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9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 COUNTY OF SACRAMENTO
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13 **EDMUND G. BROWN JR., ATTORNEY**
14 **GENERAL OF THE STATE OF CALIFORNIA,**
15
16 Petitioner,
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18 v.

19 **DEBRA BOWEN, SECRETARY OF STATE OF**
20 **THE STATE OF CALIFORNIA,**
21
22 Respondent.

23 **CHRISTINA L. WILSON, PROPONENT OF**
24 **PROPOSITION 17, HARVEY ROSENFELD,**
25 **OPPONENT OF PROPOSITION 17, AND KEVIN**
26 **HANNAH, ACTING STATE PRINTER OF THE**
27 **STATE OF CALIFORNIA,**
28

Real Parties in Interest.

Case No.

**REPLY BRIEF IN SUPPORT OF
ATTORNEY GENERAL'S PETITION
FOR PEREMPTORY WRIT OF
MANDATE**

(Proposition 17)

Date: March 12, 2010
Time: 9:00 a.m.
Dept: 42
Judge: Hon. Allen H. Sumner
Action Filed: March 1, 2010

**ELECTION WRIT
IMMEDIATE ACTION REQUESTED**

Exempt from fees (Gov. Code, § 6103)

INTRODUCTION

1
2 Both the proponent and opponents of Proposition 17 agree that the Attorney General has the
3 right to correct the error in the wording of the title and summary for Proposition 17 so that the
4 voters' ballot pamphlet will contain the title and summary the Attorney General approved rather
5 than an unapproved preliminary draft. However, the proponent opposes this petition because she
6 believes the approved title and summary is false and misleading. Specifically, the proponent
7 takes issue with the sentence in the approved title and summary, which reads "Will allow
8 insurance companies to increase cost of insurance to drivers who do not have a history of
9 insurance coverage."

10 But the proponent stops short of arguing that this assertion is untrue. In fact, she
11 acknowledges that under existing law, newly insured drivers are not eligible for the existing
12 "persistency" discount and may pay more for their insurance than drivers who receive the
13 discount. (Opp. Br. at 1:5-12, 4:1-4.) The proponent concedes, "Proposition 17 does not change
14 that." (Opp. Br. at 1:6.)

15 Rather the proponent argues the challenged sentence should be stricken for two reasons.
16 First, she asserts the cost of insurance is a function of rates approved by the Insurance
17 Commissioner, and Proposition 17 itself contains no language about rate setting. (Opp. Br. at
18 3:13-19.) Second, she asserts that because numerous pricing factors affect the total cost of a
19 driver's insurance, it is uncertain whether previously uninsured drivers affected by the measure
20 will actually end up paying more for insurance coverage. (Opp. Br. at 3:20-4:19.) Both points
21 are irrelevant to the language of the Attorney General's title and summary.

22 The fact of the matter is that if Proposition 17 passes, insurance companies will be *allowed*
23 to do two key things: (1) lower the cost of insurance to drivers who qualify for the new discount;
24 and (2) increase the cost of insurance for drivers who do not qualify for the new discount. Thus,
25 voters would be misled if the title and summary mentioned only the new discount but not the
26 corresponding surcharge. Accordingly, the petition should be granted so that the ballot pamphlet
27 contains the title and summary the Attorney General approved.
28

DISCUSSION

I. GOVERNING STANDARD

The Attorney General's ballot title and summary "shall give a true and impartial statement of the purpose of the measure in such language that the ballot title shall neither be an argument, nor be likely to create prejudice, for or against the proposed measure." (Elec. Code, § 9051.) "The ballot title and summary must reasonably inform the voter of the *character and real purpose* of the proposed measure." (*Lungren v. Superior Court* (1996) 48 Cal.App.4th 435, 440, [citation omitted and emphasis added].)

Implicit in the Attorney General's authority is the exercise of judgment and discretion in discerning a measure's chief purpose and points. (See *Epperson v. Jordan* (1938) 12 Cal.2d 61, 70.) The Attorney General must present the chief purpose in clear, understandable language. (See *Lungren v. Superior Court*, supra, 48 Cal.App.4th at p. 441 [an appropriate title and summary uses words "subject to common understanding"].) He is afforded considerable latitude in preparing the title and summary. The title and summary need not contain a complete catalogue or index of all the measure's provisions, and if reasonable minds may differ as to its sufficiency, the title and summary must be upheld as sufficient. (*Amador Valley Joint Union High Sch. Dist. v. State Board of Equalization* (1978) 22 Cal.3d 208, 243; *Epperson v. Jordan*, supra, 12 Cal.2d at p. 66.) "As a general rule, the title and summary prepared by the Attorney General [is] presumed accurate, and substantial compliance with the 'chief purposes and points' provision is sufficient." (*Amador Valley Joint Union High Sch. Dist.*, supra, 22 Cal.3d at p. 243.) "[A]ll legitimate presumptions [will] be indulged in favor of the" title and summary prepared by the Attorney General. (*Holmes v. Jones* (2002) 83 Cal.App.4th 882, 888, quoting *Epperson v. Jordan*, supra, 12 Cal.2d at p. 66.) As this Court has noted, "only in a clear case should a title or summary be held insufficient." (*Horneff v. City & County of San Francisco* (2003) 110 Cal.App.4th 814, 820 [internal quotes and citations omitted].)

For the proponent to defeat the Attorney General's petition, she must establish by clear and convincing proof that the language in the ballot title and summary is false or misleading. (See Elec. Code, § 9092; Gov. Code, § 88006.) The proponent simply cannot satisfy this burden.

1 **II. IF PROPOSITION 17 PASSES, INSURANCE COMPANIES WILL BE ALLOWED TO**
2 **OFFSET THE COST OF THE NEW DISCOUNT BY SURCHARGING DRIVERS WHO DO**
3 **NOT QUALIFY FOR THE DISCOUNT.**

4 The proponent's first point is that the title and summary should not state that Proposition 17
5 "will allow insurance companies to increase cost of insurance to drivers who do not have a
6 history of continuous insurance coverage" because any cost increase would be a function of the
7 rate setting process, and "Proposition 17 contains absolutely no language about rate setting, let
8 alone authorizing insurance companies to increase rates." (Opp. Br. at 3:16-18.) This point is
9 irrelevant. The fact of the matter is that car insurance pricing is governed by regulations that
10 require the cost of every discount to be offset by corresponding surcharges. By law, an insurer
11 cannot offer a discount without imposing a surcharge to offset the cost of the discount. As the
12 Insurance Commissioner has explained:

13 Th[e] basic ratemaking principle is "zero-sum" in the following sense: Every
14 automobile insurer must have an approved "rate plan: that establishes its average
15 premium. Within that rate plan, every "discount" requires a corresponding
16 "surcharge" so that every factor influencing a rate will balance evenly over an
17 insurer's book of business. In California, this principle is codified in Title 10 of the
18 California Code of Regulations, Section 2632.7(c). The California Court of Appeal
19 also recognized this principle in *Foundation of Taxpayer and Consumer Rights v.*
20 *Garamendi* (2005) 132 Cal.App.4th 1354, 1367-69.

21 The Continuous Coverage Auto Insurance Discount Act . . . is subject to this
22 principle. That is, if an insurer offers a continuous coverage discount for some
23 drivers it will result in a surcharge for other drivers. This is because automobile
24 insurance discounts must offset one another so that each rating factor applied by an
25 insurer is evenly balanced within the insurer's rating plan.

26 (Proponent Appx., Ex. 3, attaching "Department of Insurance statement on Continuous Coverage
27 Discount Initiative Impact on Rates" posted on Department of Insurance's website at
28 www.insurance.ca.gov/0100-consumers/ContinCovDisc.cfm; see also Proponent Appx., Ex. 7
containing text of Cal. Code Regs., tit. 10, § 2632.7, subd. (c).)

The purpose of the title and summary is to give the voters an impartial and clear
understanding of the Proposition 17's chief purposes and points. The two key purposes of the
measure are to allow insurance companies to offer a new discount, and to allow them to offer a
corresponding surcharge. The Attorney General's title and summary has summarized those two
key points so that voters know what they are voting for. If the title and summary does not make

1 voters aware that the measure will allow surcharges, voters will be misled into thinking that
2 Proposition 17 simply allows insurers to offer a new discount.

3 And while Proposition 17 may not contain any express language about rate setting, it does
4 contain language that lifts the existing prohibition set forth in Insurance Code section 1861.02(c)
5 against basing the cost of insurance on the absence of prior car insurance coverage. Specifically,
6 Proposition 17 provides that insurance companies may offer the new discount “[n]otwithstanding
7 section 1861.02 (c)[.]” (See Ins. Code § 1861.024(a) set forth in Acquisto Dec., Ex. A.) The
8 effect of this language is to ensure that companies will be allowed to impose surcharges as well as
9 the new discount. Thus, contrary to the proponent’s suggestions, the actual language of
10 Proposition 17 allows surcharges by waiving the statutory provision that would have prohibited
11 them.

12 The proponent and opponents of Proposition 17, as well as the Department of Insurance, are
13 all well aware that in the world of car insurance pricing, you cannot have a discount without a
14 surcharge. The only people who probably are not aware of this principle are the voters. It is the
15 Attorney General’s obligation to make sure they understand a ballot measure’s chief purposes and
16 points when they vote on it. The Attorney General’s approved title and summary fulfills this
17 obligation.

18 **III. ALTHOUGH CAR INSURANCE PRICING IS COMPLICATED, THE VOTERS SHOULD**
19 **STILL BE INFORMED THAT PROPOSITION 17 WOULD ALLOW INSURANCE**
20 **COMPANIES TO OFFSET THE COST OF THE NEW DISCOUNT BY SURCHARGING**
21 **DRIVERS WHO DO NOT QUALIFY FOR THE DISCOUNT.**

22 The proponent next argues that the Attorney General’s title and summary is false and
23 misleading because “[i]t is not certain how many currently uninsured drivers would be affected
24 by Proposition 17.” (Opp. Br. at 3:21-22.) This is certainly true. In fact, it is impossible to
25 predict the effect Proposition 17 would have on the *total* cost of insurance for any particular
26 driver. This is so because car insurance companies base their rates on a total of 19 rating factors,
27 of which three are mandatory and sixteen are optional. (See Proponent Appx., Ex. 7 containing
28 text of Cal. Code Regs., tit. 10, § 2632.2 et seq.) Each insurance company can decide which of
the optional rating factors to use, and how much significance any particular factor will have on

1 the rates it offers. For example, if Proposition 17 were to pass, some companies could make the
2 continuous coverage discount have the fourth most significant impact on price (behind the three
3 mandatory rating factors), while other companies could make it have the nineteenth most
4 significant impact on price. Still other companies could decide not to utilize it at all.

5 Thus, whether Proposition 17 has an impact of any particular driver—as well as the extent
6 of that impact—first depends on the rating factors used by the particular company the driver is
7 insured with. And as the proponent points out, the total price any driver pays for car insurance is
8 also a function of the combination of surcharges and discounts the driver receives for all of the
9 rating factors offered by the company. (See Opp. Br. at 4:4-8.) Obviously, no one can predict the
10 total price a driver will pay without knowing relevant information about the particular driver and
11 the particular insurance company’s rating factors.

12 But this point is misleading because the Attorney General’s title and summary does not
13 predict the effect Proposition 17 will have on the total cost of insurance for any particular driver.
14 Rather, the title and summary focuses on the key aspects of the measure that are certain. What is
15 certain is that any company that decides to offer this new discount will be *allowed* to surcharge
16 drivers who don’t qualify for it. And that is all the title and summary says. The fact that car
17 insurance pricing is complicated should not prevent voters from being accurately and fully
18 informed about the key components of Proposition 17.

19 CONCLUSION

20 The proponent’s argument that the Attorney General can’t tell voters that this measure
21 would allow insurance companies to increase the cost of insurance for certain drivers is without
22 legal merit. The Attorney General’s is obligated to inform voters of the “*character and real*
23 *purpose*” of a proposed measure. With respect to Proposition 17, satisfying that obligation
24 requires that voters be informed that this measure would allow *both* discounts and rate increases.

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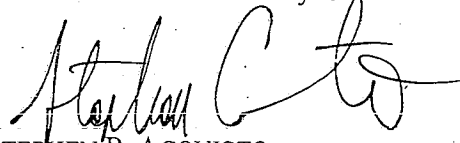
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And for the reasons discussed in this reply brief as well as the supporting points and authorities,
the Attorney General's writ petition should be granted.

Dated: March 10, 2010

Respectfully Submitted,

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DECLARATION OF SERVICE BY ELECTRONIC MAIL and U.S. MAIL

Case Name: *Edmund G. Brown Jr. v. Debra Bowen*

No.: 34-2010-80000458

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On March 10, 2010, I served the **REPLY BRIEF IN SUPPORT OF ATTORNEY GENERAL'S PETITION FOR PEREMPTORY WRIT OF MANDATE** by transmitting a true copy via electronic mail. In addition, I placed a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550, addressed as follows:

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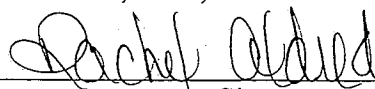
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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on March 10, 2010, at Sacramento, California.

Rachel Aldred
Declarant


Signature

SA2010100528