to inform voters about
4 AB 32. If that was his intent, he is still required to do so accurately and fairly.

5 **B. AB 32**

6 The bill digest for AB 32 (Petition for Writ of Mandate , Exhibit F) describes its scope as
7 contemplated by the legislation:

8 This bill would require the state board to adopt regulations to require the reporting and
9 verification of statewide greenhouse gas emissions and to monitor and enforce compliance
10 with this program, as specified. **The bill would require the state board to adopt a
11 statewide greenhouse gas emissions limit equivalent to the statewide greenhouse gas
12 emissions levels in 1990 to be achieved by 2020, as specified.** The bill would require
13 the state board to adopt rules and regulations in an open public process to achieve the
14 maximum technologically feasible and cost-effective greenhouse gas emission reductions,
15 as specified. The bill would authorize the state board to adopt market-based compliance
16 mechanisms, as defined, meeting specified requirements. The bill would require the state
17 board to monitor compliance with and enforce any rule, regulation, order, emission
18 limitation, emissions reduction measure, or market-based compliance mechanism adopted
19 by the state board, pursuant to specified provisions of existing law. The bill would
20 authorize the state board to adopt a schedule of fees to be paid by regulated sources of
21 greenhouse gas emissions, as specified. Because the bill would require the state board to
22 establish emissions limits and other requirements, the violation of which would be a
23 crime, this bill would create a state-mandated local program.

24 (Emphasis added).

25 The bill digest is prepared by the office of Legislative Counsel and is prepared as a summary of
26 the content of the bill and its effect on existing law for the benefit of the public and members of
27 the Legislature.

28 Even the California State Legislative Analyst description of AB 32 in its analysis of
Proposition 23 points to AB 32’s principal purpose:

In 2006, the state enacted the California Global Warming Solutions Act of 2006,
commonly referred to as Assembly Bill 32 or “AB 32.” **This legislation established the
target of reducing the state’s emissions of GHGs by 2020 to the level that emissions
were at in 1990.** It is estimated that achieving this target would result in about a 30
percent reduction in GHG’s in 2020 from where their level would otherwise be in the
absence of AB 32.

(Petition for Writ of Mandate , Exhibit E, at page 1-2, emphasis added.)

1 Lastly, CARB, the lead state agency responsible for implementing AB 32 lists as its very
2 first requirement under AB 32, the setting of the greenhouse gas reduction target:

3 AB 32 includes a number of specific requirements for ARB:

- 4 • *Identify the statewide level of greenhouse gas emissions in 1990 to serve as the*
5 *emissions limit to be achieved by 2020* [citation omitted].

6 (Petition for Writ of Mandate , Exhibit I, at 5, emphasis in original).

7
8 As indicated by the Legislative Counsel’s bill digest, the Legislative Analyst and CARB
9 itself, the chief purpose and point of point of Proposition 23 is to temporarily suspend AB 32 and
10 the chief purpose and point of AB 32 was to require a reduction in GHG emissions to 1990 levels,
11 by the year 2020.

12 **C. Attempts to Correct the Ballot Label and Title and Summary for**
13 **Proposition 23**

14 The ATTORNEY GENERAL prepared a “circulating title and summary” for Proposition
15 23 earlier in the year pursuant to Elections Code section 9004. That title and summary was used
16 on the initiative petitions themselves. In anticipation of the issuance of the circulating title and
17 summary, supporters of the initiative wrote the ATTORNEY GENERAL and asked him to use
18 fair and impartial language to describe the measure, and even suggested that the Bill Digest for
19 AB 32 was a good place to start. (Petition for Writ of Mandate, Exhibit D).

20 After the first request for fairness was ignored, supporters of Proposition 23 wrote the
21 ATTORNEY GENERAL again in anticipation of his preparation of the ballot label and title and
22 summary required for qualified initiatives. (Petition for Writ of Mandate, Exhibit H). This time,
23 the ATTORNEY GENERAL did respond to one point raised in the letter. While he did not delete
24 the argumentative and prejudicial terms, or correct the misleading statements, he DID insert a
25 sentence into the title and summary (but not the ballot label) identifying the chief purpose and
26 point of AB 32, namely the setting of a GHG emission goal and target date. The added sentence
27 now found in the proposed title and summary reads as follows:
28

- Suspends State law that requires greenhouse gas emissions be reduced to 1990 levels by 2020, until California’s unemployment drops to 5.5 percent or less for four consecutive calendar quarters.

As indicated more fully below, Petitioners do NOT challenge this sentence in the title and summary and argue that it should be used to replace the misleading and prejudicial ballot label and title portion of the title and summary.

IV.

STANDARD OF REVIEW

Elections Code sections 9092 and 13314 authorize this Court to issue a writ of mandate ordering that changes be made to the official ballot materials to ensure that the information provided to voters meets the requirements of law. Section 13314 authorizes courts to issue a peremptory writ of mandate “upon proof... that an error, omission, or neglect of duty” is about to occur with regard to the printing of the ballot materials” in violation of [the Elections Code] or the Constitution.” (Elec. Code, § 13314 (a)(2).)

The Elections Codes sets forth the requirements for the preparation of the ballot label and title and summary. Section 9051 requires the Attorney General to prepare a “true and impartial statement of the purpose of the proposed measure” to be included in the ballot pamphlet to be circulated to voters. (Elec. Code, § 9051.) This summary is to be provided “**in such language that the ballot title and summary shall neither be an argument, nor be likely to create prejudice, for or against the proposed measure.**” (*Id.*, emphasis added.) The purpose of the ballot label and title and summary is to give voters accurate information about a proposed initiative and must contain “[A] statement of the major objective or ‘chief purpose and points’ of the measure.” (*Brennan v. Board of Supervisors* (1981) 125 Cal.App.3d 87, 92.)

The statutory requirement that the ballot label and title and summary be fair and impartial is founded upon constitutional principles. A “fundamental precept of this nation’s democratic electoral process is that the government may not [use the public treasury to] ‘take sides’ in election contests or bestow an unfair advantage on one of several competing interests.” (*Stanson v. Mott* (1976) 17 Cal.3d 206, 217, and cases cited therein.) The law is well settled that the

1 government may not expend public funds or use public resources to influence the outcome of an
2 election. This is because “[g]overnment action which may tend to influence the outcome of an
3 election operates in an area protected by the guarantee of equal protection and freedom of
4 speech.” (*Citizens for Responsible Government v. City of Albany* (1997) 56 Cal.App.4th 1199,
5 1227.)

6 This is not the first time a court has been asked to amend ballot materials that contain
7 “loaded” terms that make the ballot materials argumentative and biased. In *Huntington Beach*
8 *City Council v. Superior Court* (2002) 94 Cal. App. 4th 1417, the appellate court took issue with
9 the term “exemption” in the title of a city ballot measure aimed at increasing taxes for the city’s
10 sole electricity-generating plant. (*Id.* at pp. 1422, 1433-34.) The court observed that the term
11 “exemption,” particularly in the context of a tax measure, “connotes unfair influence and special
12 treatment.” (*Id.* at 1434). The court ordered the word replaced with the more accurate and
13 neutral term “exclusion.” (*Id.*; See also, *Citizens for Responsible Government, supra* 56 Cal.
14 App. 4th at p. 1225 [striking non-neutral language in ballot question that would have placed
15 measure in favorable light].

16 Finally, the statutory requirements for preparation of the materials that appear on voters’
17 ballots must serve first and foremost “to protect [the voters] from being misled or imposed upon.”
18 (*Clark v. Jordan* (1936) 7 Cal.2d 248, 252) as well as “to foster a more informed electorate by
19 supplying correct information about the measures appearing on any given ballot.” (*Horwath v.*
20 *City of East Palo Alto* (1989) 212 Cal.App.3d 766, 776.)

21 In this matter, the ATTORNEY GENERAL’s proposed ballot materials fail to comply
22 with the legal requirements of the Elections Code as they are not impartial and in some instances
23 are affirmatively misleading.

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V.

ARGUMENT

A. THE BALLOT LABEL FOR PROPOSITION 23 IS MISLEADING, ARGUMENTATIVE AND LIKELY TO CREATE PREJUDICE AGAINST THE MEASURE IN VIOLATION OF THE ELECTIONS CODE

ATTORNEY GENERAL BROWN proposes a single sentence ballot label to describe Proposition 23, exclusive of the summary of the measure’s fiscal impact.¹

SUSPENDS AIR POLLUTION CONTROL LAWS REQUIRING MAJOR POLLUTERS TO REPORT AND REDUCE GREENHOUSE GAS EMISSIONS THAT CAUSE GLOBAL WARMING UNTIL UNEMPLOYMENT DROPS TO 5.5 PERCENT OR LESS FOR FULL YEAR. INITIATIVE STATUTE. Fiscal Impact: Likely modest net increase in overall economic activity in the state from suspension of greenhouse gases regulatory activity, resulting in a potentially significant net increase in state and local revenues.

(Petition for Writ of Mandate, Exhibit C, Emphasis in original.)

There are three legal deficiencies with the proposed ballot label. First, it fails to identify the chief purpose and point of the initiative. Second, it is argumentative and likely to create prejudice against Proposition 23, and third, it is misleading.

1) The ballot label does not express the chief purpose and point of Proposition 23

In *Lungren v. Superior Court*, the appellate court overturned a decision of the trial court amending the ballot label provided by the Attorney General for Proposition 209. (*Lungren, supra*, 48 Cal.App.4th at p. 443) The operative provisions of Proposition 209, like Proposition 23 contained relatively few words. The principal effect of Proposition 209 was to invalidate many statutory affirmative action programs by placing in the constitution a provision prohibiting government from “discriminating against or giving preferential treatment to any individual or group... on the basis of race, sex, color, ethnicity, or national origin.” (*Id.* at pp. 440-41.) The

¹ The current ballot label is 64 words. (Elections Code section 9051(b) provides that the ballot label shall not exceed 75 words, including the summary of fiscal impact.)

1 trial court amended the ballot label and title and summary to include a statement that the measure
2 would repeal affirmative action programs. (*Id.* at p. 441.) The appellate court upheld the
3 Attorney General’s nearly verbatim use of the words of the initiative as a lawful expression of the
4 chief purpose and point of Proposition 209. (*Id.* at p. 441).

5 In this case, Proposition 23 does not “repeal” any law, it merely suspends the
6 implementation of AB 32 while the state’s unemployment rate is dangerously high. Thus, a
7 simple recitation of the operative language of Proposition 23 would clearly suffice under the
8 appellate court’s decision in *Lungren v. Superior Court*.

9 Borrowing on the logic of the appellate court decision in *Lungren v. Superior Court*, a
10 nearly verbatim summary of the operative terms of Proposition 23 would read as follows:

11 Suspends the California Global Warming Solutions Act of 2006 (AB 32) until such time
12 as the unemployment rate in California is 5.5% or less for four consecutive calendar
13 quarters. While suspended, no state agency shall adopt or enforce any regulation
14 implementing the law. [with added fiscal impact statement, the ballot label would be
exactly 75 words long].

15 Despite the holding in *Lungren v. Superior Court*, the ATTORNEY GENERAL may
16 argue that in order to articulate the chief purpose and point of Proposition 23, it is necessary to
17 articulate the chief purpose and point of AB 32, the law temporarily suspended by Proposition 23.
18 If that was the ATTORNEY GENERAL’S intent, then the proposed ballot label fails to do so.

19 The chief purpose and point of AB 32 was the establishment of a goal for greenhouse gas
20 emission reductions and a target date to achieve that goal. In this regard, the ATTORNEY
21 GENERAL amended the “circulating title and summary” to include a sentence in the proposed
22 title and summary that states: “Suspends State law that requires greenhouse gas emissions be
23 reduced to 1990 levels by 2020, until California’s unemployment rate drops to 5.5 percent or less
24 for four consecutive calendar quarters.” (Petition for Writ of Mandate, Exhibit D.) In 30 words,
25 the ATTORNEY GENERAL has clearly summarized the chief purpose and point of Proposition
26 23 and AB 32. Unfortunately, he did not see fit to make that sentence the ballot label, instead
27 choosing to use a prejudicial and misleading sentence, as discussed more fully below.

28 There can be little doubt that the chief purpose of AB 32 was the setting of a greenhouse

1 gas emission reduction goal and target date for achieving that goal. Indeed, the Legislative
2 Analyst's summary of AB 32 starts with this principal objective:

3 In 2006, the state enacted the California Global Warming Solutions Act of 2006,
4 commonly referred to as Assembly Bill 32 or "AB 32." **This legislation established the
5 target of reducing the state's emissions of GHGs by 2020 to the level that emissions
6 were at in 1990.** It is estimated that achieving this target would result in about a 30
percent reduction in GHG's in 2020 from where their level would otherwise be in the
absence of AB 32.

7 (Petition for Writ of Mandate, Exhibit E, at pp. 1-2, emphasis added).

8
9 The ATTORNEY GENERAL'S clear and concise sentence, now found in the title and
10 summary, if used in the ballot label to replace the problematic sentence would accurately and
11 lawfully describe the chief purpose and point of Proposition 23 and AB 32.

12 2) **The ballot label uses terms that are argumentative and likely to create
13 prejudice against Proposition 23**

14 Taken as a whole, the existing sentence is argumentative and likely to create prejudice
15 against Proposition 23. The ATTORNEY GENERAL will likely argue that the statement is
16 "true." While that point is debatable, it is not dispositive, as the requirement that a statement be
17 fair and impartial is as important as its truthfulness. The Legislature did not engage in
18 redundancy when it imposed a requirement that ballot materials be truthful, non-argumentative,
19 non-prejudicial, and not misleading. (*Huntington Beach City Council, supra*, 94 Cal.App.4th at
20 p. 1432).

21 The ballot label is a single sentence argument against Proposition 23 chock full of
22 "loaded" terms. Starting with the most obvious, the term "major polluters" is clearly prejudicial.
23 If there is one thing most everyone can agree upon, it is that AB 32 will impact everyone, not just
24 "major polluters." Indeed, the term "major polluters" is not found anywhere in the text of AB 32.
25 Nor is that term found in the regulations adopted by CARB. Nor is that term found in the 121
26 page "Scoping Plan" adopted by CARB pursuant to AB 32.

27
28 ///

1 Not only is the term “major polluters” not found anywhere in connection with AB 32,
2 neither is the term “polluters.”²

3 The closest justification (and only for the use of the word “major”) that can be offered by
4 the ATTORNEY GENERAL is reference to section 38530(b) of AB 32. That section provides in
5 part:

6 The regulations [adopted by CARB] shall do all of the following: (1) Require the
7 monitoring and annual reporting of greenhouse gas emissions, from greenhouse gas
8 emission source beginning with the sources or categories of sources that contribute the
9 most to statewide emissions. (Emphasis added.)

10 In furtherance of this mandate, CARB has enacted a complicated regulatory scheme requiring
11 certain greenhouse gas emitters to report such emissions. (17 Cal. Code of Regs. § 95100-
12 95133.) As indicated by the statute, CARB’s regulatory authority is not limited to “major”
13 emitters of GHG, it was only directed to start its regulatory process with those sources “that
14 contribute the most” GHG emissions.

15 Furthermore, the public might be surprised to learn who is a “major polluter” required to
16 report under CARB’s regulation. In October 2009, CARB released a “Frequently Asked
17 Questions Regarding the Mandatory Reporting Program.” (Petition for Writ of Mandate, Exhibit
18 J.) To be sure, large industrial sources of GHG are required to report under the guidelines. But
19 so too are sources that would not be considered “major polluters.” Take Q 16 as an example:

20 Q: How do I report emissions from a company with a large campus with 40 buildings,
21 including distinct groups of buildings spread out over a number of roads in the general
22 area? There is no physical boundary as such around the whole campus. The campus as a
23 whole emits >25,000 MT CO2 from on-site combustion (primarily natural gas) annually
24 but no individual building or boiler emits this amount. However, there is a central group
25 of buildings that do emit over 25,000 MT CO2.

26 A: The company should report as a single facility when emitting activities are located on
27 contiguous or adjacent properties, or separated only by a public right-of-way. Portions of
28 the campus that are geographically independent (i.e. separated by more than just a public
right-of-way) may be excluded from the report, or included as optional emissions.

///

² The term “pollutant” is found in the text of AB 32, however it is used to describe “pollutants”

1 So what might constitute such a “campus?” Question 24 provides some guidance:

2 Q: Does a university qualify as a ‘school,’ thus making it exempt from Mandatory
3 Reporting?

4 A: No, the regulation only exempts primary and secondary schools. Colleges and
5 universities are not exempt from reporting. [citation omitted] If the university as a
6 ‘facility’ emits more than 25,000 MT of CO2 from stationary combustion, or has power
7 generation or cogeneration > 1 MW which emits more than 2,500 MT of CO2, the
8 university would be subject to GHG emissions reporting.

9 Surely the regulations focus on industrial uses of CO2, thereby focusing its attention on “major
10 polluters?” The answer is “no.” Question 12 makes that point crystal clear:

11 Q: Does fuel used for non-production activities (like gas used for water heater for
12 employee showers) need to be reported?

13 A: In most cases all stationary combustion sources at the facility should be reported....

14 It is doubtful that the voters would consider the University of California Davis’s decision to offer
15 showers to the football team to be a contributing factor to its classification as a “major polluter”
16 required to report GHG emissions under AB 32.

17 Moreover, the 25,000 MT threshold chosen by CARB has resulted in GHG emission
18 reporting by literally hundreds of entities, including governmental agencies. According to the
19 latest summary of CO2 emission reports collected by CARB, the highest emitter reported
20 emission of over 15 million metric tons, while the minimum reporting threshold is just 25
21 thousand metric tons. (Petition for Writ of Mandate, Exhibit K). Thus, the largest emitter of
22 GHG, according to the latest emission reports, emits 600 times more greenhouse gases than the
23 smallest reporting entities. The ATTORNEY GENERAL is not free to classify every entity on
24 this list as a “major polluter.”

25 The ballot label goes on to state that “major polluters” are required to “reduce” GHG
26 emissions as well as “report.” Here again, the term “major polluters” is misleading and totally
27 prejudicial. Indeed, CARB’s Scoping Plan makes it clear that industrial sources account for only
28

other than GHG emissions. (Health & Saf. Code § 38562(b)(6).)

1 20% of GHG emissions presently and are expected to remain flat over time. (Petition for Writ of
2 Mandate, Exhibit I, p. 11 –Figure 1). Yet, the Scoping Plan requires reductions from all sectors
3 of the economy, including transportation, electrical generation, commercial and residential use,
4 industry, agriculture, and other sources. There are a number of adopted and proposed regulations
5 in the AB 32 Scoping Plan (Petition for Writ of Mandate, Exhibit I) that also apply to tens of
6 thousands of private companies, agencies and private citizens such as independent truck owners,
7 small manufacturers, service station and auto repair facilities, restaurants, schools, and
8 commercial buildings that hardly can be considered “major polluters.” These include:

- 9 • Port Drayage Trucks (AB 32 Scoping Plan Measure T-6): Regulates several thousand
10 heavy-duty vehicles that transport cargo to and from ports and inter-modal rail facilities.
11 A very large percentage of these port drayage trucks are owned by small firms and
12 independent owner-operators.
- 13 • Heavy-Duty Vehicle GHG (AB 32 Scoping Plan Measure T-7): Applies to hundreds of
14 large and small trucking firms throughout the state.
- 15 • HFC Emission Reduction Measures for Mobile Source (AB 32 Scoping Plan Measure H-
16 1): These measures will control HFC release from Do-It-Yourself motor vehicle air
17 conditioning (MVAC) servicing, require addition of AC leak tightness test / repair to
18 smog check, enforce the federal regulations on banning HFC release from MVAC
19 servicing / dismantling, and require using low-GWP refrigerants for new MVAC. They
20 apply to several small manufacturers and the California drivers who prefer do-it-yourself
21 servicing.
- 22 • SF₆ Limits in Non-Utility and Non-Semiconductor Applications (AB 32 Scoping Plan
23 Measure H-2): Measure applies to several small metal manufacturers. The estimated cost
24 is more than \$1 million for each facility according to the California Metals Coalition.
- 25 • Regulation of Semiconductor Manufacturing (AB 32 Scoping Plan Measure H-3): This
26 regulation applies to an owner or operator of a semiconductor or related devices operation
27 that uses fluorinated gases or heat transfer fluids.
- 28 • Tire Pressure Program (AB 32 Scoping Plan Measure T-4): The Air Resources Board
adopted this regulation to require California’s automotive maintenance industry to check
the tire pressure of every vehicle they service, and to maintain and submit forms to prove
they are in compliance. This would apply to thousands of small service stations and auto
repair facilities. The regulation was disapproved by the Office of Administrative Law,
and CARB has until July 2010 to resubmit it.
- Refrigerant Management Program (AB 32 Scoping Plan Measure H-6): The strategy of
the regulation includes: registration; refrigerant leak detection and monitoring; leak repair;
reporting and recordkeeping; system retrofit or retirement planning; required service
practices; and refrigerant distributor, wholesaler, and reclaimer prohibitions,
recordkeeping, and reporting. CARB estimates that from 28,500 to 122,000 facilities
would be subject to this regulation. Those facilities include agricultural services, airports,
amusement and recreation parks, beer and ale wholesalers and retailers, bottled gas
dealers, cemeteries and crematories, dairies, department stores, K-12 education, junior

1 colleges, tech and trade schools, universities, food processing, fresh fruit and vegetable
2 wholesalers, frozen food wholesalers, fruit and vegetable processors, hotels and motels,
3 ice manufacturing, libraries, manufacturing, meat processing, medical care, warehousing
4 and storage, office buildings, petroleum, publishing, refrigerated warehousing and storage,
5 religious organizations, food retailers, semiconductors, service industry,
6 telecommunications, television and movie production, and utilities.

- 7 • Transportation Refrigeration Unit (TRU) for Cold Storage (AB 32 Scoping Plan Measure
8 T-6): This rule applies to hundreds of companies including grocery stores, warehousing,
9 medical facilities, and other companies and agencies. TRUs control the environment of
10 temperature-sensitive products in refrigerated trucks, trailers, railcars and shipping
11 containers. They may be capable of cooling or heating. TRUs are used to transport and
12 store many products, including, but not limited to food, pharmaceuticals, plants,
13 medicines, blood, chemicals, photographic film, art work, and explosives. Some
14 companies use TRUs for extended cold storage during the four- to six-week period before
15 all of the major holidays. Distribution centers and grocery stores are known to run out of
16 cold storage space in their buildings, so they store overflow goods in TRU-equipped
17 trucks and trailers outside their grocery stores and distribution centers.
- 18 • Public Goods Charge for Water (AB 32 Scoping Plan Measure W-6): The public goods
19 charge would be applied to each water connection, be collected by each retail water
20 provider in the state, and include all uses of water. CARB estimates the water charge
21 would range from \$100 million to \$500 million. It would be paid by homeowners, local
22 governments, school districts and private companies who pay a water bill.
- 23 • Medium and Heavy Duty Vehicle Hybridization (AB 32 Scoping Plan Measure T-8): This
24 measure would require existing trucks/trailers to be retrofitted with technologies that
25 reduce GHG emissions and improve the fuel efficiency of trucks. Several hundred
26 trucking companies small and large must comply with this rule.
- 27 • Commercial Harbor Craft Regulation (AB 32 Scoping Plan Measure T-6): Commercial
28 Harbor Craft (CHC) include ferries, excursion vessels, tugboats, towboats, crew and
supply vessels, work boats, commercial and charter fishing boats, and barge and dredge
vessels. CARB staff estimates there are approximately 4,300 commercial harbor craft
vessels with 8,700 diesel-fueled engines operating in California coastal waters.

19 It is clear from just these few examples out of the AB 32 Scoping Plan's 72 control
20 measures that greenhouse reductions will be required of thousands of school districts, cities,
21 counties, state agencies, small and large businesses, and millions of water bill payers. Using the
22 term "major polluters" to describe those that are subject to AB 32 provisions is simply inaccurate
23 and can only serve one purpose -- to create prejudice against Proposition 23.

24 As stated above, our Supreme Court has said that "government may not take sides in
25 election contests and bestow an unfair advantage on one of several competing factions."
26 (*Stanson, supra* 17 Cal.3d 206.) The ballot label clearly bestows an advantage on opponents to
27 Proposition 23. To borrow the words of the appellate court in *Huntington Beach City Council,*
28 *supra*, 94 Cal.App.4th at 1417, the term "major polluters" carries a "loaded meaning."

1 A common dictionary definition of a polluter is one who “make[s] foul or unclean,
2 especially with harmful chemical or waste products; dirty.” (See, Dictionary.com) In the context
3 of industrial emissions, AB 32 focuses on carbon dioxide and methane gases... gases emitted by
4 all humans and animals, not just industry. Whether CO2 or methane constitute a “pollutant”
5 under the law or not, the term is clearly prejudicial and may not be properly used to describe
6 Proposition 23.

7 Not only is the term “major polluters” prejudicial, but the ATTORNEY GENERAL’s
8 clever use of the term “air pollution control laws...” leaves the clear misleading implication that
9 all or nearly all of California’s air pollution control laws will be suspended if Proposition 23 is
10 passed.

11 As indicated more fully below, and as stated by the Legislative Analyst’s analysis of the
12 initiative, “we estimate that more than one-half of the emission reductions from implementing the
13 Scoping Plan would come because of laws enacted separately from AB 32.” (Petition for Writ of
14 Mandate, Exhibit E, p. 8, Emphasis added). In sum, Proposition 23 temporarily suspends
15 implementation of one law – AB 32. The Legislative Analyst identifies four specific “laws” that
16 would address climate change and reduce GHG emissions completely unaffected by Proposition
17 23. (*Id.*)

18 CARB’s Scoping Plan (Exhibit I) is more specific and identifies a whole host of GHG
19 focused laws and programs that are not dependent on AB 32 for their existence, including the
20 following:

21 1) AB 1493 (Pavley, Chapter 200, Statutes of 2002) – Light-Duty Vehicle Greenhouse
22 Gas Standards. According to CARB’s Scoping Plan, passenger vehicles are responsible for 30%
23 of California’s greenhouse gas emissions.

24 2) Zero-Emission Vehicle (“ZEV”) Regulation According to the Scoping Plan the ZEV
25 program is an important part in achieving GHG emission reductions by significantly increasing
26 the usage of ZEV and near-ZEV in California.

27 3) AB 118 (Nunez, Chapter 750, Statutes of 2007) – Air Quality Improvement Program.
28 This law provides funding for research and development of alternative fuel technologies and

1 alternative vehicle types all with the goal of reducing GHG emissions from transportation
2 sources.

3 4) SB 1037 (Kehoe, Chapter 366, Statutes of 2005) and AB 2021 (Levine, Chapter 734,
4 Statutes of 2006) requiring electric utilities to meet resource needs from energy efficiency rather
5 than new GHG emitting sources.

6 5) SB 107 (Simitian, Chapter 464, Statutes of 2006) requiring investor owned utilities to
7 increase the share of renewable energy production sources to 20% by 2010. This law was
8 followed up by California Energy Commission and California Public Utilities Commission plans
9 to increase the renewable goal to 33% by 2020.

10 6) SB 1368 (Perata, Chapter 598, Statutes of 2006) created greenhouse gas
11 performance standards for new long-term financial investments in base-load
12 electricity generation serving California customers. This law places restrictions on the ability
13 of utilities to build new carbon-intensive plants or enter into new contracts with high
14 carbon sources of electricity.

15 7) SB 1 (Murray, Chapter 132, Statutes of 2006) – Million Solar Roofs Initiative. The
16 program is designed to install 3,000 megawatts of new solar electricity generation from rooftop
17 solar generation, reducing electricity consumption from the grid and thereby reducing GHG
18 emissions.

19 8) Proposition 1A – High Speed Rail – The Scoping Plan identifies the voters’ approval
20 of a statewide bond measure and the eventual construction of a high speed rail system as an
21 important part of the state’s reduction of GHG emissions.

22 9) Green Building Standards Code – In 2008 the California Building Standards
23 Commission adopted the Green Building Standards Code for all new construction in the state.
24 Once the Code becomes mandatory (expected in 2011), CARB estimates that the GHG emission
25 reductions would be nearly as much as the reductions achieved by the Light-Duty Vehicle
26 Greenhouse Gas Standards law.

27 10) Title 24 Energy Regulations.

28 11) Title 19 Appliance Energy Regulations.

1 12) AB 758 Energy Efficiency Regulations.

2 13) Utility Energy Efficiency Programs: The California Public Utility Commission last
3 year reauthorized this program which allows \$3.1 billion in ratepayer funding over the next three
4 years to be used for utility energy efficiency programs that reduce greenhouse gas emissions.

5 14) SB 375 Regional Transportation Planning.

6 Lastly, there are a host of laws designed to reduce “air pollution” without regard to
7 greenhouse gas emissions referenced in the 2010 “Bluebook.” A partial list of these laws include:
8 California Environmental Quality Act (CEQA), California Clean Air Act, Protect California Air
9 Act, Safe Drinking Water and Toxic Enforcement Act of 1986, California Pollution Control
10 Financing Authority Act, California Hazardous Waste Substances Act, California Safe Drinking
11 Water Act, Environmental Water Act, Water Pollution Control Act, Air Toxics “Hot Spots”
12 Information and Assessment Act, Environmental Protection Permit Reform Act of 1993, and the
13 Lewis-Presley Air Quality Management Act. All of these laws would remain fully operable with
14 passage of the California Jobs Initiative because the initiative takes no action with respect to
15 them.

16 **3) The ballot label is misleading in several respects**

17 For each of the reasons the ballot label is prejudicial it is also misleading. Proposition 23
18 does not suspend all “air pollution control laws” nor does it suspend all “air pollution control
19 laws” that reduce GHG emissions.” AB 32’s reporting and reduction requirements do not apply
20 only to “major polluters” whatever, the ATTORNEY GENERAL intends that term to mean.

21 Indeed, it is not clear that “major polluters” will be required to “reduce” GHG emissions
22 at all under AB 32. AB 32 contemplates a “cap-and-trade” system (not yet designed or enacted
23 by CARB; and as a practical matter, likely to be used only by large emitters of GHG) that would
24 allow an emitter of GHG to purchase or receive “free” emission credits in lieu of actually
25 reducing their own GHG emissions. (Health & Saf. Code § 38570) While AB 32 clearly
26 contemplates a total reduction of greenhouse gas emissions in the State, the manner in which it
27 achieves such reductions is not going to come only from “major polluters.”
28

1 Lastly, the ballot label states that the unemployment target of 5.5 percent must be
2 achieved “for a full year.” The implication is that it must be achieved for a calendar year when it
3 is clear from the initiative that the unemployment target must be achieved over four consecutive
4 calendar quarters. If the unemployment rate dips below 5.5 percent in the second, third, fourth
5 quarters of 2012 and the first quarter of 2013, the suspension would be lifted.

6 The ballot label as presently drafted is argumentative and likely to create prejudice against
7 Proposition 23. The supporters of Proposition 23 have consistently asked the ATTORNEY
8 GENERAL to give them a fair ballot label, even offering up alternatives based on impartial
9 sources. The ATTORNEY GENERAL has refused and it is this court’s duty to protect the
10 interests of the voters to a fair and impartial summary of the chief purpose and point of
11 Proposition 23. Petitioners offer the following suggestion for the court’s consideration using the
12 second sentence of the proposed title and summary to replace to offending sentence in the ballot
13 label:

14 **SUSPENDS STATE LAW THAT REQUIRES GREENHOUSE GAS EMISSIONS**
15 **BE REDUCED TO 1990 LEVELS BY 2020, UNTIL CALIFORNIA’S**
16 **UNEMPLOYMENT DROPS TO 5.5 PERCENT OR LESS FOR FOUR**
17 **CONSECUTIVE CALENDAR QUARTERS. ~~SUSPENDS AIR POLLUTION~~**
18 **~~CONTROL LAWS REQUIRING MAJOR POLLUTERS TO REPORT AND~~**
19 **~~REDUCE GREENHOUSE GAS EMISSIONS THAT CAUSE GLOBAL~~**
20 **~~WARMING UNTIL UNEMPLOYMENT DROPS TO 5.5 PERCENT OR LESS~~**
21 **~~FOR FULL YEAR. INITIATIVE STATUTE.~~ Fiscal Impact: Likely modest net**
22 **increase in overall economic activity in the state from suspension of greenhouse gases**
23 **regulatory activity, resulting in a potentially significant net increase in state and local**
24 **revenue.**

21 **B. THE BALLOT TITLE AND SUMMARY FOR PROPOSITION 23 IS**
22 **MISLEADING, ARGUMENTATIVE, AND LIKELY TO CREATE**
23 **PREJUDICE AGAINST THE MEASURE IN VIOLATION OF THE**
24 **ELECTIONS CODE**

25 The title and summary prepared by the ATTORNEY GENERAL for Proposition 23 and
26 which Respondent Secretary of State will order to be printed in the official ballot materials
27 distributed to voters reads as follows:

28 ///

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1 **SUSPENDS AIR POLLUTION CONTROL LAWS**
2 **REQUIRING MAJOR POLLUTERS TO REPORT AND**
3 **REDUCE GREENHOUSE GAS EMISSIONS THAT**
4 **CAUSE GLOBAL WARMING UNTIL UNEMPLOYMENT**
5 **DROPS TO 5.5 PERCENT OR LESS FOR FULL YEAR.**
6 **INITIATIVE STATUTE.**

- 7 • Suspends State law that requires greenhouse gas emissions
8 be reduced to 1990 levels by 2020, until California’s
9 unemployment drops to 5.5 percent or less for four
10 consecutive calendar quarters.
- 11 • Requires State to abandon implementation of
12 comprehensive greenhouse-gas-reduction program that
13 includes increased renewable energy and cleaner fuel
14 requirements, and mandatory emissions reporting and fee
15 requirements for major polluters such as power plants and
16 oil refineries, until suspension ends.

17 **Summary of Legislative Analyst’s Estimate of Net State and**
18 **Local Government Fiscal Impact:**

- 19 • The suspension of AB 32 could result in a modest net
20 increase in overall economic activity in the state. In this
21 event, there would be an unknown but potentially
22 significant net increase in state and local government
23 revenues.
- 24 • Potential loss of a new source of state revenues from the
25 auctioning of emission allowances by state government to
26 certain businesses that would pay for these allowances, by
27 suspending the future implementation of cap-and-trade
28 regulations.
- Lower energy costs for state and local governments than
 otherwise.

(Petition for Writ of Mandate, Exhibit D, Emphasis in original.)

Like the ballot label, the proposed title and summary suffers the same legal deficiencies – it fails to identify the chief purpose and point of the Proposition in the “title:” it is argumentative and likely to create prejudice against Proposition 23; and it is misleading.

1) **The “title” in the title and summary fails to identify the chief purpose and point of Proposition 23**

As indicated above, the “title” of the title and summary does not identify the chief purpose and point of Proposition 23 or of AB 32. However, the second sentence (the first bullet) does accurately describe the chief purpose and point of both Proposition 23 and AB 32. As

1 indicated above and below, Petitioners ask the Court to use the ATTORNEY GENERAL's
2 second sentence as the title.

3 **2) The title and summary is argumentative and likely to create prejudice**
4 **against Proposition 23**

5 The arguments against the "title" are identical to the arguments made against the ballot
6 label above, as they are identical. Additionally, the third sentence of the title and summary (the
7 second bullet) is equally argumentative and prejudicial.

8 For starters, use of the word "abandon" is both false and misleading and prejudicial.
9 Perhaps the ATTORNEY GENERAL was searching for a synonym for the word "suspends"
10 since he had used that word to start the prior two sentences. However, the word "abandon" is not
11 a synonym of "suspends." A common list of synonyms for the word "suspend" includes:
12 adjourn, defer, hold up, postpone, and stay. Not surprisingly, the common dictionary definition
13 of the term "abandon" is to "leave completely and finally."

14 Second, "comprehensive" greenhouse gas reduction in California is to be achieved
15 through a host of laws (some of which are described above) which are unaffected by Proposition
16 23. Those laws require "renewable energy" and "cleaner fuel requirements" to reduce GHG
17 emissions, among other policy objectives. Indeed, the Legislative Analyst concluded that more
18 than half of the existing laws requiring GHG emission reductions are not affected by Proposition
19 23. "Comprehensive" is a subjective term and is not appropriately used in an impartial title and
20 summary.

21 Moreover, the prejudicial use of the term "major polluters" is emphasized by its use again,
22 this time modified by the inclusion of "power plants" and "oil refineries," thereby adding to the
23 argumentative nature of the entire title and summary. AB 32 does not use the term "major
24 polluters," and it does not focus on "oil refineries" or "power plants," as is clearly shown by the
25 AB 32 measures listed above and the 72 individual measures listed in the AB 32 Scoping Plan.
26 Its intended application is far broader than explained to the voters by the biased summary
27 provided by the ATTORNEY GENERAL.

28 ///

1 To ensure neutrality and prevent the title and summary from being false and/or
2 misleading, Petitioners ask this Court to amend or correct this statement as follows:

3 **SUSPENDS STATE LAW THAT REQUIRES**
4 **GREENHOUSE GAS EMISSIONS BE REDUCED TO 1990**
5 **LEVELS BY 2020, UNTIL CALIFORNIA'S**
6 **UNEMPLOYMENT DROPS TO 5.5 PERCENT OR LESS**
7 **FOR FOUR CONSECUTIVE CALENDAR QUARTERS.**
8 **SUSPENDS AIR POLLUTION CONTROL LAWS**
9 **REQUIRING MAJOR POLLUTERS TO REPORT AND**
10 **REDUCE GREENHOUSE GAS EMISSIONS THAT**
11 **CAUSE GLOBAL WARMING UNTIL UNEMPLOYMENT**
12 **DROPS TO 5.5 PERCENT OR LESS FOR FULL YEAR.**
13 **SUSPENDS INITIATIVE STATUTE.**

14 • [moved to first sentence above] Suspends State law that
15 requires greenhouse gas emissions be reduced to 1990 levels by
16 2020, until California's unemployment drops to 5.5 percent or less
17 for four consecutive calendar quarters. [taken from Bill Digest for
18 AB 32] Suspends State law that require the state air resources
19 board to adopt regulations to require the reporting and verification
20 of statewide greenhouse gas emissions and to monitor and enforce
21 compliance with this program

22 • Requires State to ~~abandon~~ suspend implementation of
23 ~~comprehensive~~ greenhouse-gas-reduction program that may
24 includes increased renewable energy and cleaner fuel
25 requirements, and mandatory emissions reporting and fee
26 requirements for major polluters such as power plants and oil
27 refineries, until suspension ends.

28 **Summary of Legislative Analyst's Estimate of Net State and
Local Government Fiscal Impact:**

• The suspension of AB 32 could result in a modest net
increase in overall economic activity in the state. In this event,
there would be an unknown but potentially significant net increase
in state and local government revenues.

• Potential loss of a new source of state revenues from the
auctioning of emission allowances by state government to certain
businesses that would pay for these allowances, by suspending the
future implementation of cap-and-trade regulations..

• Lower energy costs for state and local governments than otherwise.

This suggested language is a fair and accurate informational summary of Proposition 23.

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VI.

CONCLUSION

For the foregoing reasons, Petitioners ask that this Court order the above-requested revisions to the ballot label and title and summary for Proposition 23.

Dated: July 27, 2010

Respectfully Submitted,
BELL, McANDREWS, & HILTACHK, LLP

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