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9 CRAIG K. POWELL, GREG HATFIELD and ERIK
SMITT, Appearing *In Propria Persona*

10 SUPERIOR COURT OF THE STATE OF CALIFORNIA
11 COUNTY OF SACRAMENTO

13 CRAIG K. POWELL, an individual; GREG
14 HATFIELD, an individual; and ERIK SMITT, an
individual,

23 Petitioners,

16 v.

17 SHIRLEY CONCOLINO, as the City Clerk of
18 the CITY OF SACRAMENTO

19 Respondents.

20 CITY OF SACRAMENTO, a municipal
21 corporation; and JILL LAVINE, in her official
22 capacity as REGISTRAR OF VOTERS for the
COUNTY OF SACRAMENTO,

23 Real Parties In Interest.

Case No.

**VERIFIED PETITION FOR WRIT OF
MANDATE**

[ELEC. CODE, §§ 9092; 13314]

ELECTION MATTER
IMMEDIATE ACTION REQUESTED

Date:

Time:

Dept:

Judge:

Petition Filed: 08/13/12

[City of Sacramento Measure U]

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25 Petitioners CRAIG K. POWELL, GREG HATFIELD and ERIK SMITT will, and hereby
26 do, seek a writ of mandate to require Respondent SHIRLEY CONCOLINO ("CONCOLINO"),
27 City Clerk of Real Party in Interest CITY OF SACRAMENTO ("City"), to accept for filing and
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PARTIES

2. Petitioner CRAIG K. POWELL is a resident and registered voter in the City of Sacramento. He is also President of Eye on Sacramento, a local government watchdog organization. He is also one of three co-authors of the ballot argument opposing Measure U that Petitioners are seeking to have included in the ballot pamphlet for the November 6, 2012 election (the "Proffered Argument"), a copy of which is attached as **Exhibit A**.

3. Petitioner GREG HATFIELD is a resident and registered voter in the City of Sacramento. He is also a member of the Board of Directors of the Sacramento Taxpayers Association and a co-author of the Proffered Argument.

4. Petitioner ERIK SMITT is a resident and registered voter in the City of Sacramento. He is a co-author of the Proffered Argument.

5. Respondent SHIRLEY CONCOLINO ("CONCOLINO") is City Clerk of the Real Party in Interest CITY OF SACRAMENTO and is its chief elections officer. She is charged with the duty of compiling ballot materials, including arguments for and against municipal ballot measures, necessary for inclusion in ballots, ballot materials, sample ballots and other voting materials, and transmitting such materials to Real Party in Interest JILL VALINE (Cal. Elec. Code, §§ 9081-9086.) CONCOLINO is named in her official capacity only.

6. Real Party in Interest JILL VALINE is the Registrar of Voters for the County of Sacramento. She is charged with receiving from Respondent municipal ballot materials involving CITY OF SACRAMENTO elections and compiling such materials for inclusion in ballots, ballot materials, sample ballots and other voting materials. She is sued in her official capacity only.

7. Real Party in Interest CITY OF SACRAMENTO is a municipal corporation with an interest in the protecting the integrity of the electoral process in municipal elections.

JURISDICTION AND VENUE

8. Elections Code section 9092 provides a time period in which voters are entitled to review the ballot materials and file any legal challenges.

9. This Court has jurisdiction over this matter under Elections sections 9092 and 13314. Pursuant to Elections Code section 13314(c), this action "shall have priority over all other civil matters" pending before the court.

1 15. Ms. Mizuno was correctly stating the law. Under California law (Elec. Code Sec.
2 9287), a ballot argument that is submitted by a member of a city council who has been selected by
3 that city council to file a ballot argument on a municipal ballot measure has priority over ballot
4 arguments submitted by all others, including any member of the public. The election official of
5 such a city is obligated to publish the ballot argument submitted by the designated council
6 member and must reject all ballot statements submitted by others.

7 16. Mr. Neufeld thereupon ceased all efforts to submit a ballot argument opposing
8 Measure U to the City Clerk. "It would have been a complete waste of my time to file such an
9 argument only to have it rejected," he states. "I never conceived for a moment that the Mayor of
10 the City of Sacramento would fail to discharge a simple responsibility that he had been formally
11 assigned and that he had very publicly committed to perform" (Declaration of DENNIS
12 NEUFELD).

13 17. Mr. Neufeld, upset by the City Council's usurping of both the "pro" and "con"
14 arguments on Measure U, as well as on another ballot measure, wrote back to Ms. Mizuno to
23 object to the curtailing of the public's right to weigh in on ballot issues. He also, presciently as it
16 turns out, expressed his suspicion to Ms. Mizuno that the ballot argument submitted by the Mayor
17 would "avoid a hard-hitting 'Against' message that would embarrass the Council's past decisions
18 (eg garbage contracts, etc)..." (Declaration of DENNIS NEUFELD).

19 18. As Mr. Neufeld describes in his attached Declaration, the ballot argument that the
20 Mayor prepared (Declaration of CRAIG K. POWELL, **Exhibit Powell-3**), but failed to timely
21 file, failed to take note of wasteful and highly controversial city spending of which the Mayor
22 approved, such as the expenditure of \$1 million of taxpayers funds on an aborted sports arena
23 deal that required massive taxpayer subsidies without a vote of the people. Nor did the Mayor's
24 argument take note of fraudulent city spending involving his own staff, like the \$9,000 in
25 personal expenses run up by a former mayoral aide on City-issued credit cards, the subject of a
26 well-publicized and current criminal investigation. Instead, the primary thrust of the Mayor's
27 ballot argument appears to have been to make the case for "modernization" of city government,
28 which is widely acknowledged as code for his own "Strong Mayor" initiative to expand his
powers (Declaration of DENNIS NEUFELD).

1 19. The City Council's new and pernicious practice of assigning to its own members
2 the responsibility for authoring *both* the pro and con arguments on ballot measures that it places
3 on the ballot is an open invitation for such misuse and abuse of the ballot argument process. The
4 potential for abuse is immense as councilmembers may contrive to submit weak or watered down
5 ballot arguments to nominally "oppose" measures favored by the City Council (the Mayor, in
6 fact, voted to place Measure U on the ballot), sand-bagging members of the public from filing
7 robust ballot arguments that would be persuasive to voters. Alternatively, a member of the
8 Council selected to write an opposing ballot argument might "fail" to timely file his assigned
9 ballot argument with the City Clerk, which virtually guarantees that no ballot argument opposing
10 the measure will appear on the sample ballot, perverting the election process and cheating voters
11 out of their democratic right to weigh the arguments opposing such a ballot measure.

12 20. In additionally, the Council's corrupt practice of assigning both the pro and con
13 sides of ballot arguments to councilmembers creates a very high risk of undermining voter
14 confidence in the integrity of the electoral process and corroding public respect for, and the
23 legitimacy of, local governmental institutions. This is no mere speculative risk. As recounted in
16 the Declaration of CRAIG K. Powell, the Sacramento Bee story posted a story on SacBee.com on
17 August 9th entitled "Mayor Johnson Fails to Write Ballot Argument Against Tax Measure"
18 (**Exhibit Powell-4**). An astonishing 138 comments to that story were posted by members of the
19 public, the great majority of which expressed clear disdain, cynicism or distrust of city
20 government, the City Council and/or the Mayor. Twenty-two of the comments posted expressed
21 suspicion that the Mayor had *intentionally* failed to file a ballot argument opposing Measure U to
22 secure passage of Measure U. This Court can help restore basic public trust in the city's electoral
23 process, if not city government, by ordering that the Respondents' Proffered Argument be
24 accepted for filing by Respondent.

25 21. Once news of the Mayor's failure to timely file a ballot argument opposing
26 Measure U was received, both Mr. Neufeld and Petitioner POWELL contacted Assistant City
27 Clerk Stephanie Mizuno to request a brief extension of time for others to file a ballot argument
28 opposing Measure U in light of the Mayor's failure to timely file such an argument. Mr. Neufeld
sought a five-day extension. Petitioner POWELL asserted to Ms. Mizuno that nothing in the law

1 prohibited Respondent from providing relief in the form of a brief extension of the deadline. He
2 further asserted that the state statute that granted her the authority to establish deadlines for
3 argument submissions(Elec. Code sec. 95502) carried with it the implied authority to offer relief
4 from such deadlines in the absence of any law prohibiting her from providing such relief or
5 exercising such discretion. Ms. Mizuno responded that her office would only accept a ballot
6 argument opposing Measure U if ordered to do so by a court (Declaration of CRAIG K.
7 POWELL).

8 22. Pursuant to Elections Code 9502, Respondent established a deadline for the filing
9 of arguments supporting and opposing Measure U at 4:30 p.m., Wednesday, August 8, 2012. In
10 an interview she gave to a local television news station on August 9th., Respondent stated that she
11 had sent four e-mails to Mayor Johnson between July 31st and August 8th reminding him of the
12 4:30 p.m., August 8, 2012 deadline for the filing of his argument opposing Measure U. Despite
13 the Mayor's promise to file an argument opposing Measure U and despite multiple reminders
14 from Respondent, the Mayor failed to file his "con" argument by the deadline. Instead, a
23 representative of the Mayor, Robert Graswich, called Respondent at 5:05 p.m. on August 8th, 35
16 minutes past the 4:30 p.m. deadline and asked Respondent for relief from the deadline so he could
17 file the Mayor's "con" argument. Respondent denied the Mayor's representative's request for
18 relief from the deadline and refused to accept the Mayor's "con" argument for filing (Declaration
19 of CRAIG K. POWELL).

20 23. In establishing a mechanism for voters and other parties to submit and have
21 selected for publication supporting and opposing ballot arguments in municipal and other
22 elections, the California Legislature has, by design, established the sample ballot as a de facto
23 "public forum" for the expression of First Amendment-protected speech by citizens who wish to
24 participate in the electoral process. Political expression is considered the most valued of speech
25 and afforded the highest degree of protection under the First Amendment and the California
26 Constitution. In this case, the actions and dereliction of duty of government officials have
27 combined to deprived Petitioners of their rights under the First Amendment to express their views
28 to fellow voters via the instrumentality of the sample ballot.

1 24. Petitioners are informed and believe, and on that basis allege, that a brief extension
2 of the deadline for filing primary arguments opposing Measure U and a corresponding brief
3 extension of the August 15th deadline for filing rebuttal arguments to the measure will not
4 interfere with the timely printing of ballot materials for the November 6, 2012 election. First,
5 state law provides a 10-day public review period and legal challenge period for ballot materials
6 following the deadline for submittal of ballot arguments. Secondly, as noted in the Declaration of
7 CRAIG K. POWELL, the August 15th deadline established by Respondent for the submission of
8 rebuttal arguments is the *earliest* such deadline of nine California cities surveyed at random by
9 Declarant POWELL. The final deadlines for submission of ballot arguments of the nine cities
10 surveyed range from August 16th to August 30th. Respondents believe, and on that basis allege,
11 that the conservative August 15th deadline established by Respondent, coupled with the 10-day
12 review and challenge period established by state law, provides sufficient time for a brief
13 extension of the filing deadlines for submission of primary and rebuttal arguments opposing
14 Measure U.

23 25. The issue presented to this Court is whether the collective and unprecedented
16 action of the Sacramento City Council in assigning the job of writing the opposing argument to
17 Measure U to Mayor Johnson, the Mayor's action of publicly accepting that responsibility and
18 then failing to discharge his responsibility should, under principles of equity, Due Process and
19 the First Amendment, estopp Respondent and Real Parties in Interest JILL LAVINE and CITY
20 OF SACRAMENTO from depriving Respondents of the opportunity right to file opposing
21 arguments against Measure U, notwithstanding the passage of the Respondent's August 8th and
22 August 15th deadlines.

23 26. This Court must order Respondent to accept the Proffered Argument to assure that:
24 (a) the election on Measure U is conducted fairly; (b) that voters have the opportunity to weigh
25 both the supporting and opposing arguments on the measure; and (c) that the integrity of the
26 electoral process is protected.

27 27. Elections Code section 9092 provides that this Court may issue a writ of mandate
28 to prevent the publication of material in the ballot pamphlet that is "misleading," while Elections
Code section 13314 authorizes the Court to issue a writ of mandate "upon proof... that an error,

1 omission, or neglect” violates the California Constitution and “that issuance of the writ will not
2 substantially interfere with the conduct of the election.” (Cal. Elec. Code § 13314 (a)(2).)

3 28. California Code of Civil Procedure section 1085 provides that a writ of mandate
4 will lie" [traditional mandamus] to compel the performance of an act which the law specially
5 enjoins, as a duty resulting from an office, trust, or station; or to compel the admission of a party
6 to the use and enjoyment of a right or office to which he is entitled" While mandamus is not
7 available to control the discretion exercised by a public official or board, it is available to correct
8 an abuse of discretion by such party. (Glendale City Employees' Assn., Inc. v. City of Glendale
9 (1975) [15 Cal. 3d 328](#), 344.

10 29. Elections Code section 9287 compels Respondent "to perform an act" as a "duty of
11 her office" within the meaning of Calif. Code of Civ. Proc. section 1085, to wit, to establish a
12 deadline for submission of ballot arguments and to accept for filing those ballot arguments that
13 conform to statute. Further, Petitioners, in endeavoring to submit the Proffered Argument to
14 Respondent, have a clear, present and beneficial right in the Respondent's performance of that
23 duty. Implicit in Election Code section 9287's grant of authority to Respondent to establish
16 deadlines for the submission of ballot arguments is the implied authority to exercise discretion in
17 granting relief from such deadlines in instances where fundamental Constitutional and equitable
18 principles require her to do so. Her failure to exercise such discretion in the instant case and
19 accept for filing the Proffered Argument from Respondents is an abuse of her discretion under
20 Elections Code section 9287.

21 30. Petitioners have no other adequate remedy at law and will suffer immediate and
22 irreparable injury unless this Court issues a peremptory writ of mandate compelling Respondent
23 to accept the Proffered Argument for filing and to briefly extend the deadline for submission of
24 rebuttal arguments to Measure U.

25 **FIRST CLAIM FOR RELIEF**
26 **(EQUITABLE ESTOPPEL)**

27 31. Petitioners incorporate paragraphs 1 through 30 of this Petition.
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FIFTH CLAIM FOR RELIEF
(Elections Code Sections 9092 and 13314)

39. Petitioners incorporate paragraphs 1 through 38 of this Petition.

40. Respondent's refusal to accept the filing of Respondents' Proffered Argument renders the ballot pamphlet for the November 6, 2012 election "misleading" within the meaning of Elections Code section 9092, and is an "error, omission, or neglect" violative of the California Constitution within the meaning of Elections Code section 13314.

RELIEF

WHEREFORE, Petitioners pray that this Court:

1. Issue a peremptory writ of mandate commanding Respondent to immediately accept Petitioners' Proffered Argument for filing or, alternatively, to briefly extend the deadline for submission of primary arguments opposing Measure U;
2. Issue a peremptory writ of mandate commanding Respondent to briefly extend the deadline for submission of rebuttal arguments opposing Measure U;
3. Issue a peremptory writ of mandate commanding Respondent to include arguments so submitted, selected in accordance with applicable law, in the ballot information she submits to Real Party in Interest JILL LAVINE for inclusion in ballot materials prepared for the November 6, 2012 election;
4. Award Petitioners' costs incurred in connection with this matter; and
5. Grant such other and further relief as the Court may deem necessary.

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1 Dated: August 16, 2012.

Respectfully Submitted,

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CRAIG K. POWELL, Petitioner, *In Pro Per*

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GREG HATFIELD, Petitioner, *In Pro Per*

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ERIK SMITT, Petitioner, *In Pro Per*

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