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19 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
20 COUNTY OF SACRAMENTO
21 (UNLIMITED JURISDICTION)

22 AREF AZIZ,

23 Petitioner,

24 vs.

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

27 Respondent.

28 DAVID GERALD HILL, in his official capacity
as State Printer of the State of California, and
MAC TAYLOR, in his official capacity as the
Legislative Analysisist of the State of California,

Real Parties in Interest.

No.: _____

Action Filed: August 8, 2016

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

(Proposition 61)

**PRIORITY ELECTIONS MATTER
PURSUANT TO ELECTIONS CODE
SECTION 13314(a)(3) –
IMMEDIATE ACTION REQUESTED**

Hearing: _____

Date: _____

Time: _____

Dept.: _____

(The Honorable _____)

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1 **INTRODUCTION**

2 Proposition 61 seeks to address the problem of skyrocketing prescription drug costs in
3 California. It does so by requiring the State to negotiate with drug companies for prescription drug
4 prices in state healthcare programs that are no more than the amounts paid for the same drugs by the
5 United States Department of Veterans Affairs (“VA”). In this way, California could save billions in
6 healthcare costs because the VA currently pays far less for prescription drugs than other government
7 agencies, including up to 40 percent less than the Medicare prescription drug program.

8 The pharmaceutical industry bitterly opposes Proposition 61. They have announced
9 their intention to spend \$100 million to defeat the measure, and they have begun to launch attacks
10 designed to frighten voters into voting against the measure this November. One of the pharmaceutical
11 industry’s leading scare tactics is to warn that the measure will hurt veterans because drug
12 manufacturers will raise the prices of the drugs that they sell to the VA rather than agree to provide the
13 State with the drug prices currently offered to the VA.

14 What the pharmaceutical industry does not tell voters is that federal law already protects
15 veterans. Although the VA enters into various kinds of agreements for pricing concessions from drug
16 manufacturers, the Veterans Healthcare Act of 1992 places a strict cap on the prices that the VA must
17 pay for brand-name prescription drugs. Specifically, drug manufacturers must enter into “master
18 agreements” with the VA requiring a *minimum* discount on covered drugs equal to 24 percent of the
19 average manufacturer price, which is called the Federal Ceiling Price. Furthermore, drug
20 manufacturers cannot raise the price on any drug covered by a multi-year master agreement by more
21 than the increase in the Consumer Price Index. This means that regardless of whether drug
22 manufacturers would like to raise VA drug prices in order to maintain their profits, the Federal Ceiling
23 Price provides a hard cap on the price that the pharmaceutical industry can charge the VA for brand-
24 name drugs, and contracts with the VA may further limit the ability of drug companies to raise drug
25 prices.

26 Despite these federal protections, when the Legislative Analyst’s Office refers to the
27 possibility that “drug manufacturers might choose to raise VA drug prices” in its Analysis of
28 Proposition 61, the Analysis is silent about the federal law that restrains VA drug pricing. This silence

1 leaves voters with the impression that drug manufacturers would be free to raise drug prices on
2 veterans as high as they want – the sky is the limit. That specter of unrestrained price increases on our
3 nation’s veterans inadvertently stokes the very fears that Proposition 61’s opponents have raised in this
4 campaign, rather than providing the factual context that is necessary to understand Proposition 61.

5 If left unchanged, this phrase will mislead voters and create undue prejudice against
6 Proposition 61. Petitioner therefore seeks a single, discrete change, so that instead of being told simply
7 that “drug manufacturers might choose to raise VA drug prices,” voters are told that “drug
8 manufacturers might choose to raise VA drug prices, subject to federal price caps on brand-name
9 drugs.”

10 **FACTUAL BACKGROUND**

11 **I.**

12 **PROPOSITION 61 AND APPLICABLE FEDERAL LAW**

13 The Secretary of State has certified the California Drug Price Relief Act for the
14 November 8, 2016 ballot as Proposition 61. (Verified Petition for Writ of Mandate [“Pet.”], ¶ 5.)
15 Proposition 61 would prohibit the State of California, its state agencies, and other state entities from
16 buying prescription drugs from drug companies at prices that are higher than the amounts paid for the
17 same drugs by the VA. (Pet., Exh. A, § 4 [adding Welf. & Inst. Code, § 14105.32].) This would give
18 California leverage to negotiate the same low prices that the VA has been able to secure from drug
19 manufacturers, which are generally far lower than the prices paid by private payers, other federal
20 agencies, or the State of California. (See, e.g., Declaration of Prit Singh in Support of Verified Petition
21 for Writ of Mandate [“Singh Decl.”], Exh. 4 at 3.) By doing so, Proposition 61 seeks to lower drug
22 prices for the State of California in order to save taxpayers money, and to lower drug prices for the
23 beneficiaries of state-funded health care in order to save lives. (Pet., Exh. A, §§ 2 & 3; Singh Decl.,
24 Exh. 1.)

25 One of the pharmaceutical industry’s key political arguments against Proposition 61 is
26 that the measure could lead to increased prescription drug prices for veterans because the
27 pharmaceutical industry will raise VA drug prices rather than agree to provide the State with the drug
28

1 prices currently offered to the VA. (Singh Decl., Exh. 2.) Because nothing in the measure requires
2 that result, or necessarily leads to that result, prescription drug prices would increase for veterans only
3 if drug manufacturers *choose* to increase prescription drug prices on the VA.

4 Furthermore, if drug manufacturers do choose to increase prices on veterans, federal
5 law strictly limits the size of those increases on all brand-name drugs. As the LAO explains on page 3
6 of its Analysis, “[t]he federal government has established discount programs that place upper limits on
7 the prices paid for prescription drugs by selected federal payers, including the VA.” (Pet., Exh. B
8 at 3.) Specifically:

9 The Veterans Healthcare Act of 1992 controls the price of all “covered drugs” –
10 basically, brand-name drugs¹ – purchased by the “Big Four” federal agencies, including the VA.
11 (38 U.S.C. § 8126.) That Act requires drug manufacturers that wish to sell drugs to certain federal
12 programs including Medicaid to enter into “master agreements” with the VA that cap drug prices at no
13 more than 76 percent of the non-Federal average manufacturer price, minus any additional discounts as
14 determined each year. (38 U.S.C. § 8126(a)(2).) This is called the Federal Ceiling Price. (Singh
15 Decl., Exh. 4 at 8.)

16 The Act also requires drug manufacturers to extend an additional discount if they raise
17 the price faster than the rate of inflation based on the Consumer Price Index (“CPI”), and it limits
18 annual price increases on drugs covered by multi-year master agreements to the rate of inflation based
19 on CPI. (38 U.S.C. § 8126(c) & (d).)

20 The Act leaves the VA free to negotiate further discounts with drug manufacturers,
21 given that the Federal Ceiling Price is only a ceiling, not a floor. Thus, the VA enters into “VA
22

23
24 ¹ “Covered drugs” include (1) “innovator multiple source drugs,” which are multiple source drugs that
25 were originally marketed under an original new drug application approved by the Food and Drug
26 Administration (“FDA”); (2) “single source drugs,” which are covered outpatient drugs produced or
27 distributed under an original new drug application approved by the FDA; and (3) biologics marketed
28 under an FDA license. (38 U.S.C. § 8126(h)(2).) This definition of “covered drugs” generally covers
brand-name drugs while excluding certain generic drugs. (See Singh Decl., Exh. 4 at 8 & Exh. 3 at 4,
fn. 9.)

1 national contracts” with some drug manufacturers to bring some VA drug prices below the Federal
2 Ceiling Price. (Singh Decl., Exh. 3 at 4; Exh. 4 at 9.)

3 The VA also negotiates Federal Supply Schedule (“FSS”) prices and contracts for
4 prescription drugs on behalf of all direct federal purchasers, with the goal of securing prices that are no
5 more than the price given by the manufacturer to its “most favored customer.” (*Id.*, Exh. 4 at 6; Exh. 3
6 at 4.) During a multi-year contract for an FSS price, manufacturers must limit annual price increases
7 on covered drugs to the rate of inflation based on CPI. (38 U.S.C. § 8126(d); Singh Decl., Exh. 4 at 6.)
8 The VA may use FSS prices that are lower than the Federal Ceiling Price.

9 **II.**

10 **LAO’S ANALYSIS OF PROPOSITION 61**

11 On July 26, 2016, Secretary of State Alex Padilla made available for public inspection
12 the proposed copy of the ballot pamphlet to be used for the November 8, 2016 election, which includes
13 an Analysis by the Legislative Analyst for Proposition 61.

14 On page three of that Analysis, the Legislative Analyst explains that federal law
15 imposes a price cap on prices the VA pays for prescription drugs. The Analysis states: “The federal
16 government has established discount programs that place upper limits on the prices paid for
17 prescription drugs by selected federal payers, including the VA.” (Pet., Exh. B at 3.)

18 Nevertheless, four pages later when the Analysis addresses the possibility that drug
19 manufacturers might choose to raise VA drug prices, the LAO makes no reference to these “upper
20 limits” on prices imposed by federal law. The entire relevant section states:

- 21
- 22 • ***Drug Manufacturers Might Raise VA Drug Prices.*** Knowing that the
23 measure makes VA prices the upper limit for what the state can pay,
24 ***drug manufacturers might choose to raise VA drug prices.*** This
25 would allow drug manufacturers to continue to offer prescription drugs
26 to state agencies while minimizing any reductions to their profits.
27 Should manufacturers respond in this manner, potential savings related
28 to state prescription drug spending would be reduced.

(*Id.*, Exh. B at 7-8, first emphasis in original,
second emphasis added.)

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ARGUMENT

I.

STANDARD OF REVIEW

The Elections Code authorizes the Court to amend the copy proposed to be included in the state ballot pamphlet “upon clear and convincing proof that the copy in question is false, misleading, or inconsistent with the requirements of this code or Chapter 8 (commencing with Section 88000) of Title 9 of the Government Code” (Elec. Code, § 9092.)

The Legislative Analyst’s duties in relation to the analysis of a ballot measure are set forth in Elections Code section 9087. Section 9087 requires the Legislative Analyst to “prepare an impartial analysis of the measure describing the measure and including a fiscal analysis of the measure showing the amount of any increase or decrease in revenue or cost to state or local government.” (*Id.*, § 9087(a).) Of particular relevance here, the analysis must “be written in clear and concise terms, so as to be easily understood by the average voter,” and “*shall generally set forth in an impartial manner the information the average voter needs to adequately understand the measure.*” (*Id.*, § 9087(b), emphasis added.)

The Supreme Court has emphasized the need to “avoid misleading the public with inaccurate information.” (*Amador Valley Joint Union High School Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 243, citing *Clark v. Jordan* (1936) 7 Cal.2d 248, 249-250 and *Boyd v. Jordan* (1934) 1 Cal.2d 468, 471.) Other Elections Code provisions underscore the importance of the LAO’s analysis as an impartial and reliable source of information for the public: it appears in an official state publication (Elec. Code, § 9081); it appears immediately following the Attorney General’s official title and summary of the measure (Elec. Code, § 9086(b)); and it is presented as the only “analysis” of the measure by a government agency. Because “the pamphlet is printed by a governmental body and distributed to all registered voters,” the materials it contains are “likely to ‘carry greater weight in the minds of the voters than normal campaign literature’” (*Patterson v. Bd. of Supervisors* (1988) 202 Cal.App.3d 22, 30, quoting *Knoll v. Davidson* (1974) 12 Cal.3d 335, 352.) It is the description of the measure drafted by the State, more than anything else presented, that should embody the ballot

1 pamphlet’s purpose – “to foster a more informed electorate by supplying correct information about the
2 measures appearing on any given ballot.” (*Horwath v. City of East Palo Alto* (1989) 212 Cal.App.3d
3 766, 776.)

4 The materials drafted by state agencies are generally presumed accurate. (*Lungren v.*
5 *Super. Ct.* (1996) 48 Cal.App.4th 435, 439-440.) Nevertheless, “[t]he case law . . . clearly empowers
6 trial courts to examine the content of [ballot pamphlet materials] to determine if it *fairly* represents the
7 measure it summarizes.” (*Brennan v. Bd. of Supervisors* (1981) 125 Cal.App.3d 87, 93, emphasis in
8 original); *see also id.* at 91 [courts exercise “broad powers of review concerning the fairness” of
9 government’s description of a measure].) In particular, although a government agency has discretion
10 “[w]ithin certain limits” to decide which provisions in a measure are sufficiently important to describe,
11 “a ballot summary cannot be misleading.” (*Id.* at 92-93, emphasis added.) It must be true, impartial,
12 and not “likely to create prejudice for or against the measure.” (*Id.* at 93, quoting *Amador Valley Joint*
13 *Union High School Dist. v. State Bd. of Equalization, supra*, 22 Cal.3d at 243.)²

14 The standard, then, comes down to this: As long as there is “clear and convincing
15 proof,” misleading ballot pamphlet materials that are likely to create prejudice against a measure and
16 fail to comply fully with the Elections Code are properly amended by this Court. (Elec. Code, § 9092;
17 *Patterson v. Bd. of Supervisors, supra*, 202 Cal.App.3d at 30-35.)

18 **II.**

19 **LAO’S ANALYSIS IS MISLEADING AND**
20 **PREJUDICIAL AND SHOULD BE CHANGED**

21 This litigation challenges the statement in the LAO’s Analysis that tells voters that
22 “drug manufacturers might choose to raise VA drug prices” without also telling them that such prices
23 can only increase to the extent allowed by federal price caps on brand-name drugs.

24
25 ² The case law assessing the adequacy of ballot pamphlet materials focuses on the title and summary
26 prepared by the Attorney General rather than the Analysis prepared by LAO. Nevertheless, some of
27 the principles set forth in those cases apply equally in cases considering the LAO’s analysis, including
28 the presumption of accuracy and the need to scrutinize the Analysis for truthfulness, impartiality, and
compliance with the Elections Code.

1 As currently phrased, the statement that “drug manufacturers might choose to raise VA
2 drug prices” suggests that drug manufacturers could respond to Proposition 61 by raising VA drug
3 prices to any amount chosen by the drug manufacturer, without limitation. This impression is
4 enhanced by the very next statement in the Analysis which states that drug manufacturers would
5 “minimiz[e] any reductions to their profits” by raising their prices. The average voter will assume that
6 drug manufacturers are free to raise drug prices on veterans as much as they want, in order to
7 maximize their profits. Indeed, voters reading this analysis would be surprised to learn that federal law
8 strictly limits all covered drug prices to no more than 76 percent of the non-Federal average
9 manufacturer price, and strictly limits annual increases on such prices to the increase in the rate of
10 inflation. In the absence of such knowledge, voters will be left with the alarming impression that
11 veterans could face unlimited price increases, perhaps doubling or tripling their brand name
12 prescription drug costs, or even worse.

13 This statement is misleading, in violation of Elections Code section 9092, because drug
14 companies cannot simply choose to raise VA drug prices. Instead, federal law and any applicable
15 federal contracts may constrain their ability to increase drug prices at all, at least in the near-term, and
16 federal law and applicable contracts will constrain the extent to which such prices can eventually be
17 raised. Specifically, if the drug is currently subject to a master agreement pursuant to the Veterans
18 Healthcare Act of 1992, an FSS contract price, or a VA national contract, a drug company could only
19 raise the price of that drug if allowed to do so by the contract, and to the extent permitted by federal
20 law. Drug manufacturers could, for example, only raise prices on drugs covered by multi-year master
21 agreements by the rate of inflation as measured by CPI. (38 U.S.C. § 8126(d).) And federal law
22 strictly prohibits drug manufacturers from raising the price of covered brand-name drugs above the
23 Federal Ceiling Price. (38 U.S.C. § 8126(a).) With respect to non-covered generic drugs, the category
24 of drugs that are not covered by the Federal Ceiling Price, the VA has other tools to keep these prices
25 down, including purchasing from a competitor that manufactures the same generic drug, entering into
26 subsequent VA national contracts covering that drug, or negotiating a new FSS contract price for that
27 prescription drug.
28

1 It is no answer to say that the VA's statement is technically true, however incomplete
2 the statement may be. In the context of a ballot pamphlet, "a statement that, in one sense, can be said
3 to be literally true can still be materially misleading; hence the Legislature did not indulge in
4 redundancy when it used both" the term "false" and the term "misleading" in the sections of the
5 Elections Code authorizing challenges to ballot materials. (*Huntington Beach City Council v. Super.
6 Ct.* (2002) 94 Cal.App.4th 1417, 1432.) The Court in *Huntington Beach* therefore struck a statement
7 from a city's ballot pamphlet argument that proclaimed that a local electricity generating plant "is the
8 only business in Huntington Beach that does not pay" a particular utility tax. (*Id.* at 1438.) Although
9 the Court found the statement was "literally true," because the plant did not pay the utility tax on its
10 purchase of wholesale gas, it also found the statement "misleading in light of objective facts," because
11 the plant did pay the utility tax on its utilities, including its water and electricity. (*Id.* at 1432; *see also*
12 *id.* at 1425.) The same principle requires judicial intervention here. It may be literally true that
13 manufacturers can raise prices, given that prices could be raised to some extent in certain
14 circumstances. Nevertheless, the unqualified statement is misleading in light of the objective facts that
15 price increases for brand-name drugs are constrained and capped by federal law. The lesson of
16 *Huntington Beach* is that partial truths in ballot litigation require a remedy, particularly when that
17 partial truth would spark a prejudicial emotional response in voters.³ (*See id.* at 1433.)

18 This prejudicial effect is key to this challenge for two reasons. First, section 9087
19 emphasizes the need, perhaps above all else, for the Analysis to be "impartial," as the term is used in
20 the title of the statute and repeated twice in its text. (Elec. Code, § 9087(a) ["The Legislative Analyst
21 shall prepare an *impartial* analysis of the measure"]; § 9087(b) [the Analysis shall set forth
22 information in "an *impartial* manner"], emphases added.) Here, the fear of looming and
23 potentially ruinous price increases on our nation's veterans is bound to prejudice voters against
24 Proposition 61, in violation of the requirements of the Elections Code.

25
26 ³ Petitioner neither believes nor suggests that the LAO is acting with the intent to mislead or prejudice
27 voters, as the city apparently sought to do in *Huntington Beach City Council v. Superior Court, supra*,
28 94 Cal.App.4th 1417. Yet the subjective intent of the drafter of the challenged material is irrelevant
when the *effect* of that material is voter confusion and prejudice.

1 Yet the statement does not require judicial intervention merely because it will inflame
2 opposition to the measure. It requires intervention because the degree of prejudice that could be
3 caused by the current misleading statement is aggravated by the failure to include a more fully accurate
4 statement. After all, voters should not be led to oppose the measure based on an unfounded fear of
5 unrestrained price increases on veterans, if those voters would not oppose the measure if they were told
6 that many price increases are in fact limited by federal law.

7 It is important to note that this is not a dispute over the facts. LAO acknowledges
8 elsewhere in its Analysis that “[t]he federal government has established discount programs that place
9 upper limits on the prices paid for prescription drugs by selected federal payers, including the VA.”
10 (Pet., Exh. B at 3.) Thus, everyone agrees that federal law imposes these “upper limits” on the prices
11 manufacturers can charge the VA for drugs. The question presented is whether voters need additional
12 information to understand whether and how these “upper limits” would restrain the response by drug
13 companies to Proposition 61. And the answer is clearly yes. Even assuming that a voter who reads the
14 warning on page 7 of the Analysis that drug companies may hike VA drug prices has also read and
15 remembers the information from page 3 about the upper price limits imposed by federal law, that voter
16 will not know whether those limits apply in all circumstances, or whether they will continue to apply if
17 voters approve Proposition 61.⁴ As a consequence, voters need the additional information on page 7 of
18 the Analysis which petitioner seeks to provide them with here.

19 By adding the phrase “subject to federal price caps on brand-name drugs,” voters will
20 have both the information LAO wants them to have about the possibility of increased VA prices *and*
21 information about the ways in which federal law constrains those price increases. This solution is fully
22 consistent with LAO’s duty under section 9087 to “set forth in an impartial manner the information the
23 average voter needs to adequately understand the measure.” (Elec. Code, § 9087(b).)

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27 ⁴ Most voters, of course, are focused on a measure’s fiscal impact, so it may not be reasonable to
28 assume that most voters even read the “background” section of the LAO’s analysis.

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CONCLUSION

Whether one supports Proposition 61 or not, there can be no dispute that federal law imposes an upper limit on the extent to which drug manufacturers can raise the price of brand-name drugs. The LAO's failure to include this critical information in its discussion of the measure's fiscal impact renders it misleading and prejudicial. It therefore can and should be remedied by this Court, because the official voter's pamphlet has a substantial impact on the equality and fairness of the electoral process. (*Patterson v. Bd. of Supervisors, supra*, 202 Cal.App.3d at 30.)

Dated: August 8, 2016

Respectfully submitted,

James C. Harrison
Margaret R. Prinzing
REMCHO, JOHANSEN & PURCELL, LLP

By: 
Margaret R. Prinzing

Attorneys for Petitioner Aref Aziz

1 **PROOF OF SERVICE**

2 I, the undersigned, declare under penalty of perjury that:

3 I am a citizen of the United States, over the age of 18, and not a party to the within
4 cause of action. My business address is 1901 Harrison Street, Suite 1550, Oakland, CA 94612.

5 On August 8, 2016, I served a true copy of the following document(s):

6 **Memorandum of Points and Authorities in Support of**
7 **Verified Petition for Writ of Mandate**

8 on the following party(ies) in said action:

9 Nancy Doig
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Analyst Mac Taylor*

- 17 **BY UNITED STATES MAIL:** By enclosing the document(s) in a sealed
18 envelope or package addressed to the person(s) at the address above and
19 depositing the sealed envelope with the United States Postal Service, with
20 the postage fully prepaid.
21 placing the envelope for collection and mailing, following our ordinary
22 business practices. I am readily familiar with the business's practice for
23 collecting and processing correspondence for mailing. On the same day
24 that correspondence is placed for collection and mailing, it is deposited in
25 the ordinary course of business with the United States Postal Service,
26 located in Oakland, California, in a sealed envelope with postage fully
27 prepaid.

24 **BY OVERNIGHT DELIVERY:** By enclosing the document(s) in an envelope
25 or package provided by an overnight delivery carrier and addressed to the persons
26 at the addresses listed. I placed the envelope or package for collection and
27 overnight delivery at an office or a regularly utilized drop box of the overnight
28 delivery carrier.

26 **BY MESSENGER SERVICE:** By placing the document(s) in an envelope or
27 package addressed to the persons at the addresses listed and providing them to a
28 professional messenger service for service.

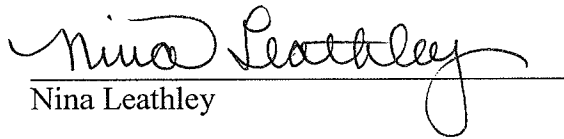
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BY PROCESS SERVER: By placing the document(s) in an envelope or package addressed to the persons at the addresses listed and providing them to a professional process server for service.

BY FACSIMILE TRANSMISSION: By faxing the document(s) to the persons at the fax numbers listed based on an agreement of the parties to accept service by fax transmission. No error was reported by the fax machine used. A copy of the fax transmission is maintained in our files.

BY EMAIL TRANSMISSION: By emailing the document(s) to the persons at the email addresses listed based on a court order or an agreement of the parties to accept service by email. No electronic message or other indication that the transmission was unsuccessful was received within a reasonable time after the transmission.

I declare, under penalty of perjury, that the foregoing is true and correct. Executed on August 8, 2016, in Oakland, California.


Nina Leathley

(00283212-6)