

No. G047591

**IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION THREE**

STEVEN VARGAS, an Individual,
Plaintiff and Appellant,

v.

CHERYL BALZ, as City Clerk, and
NEAL KELLEY, as Registrar of Voters
Defendants and Respondents.

CITY OF BREA, et al.,
Real Parties in Interest and Respondents

Appeal from the Superior Court for the County of Orange
Hon. Robert J. Moss, Judge
Trial Court Case No.: 30-2012-00585496

**APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE*
BRIEF BY BALLOTPEDIA AND CALIFORNIANS AWARE,
STATEMENT OF INTEREST OF *AMICUS CURIAE*, AND
AMICUS BRIEF IN SUPPORT OF PLAINTIFF/APPELLANT**

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TO THE HONORABLE COURT OF APPEAL OF CALIFORNIA:

Ballotpedia, a nonprofit and nonpartisan collaborative encyclopedia, and Californians Aware, an educational California Corporation, pursuant to Rule 8.200(c) of the California Rules of Court, hereby apply for leave to file a brief as *amicus curiae* in the above-captioned matter. As its main function Ballotpedia disseminates information on elections with a particular emphasis on ballot measures. Ballotpedia published the ballot arguments at issue in the present case during the public review and challenge period and later found that the voter guide included a different “signature block” than what they published on their website. Ballotpedia has a significant interest in maintaining credibility by providing accurate information on elections and has an interest not only in this particular case, but with how future ballot arguments appear on the voter pamphlet as an exact replica of the ballot arguments submitted for review.

As its main function Californians Aware promotes the public’s understanding and use of the public law forum to specifically promote better practices and better observance of the law by public agencies. The underlying facts of the case are simple, a clerk changed the

signature block of the ballot arguments on the subject measures to read the City Council of the City of Brea in the voter pamphlet when it presented the ballot arguments for review and challenge as being signed by two individuals. Californians Aware has a vested interest in clear precedent that does not permit any government agency the ability to change the ballot arguments that is not in strict compliance with the Elections Code.

Amicus have read the Parties Briefs and believes the points and authorities presented herein offer a helpful perspective to this Court that has not been directly addressed and is not requesting any time for oral argument. No Party or any counsel for a party in the pending appeal authored the proposed brief in whole or in part, or made a monetary contribution intended to fund the preparation or submission of the brief. Further, no individual or entity made a contribution intended to fund the preparation or submission of the brief other than *Amicus* and its counsel.

For the foregoing reasons, *Amicus* respectfully requests that this Application for Leave to File Brief *Amicus Curiae* on behalf of Ballotpedia and Californians Aware be granted.

This the 19th day of October, 2013.


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INTEREST OF THE *AMICUS CURIAE*

As its main function Ballotpedia gathers and disseminates information on elections with a particular emphasis on ballot measures. Ballotpedia has twenty five paid staff members that gather information and write articles, it has thousands of registered users, and hundreds of thousands of articles on its website www.ballotpedia.org. Ballotpedia published the ballot arguments for Brea Measures U and T as presented by the City Clerk during the ten day review and challenge period. Approximately two thousand people viewed the ballot measures as presented on their website, with the Mayor and Mayor Pro Tem as the proponents. The voter pamphlet listed the City Council of the City of Brea as the proponent of the ballot argument, different from how Ballotpedia presented it to the public. This reduces the credibility of Ballotpedia as providing accurate ballot information to the public and Ballotpedia has a significant interest in maintaining credibility not only in this particular case, but ensuring that future ballot arguments appear in the voter pamphlet exactly as they are worded, signed, and submitted for the review and challenge period.

As its main function Californians Aware fosters public understanding and use of the public law forum to specifically promote better practices and better observance of the law by public agencies. Californians Aware has a vested interest in obtaining clear precedent that

does not permit any City the ability to change the ballot arguments that is not in complete compliance with the law and not completely transparent. This case involves an important issue of the City Governments being able to create deadlines from a clear set of rules and then disregard them by swapping the signatories of a ballot argument from as submitted and reviewed to a different signatory.

Both Ballotpedia and Californians Aware have a great deal of interest in a case involving fair and transparent election processes and *Amicus Curie* can provide perspective and arguments not adequately addressed by the Parties' Briefs.

STATEMENT OF THE CASE

In regards to the ballot measures¹ at issue this controversy started when, "the City Clerk has fixed July 3rd, 2012, during normal business hours, as posted, as the date after which no arguments for or against the City measures(s) may be submitted to the clerk for printing and distribution to the voters as provided in the Article 4." AA page 36. The City of Brea filed its ballot argument against the "Brea Open Governance Act" that was signed by Don Schweitzer as Mayor and Brett Murdock as Mayor Pro Tem which was stamped received on July 3, 2012 (time stamp not available). AA 42-43. At 6:09pm the City Clerk attempts to modify the ballot

¹ City of Brea Accountability Act, Measure T that passed and City of Brea Open Governance Act, Measure U that failed (November 2012).

argument signature block submitted via email, however, that email is not fruitful and the ballot argument is presented for review and challenge without the City Council of the City of Brea as its listed author. AA 45.

The issues presented for this Court are: (1) If a City has the ability to disregard the Elections Code and change the signature block of a ballot argument when no other person or entity would be allowed to submit such a change without a Court order; (2) if public policy concerns that make this matter ripe for future controversies even though the election has passed; and (3) is a standard of review for ballot measures de novo or abuse of discretion?

ARGUMENT

I. THE BALLOT ARGUMENT MUST BE PRINTED EXACTLY AS SUBMITTED FOR REVIEW WHEN PRINTED IN THE VOTER PAMPHLET.

The California Election Code provides a precise set of rules for the ballot arguments, § 9295(a) requires that elections officials make a copy of the arguments available for the public to review for ten calendar days. Section 9295(b) states that “any voter [], or the elections official, himself or herself, may seek a writ of mandate to an injunction requiring any or all of the materials to be amended or deleted.” Amicus requests this Court clearly rule that a City cannot end around the only legal path to amend a ballot argument. If a City wants to change a signature block it must do so during the ten day review window by filing a mandamus writ just like

everyone else, including an elections official. After that ten day window the ballot arguments are set, there is no chance to go back and improve or otherwise change them.

The exact language that gets published in the voter pamphlet is incredibly important as there is often little other information available to a voter². The propositions at issue in the present case were decided by less than five percent of the vote, just a slight change of language on the ballot arguments could make the difference of the measure passing or failing both for this case and future ballot measures. While *Brown v. Superior Court* (1971) 5 Cal.3d 509, 522 is not directly on point for the present case, it does discuss how important the signatories of a ballot argument are, which is the threshold issue of this appeal.

There are two Elections Code Sections that deal with ballot argument signatures, of primary importance is § 9283 that requires a ballot argument be accompanied by its author's printed and signed name or if an organization it be printed and then signed by one of its principal authors. Section 9287 sets out a four tier priority structure of who gets to have their ballot argument printed in the voter pamphlet when multiple parties submit

² *Brown v. Superior Court* (1971) 5 Cal.3d 509, 522 (“A ballot measure, on the other hand, is presented to voters without a historical background of established political support, and voters are unable to make the same quality judgment without knowledge of established persons or entities who or which are the real advocates or opponents of the measure[...] But in the case of a ballot measure there is little assurance that the issues will be exposed...”)

ballot arguments for the same side of the same Measure. These two code sections show the importance of the signature block and this Court must question if a seemingly minor change like in the present case has any actual consequences and presents any possible advantages.

Amicus contends this appeal is truly a review of § 9283 and a case of first impression that it will dub the dubious “signature block bait and switch.” Amicus reviewed the Parties’ Briefs and found no cases that discussed Elections Code §§ 9283 and 9287. Amicus then did a case search for California Appellate decisions that discussed §§ 9283 and 9287 and found none. The only ballot argument case found that discussed the situation was that of *Ferrara v. Belanger*³ (1976) 18 Cal.3d 252 , involving then Elections Code § 5014 in footnote 6 (which is renumbered as § 9287 in today’s code).

The short of *Ferrara* is a case where a clerk wrongly rejected ballot arguments prior to the deadline despite compliance with the 5000 series of the election code but then allowed ballot arguments of the City. *Ferrara* stated:

Because strict procedural restrictions on the filing of ballot arguments could frequently have a "real and appreciable impact" on the equality, fairness and integrity of the electoral process" the differential treatment urged by the city clerk would present very serious, perhaps fatal, equal protection problems. Moreover, because under the city clerk's interpretation of section 4017 rigid procedural

³ Cited in Appellant’s Opening and Reply Brief but not discussed in detail and not cited by Respondents.

limitations would be imposed upon proponents and supporters of an initiative measure but would not be imposed upon opponents of the measure, such a construction would raise the additional question of whether the state had violated its constitutional duty to maintain impartiality in electoral matters.

We need not reach these constitutional questions in the present case, however, for, as already explained, section 4017 in our view was never intended to make the filing of ballot arguments in favor of initiative measures more difficult and frustrating than the filing of ballot arguments on other propositions submitted to the electorate. Only a strained reading of the Elections Code will yield the capricious result, urged by the city clerk here, that the arguments against the city measure will be printed and distributed to the voters with the sample ballots, but the arguments for the measure will not be. Surely the provisions of sections 5012 and 5013, applying to all city measures, providing for reasonable times for the submission of arguments pro and con, apply to this city measure. The whole purpose of the procedures as to ballot arguments is to give voters a plenary opportunity to weigh the arguments on both sides of the question. To erect arbitrary barriers to such presentation is to thwart that purpose.

Ferrara v. Belanger 18 Cal.3d 252, 264-265 (citations omitted). *Ferrara* is incredibly useful to show the importance of compliance with the code to address the constitutional duty to maintain impartiality of the electoral process and its sound reasoning requires the reversal of the Superior Court in the instant litigation. Amicus contends the bait and switch of the signature block has a "real and appreciable impact' on the equality, fairness and integrity of the electoral process."

Under California Code of Civil Procedure § 1021.5 attorneys' fees are awarded to a prevailing party on cases of important public interest, obviously including elections cases. However, "[w]ith respect to actions

involving public entities, this section applies to allowances against, but not in favor of public entities,..." So if an organization wanted to challenge the ballot arguments in the present case as presented for inspection during the ten day period, if they were not the prevailing party they could be liable for substantial attorneys' fees. Of course there is a policy to prevent frivolous litigation so parties should never bring questionable litigation, but consider the case of *Hull v. Rossi* (1993) 13 Cal.App.4th 1763, 1765 where Hull and others filed a petition for writ of mandate to have eighteen separate statements stricken from the appellants' ballot arguments. The Court awarded attorneys' fees for the Defendant even though it made very minor changes on four of the eighteen statements. One of the four changes made: "Reliability: There is no State water" to "Reliability: There is not enough State water." *Id.* at 1766. Amicus contends that in very close ballot measures language changes such as this could have a very realistic impact on a small number of voters which may be enough to tip the balance on a certain ballot measure.

Consider a ballot measure in the future that states "the school cannot afford to buy books" but that is challenged and modified to "the school cannot afford to buy the revised addition of American History books." The Court can see such a change in language could sway voters, but under *Hull*, even winning a change like that could lead to a significant expense in attorneys' fees. A voter viewing the ballot arguments during the ten day

window on Ballotpedia will be more likely to file a writ of mandate to challenge the language if the signatory is a government entity because there is no risk of paying attorneys' fees if not declared the prevailing party.

Consider that Measure T that was part of this dispute involved pay limits on the City Council. It was the City Council that wrote the ballot argument at issue. Consider further this was not a one-time innocent error, the signatory bait and switch happened again ten days later during the rebuttal argument. AA 53-54, 56-57. Respondents include a City Council, with legal advice of a City Attorney, a Mayor, a Mayor Pro Tempore, and a City Clerk who attested to the submission and even set the deadline for submission. It borders on unbelievable that they would improperly submit ballot arguments for the inspection period on two different occasions on a total of four ballot arguments. Especially when there is a tangible benefit to performing their bait and switch, that of chilling challenges to their ballot argument language. Amicus contends this smells of impropriety, even if there was none, and this Court must quell the stench by requiring the City Council of Brea to follow the same rules as everyone else to modify their ballot arguments.

Elections Code § 9286(a) permits arguments to be changed up to the end of normal business hours of the ten day examination period. After that point, there is no way to alter the ballot argument other than obtaining a writ of mandate. Whether Amicus' contention of prospective attorneys'

fees chilling a challenge to ballot language is real or merely hypothetical, the Elections Code is set up to assuage those concerns by having strict ballot argument submission and challenge procedures. This Court has an interest in eliminating even the appearance of an impropriety and special treatment of the City.

Amicus believes the legal fee discouragement of writ language challenges to individually signed ballot arguments is not the only practical significant effect of a bait and switch. Consider a situation where the named signatory of a ballot argument regarding a bond issue is an individual with a history of financial mismanagement and the rebuttal argument focuses on the credibility of the signatory. It would be unfair to allow the City to swap signatories in this scenario. Consider the City's rebuttal to Measure U states "[t]his measure is presented and funded by a single individual that is a disgruntled former vendor of the City of Brea." AA 173. If the Measure U ballot argument could swap out signatories for current City vendors it would substantively undercut the argument raised by the City. Amicus concerns regarding bait and switch advantages the City claims is their right to correct typos are not merely academic, they are very real and destined to provide an unfair advantage to the City if it is allowed to swap signatories without following the legal requirements of § 9295.

It is undisputed that ballot arguments presented during the review and challenge period had the signature block of two elected officials. Then

the voter pamphlet listed the City Council of the City of Brea as its proponent. Amicus contends the very real consequence of swapping the signatures from individuals to the City after the ten day inspection period chilled prospective language challenges because of the very real fear being liable for massive attorneys' fees. Regardless of any actual effect, the appearance of impropriety and any possible advantages by making the "signature block bait and switch" not authorized by the Elections Code must be prohibited to set a clear example for future ballot argument submissions being final as submitted.

II. THIS MATTER IS RIPE FOR REVIEW, THE ELECTION HAVING PASSED DOES NOT RENDER IT MOOT.

Respondent's Brief argues the case is moot because the election has passed. Amicus contends this Court has the authority to review this important signature swap issue and believes this Court should follow the ripeness reasoning of the First Appellate District in a ballot challenge of *Horneff v. City and County of San Francisco* (2003) 2 Cal.Rptr.3d 79, 82-83:

The City's appeal is arguably moot because the election has already taken place and Proposition A passed. Nevertheless, this court has the discretion to consider the merits if the appeal presents a question "capable of repetition, yet evading review" or the issue is of continuing public interest. Respondent urges us not to apply this well-established exception to the mootness doctrine in this case. She argues that our prior decision in *Brennan, supra*, 125 Cal.App.3d 87, 177 Cal. Rptr. 677 has settled the law concerning the requisite contents of a digest prepared by a Ballot Simplification Committee and the standard to be applied in determining whether a judicially

ordered revision is appropriate. We decline to deem the case moot. The issue raised is a matter of continuing public interest, and the arguments in this appeal demonstrate the need to clarify our holding in *Brennan*.

(Citations Omitted). *Horneff* uses sound rationale to explain that an important election issue may escape review and Amicus contends the signature block of ballot arguments is an incredibly important issue that has very little caselaw. This argument was adequately briefed by the Parties and Amicus merely wanted to remind the Court that this is an important case of apparent first impression regarding the "signature block swap."

III. THE PROPER STANDARD OF REVIEW IS DE NOVO.

This argument again appears adequately briefed by the Parties, however Amicus wanted to draw the Court's attention to the sound rationale of *Horneff* once again:

Nor are we persuaded by respondent's contention that our review of the trial court's order should be subject to the deferential abuse-of-discretion standard. The terms of section 9295 do not vest the trial court with a wide range of discretion. Instead, relief may be granted "only upon clear and convincing evidence" that the challenged election material is "false or misleading or otherwise inconsistent with the provisions" applicable to municipal elections. Although we did not explicitly state the appellate standard of review in *Brennan, supra*, in substance, our analysis applied a de novo standard of review to conclude that the court erred in ordering the revisions in that case. (See also *Lungren v. Superior Court, supra*, 48 Cal. App.4th 435, 55 Cal.Rptr .2d 690 [court implicitly adopted de novo standard of review to find trial court "erred" in ordering the Attorney General to revise the ballot title and label for Proposition 209 to reflect that the purpose of the measure was to prohibit affirmative action programs].)

Horneff v. City and County of San Francisco (2003) 2 Cal.Rptr.3d 79, 84-85. It appears most proper for election law cases to engage in a de novo review. Regardless of the standard of review, the trial court abused its discretion because it did not have authority to change the ballot argument signature block after the time to review and challenge had passed as discussed in Section I.

CONCLUSION

This Court will decide if a signature block, and in particular a bait and switch, is important in the ballot argument process. Amicus has attempted to show the real world impact of chilling challenges to an individually signed ballot argument as opposed to a public entity. The risk of making a small change to the ballot argument and still being liable for attorneys' fees is a threat that many advocates cannot afford. The fact that one of the present measures involved caps to the bait and switchers' own salaries should raise an eyebrow of skepticism regarding any actions not completely compliant with the Elections Code. The City of Brea whether honest or nefarious in its mistake should not be permitted to swap signatories after the review and challenge period passed.

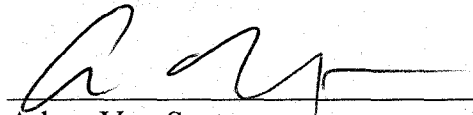
This Court must ensure that all entities play by the rules as clearly laid out in the Elections Code. Section 9283 is crystal clear that the ballot arguments need to be signed by whoever authored them and § 9295

provides the only means to correct a ballot argument during the review period. This was not followed by Respondents and this Court cannot allow a City to follow a different set of rules.

For the foregoing reasons, Amicus respectfully requests that the decision of the Court below be reversed in a published opinion that clearly holds a City is beholden to the exact same set of ballot argument requirements as every other person or entity. Amicus requests that the City's signature box bait and switch is not allowed.

October 19, 2013

Respectfully submitted,



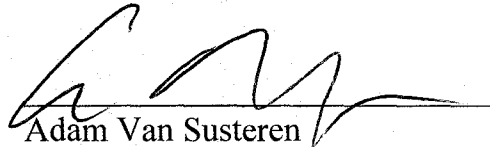
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WORD CERTIFICATION

I, Adam Van Susteren, counsel of record for Amicus Ballotpedia and Californians Aware hereby certify that according to Microsoft Word, the computer program used to prepare this Brief *Amicus Curiae* of Ballotpedia and Californians Aware in Support of Plaintiff/Appellant, the number of words in the document, including footnotes is 3524, inclusive of captions, tables, signature block, and this certification.

Executed, this the 19th day of October, 2013, at San Diego, California.

Respectfully submitted,



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PROOF OF SERVICE

Case: *Vargas v. Balz*, 4th District Appellate Civil Case No. G047591

I, Adam Van Susteren, am over the age of eighteen years, and not a party to the within action. My address is 6031 Cirrus St., San Diego, CA 92110. On October ____, 2013 I served the within document:

BALLOTPEDIA, CALIFORNIANS AWARE BRIEF AMICUS
CURIAE IN SUPPORT OF PLAINTIFF/APPELLANT

on the parties thereof below by depositing a true copy thereof, enclosed in a sealed envelope with postage fully pre-paid, in a mailbox regularly maintained by the Government of the United States in the County of San Diego, CA to each person listed below, addressed as follows:

Civil Clerk
California Supreme Court
350 McAllister Street
San Francisco, CA 94102-4797
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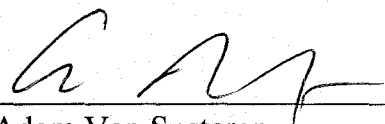
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Executed on October 19th, 2013 at San Diego, CA. I declare under
penalty of perjury that the foregoing is true and correct.

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