No. C101480

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**
**THIRD APPELLATE DISTRICT**

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| PROTECT KIDS CALIFORNIA and JONATHAN ZACHRESON, individually and on behalf of PROTECT KIDS CALIFORNIA<br><br>Appellants<br><br>v.<br><br>ROB BONTA, in his official capacity as Attorney General of the State of California and DOES 1-50, inclusive,<br><br>Appellees | Appeal from the Superior Court of the State of California, County of Sacramento<br><br>No. 24WM000034<br><br>The Hon. Stephen Acquisto, Judge Presiding |

# APPELLANTS' REPLY BRIEF


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The Attorney General had a duty to prepare a circulating title and summary for the Initiative that was true, impartial, and unlikely to create prejudice. (Cal. Elec. Code § 9051(d).) He did not. And notably, he does not waste this Court's time trying to pretend that his title and summary was "impartial" or "unlikely to create prejudice" —because it was plainly not. He only argues that it was "accurate," (although it was not that, either). In doing so, he replicates the trial court's error of failing to consider whether his title and summary was also impartial or prejudicial.

The Attorney General shirked his duty and is now attempting to avoid responsibility by claiming that the appeal is moot. But Appellants' requested relief makes clear that there is ongoing harm that this Court can redress by (1) providing the impartial title and summary Appellants should have received at the outset from the Attorney General and (2) affording Appellants a reasonable opportunity to continue gathering signatures without the weight of a prejudicial title and summary.

## I. This appeal is not moot.

At the trial court level, Appellants were cognizant of the time constraints on this litigation and specifically noted that the 180-day clock to gather petition signatures must be reset "once [Bonta] issues a lawful title and summary." (App. at 562.) The court refused such an extension. On appeal, Bonta now spills much ink claiming that the appeal must be dismissed because the 180-day deadline has passed.

In their opening brief, Appellants outlined their ongoing harm and requested relief when they asked that this Court order the trial court to "provide Appellants with a true, impartial, neutral title and summary and a new opportunity to continue gathering signatures for the Initiative." (Appellants' Opening Brief ("AOB") at 31.)[1] Despite this,

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[1] That the Secretary of State is not a party to this case is of no consequence. (*See* Response at 18.) The Secretary of State did not create the harm at issue in this case—the Attorney General did. And this Court has the authority to declare that the 180-day circulation period set by statute has not run out because it was tolled by the Attorney General's malfeasance. (*Law Finance Group, LLC v. Key* (2023), 14 Cal. 5th 932, 952–53 (In the absence of "explicit statutory language" or "manifest policy underlying a statute" demonstrating "that the Legislature intended" otherwise, courts "presume that a statutory limitations period is subject to equitable tolling") (quote and citation omitted).)

Bonta tries to pretend that there is no live case or controversy. (Response at 16–31.) This is new; now, not only is the Attorney General claiming the power to unilaterally misrepresent any initiative to ensure its defeat, he is also claiming that he can evade judicial review by running out the clock while the case is on appeal.

This case is plainly not moot.

## II. Even if this case is moot (it is not), exceptions to the mootness doctrine apply.

Even if the Court were to find this case is moot, exceptions to mootness apply. In its discretion, an appellate court may rule on an otherwise moot case "(1) when the case presents an issue of broad public interest that is likely to recur [citation]; (2) when there may be a recurrence of the controversy between the parties [citation]; and (3) when a material question remains for the court's determination [citation]." (*Ghost Golf, Inc. v. Newsom* (2024) 102 Cal.App.5th 88, 100, *review denied* (Sept. 11, 2024).)

The ability of an attorney general to effectively kill initiatives he doesn't like is an issue of broad public interest. By allowing the Attorney General to get away with issuing a prejudicial circulating title

and summary for Appellants' Initiative—which has a widespread impact on California residents—this Court would be enabling any attorney general to undermine the ballot initiative process to the detriment of Californians.

Further, this matter is plainly "capable of repetition, yet evading review." (*Murphy v. Hunt* (1982) 455 U.S. 478, 482.) If Bonta is correct, his "challenged action was in its duration too short to be fully litigated prior to its cessation or expiration." (*Weinstein v. Bradford* (1975) 425 U.S. 147, 149.) In that case, Appellants will undoubtedly try again to gather signatures for the Initiative[2] or something substantially similar.[3] Given Bonta's long track record of hostility to parental

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[2] Bonta argues that Appellants have not contended that they will undertake any such action. (Response at 22.) First, no such contention is necessary, because the relief Appellants seek includes an opportunity to properly circulate their Initiative petition under a fair title and summary. Second, Appellants have had no prior need to make such a contention in response to a mootness argument, because this is the first time Bonta has argued that their case is moot.

[3] The enactment of AB 1955 (*see* Response at 22) would, of course, not bar such a ballot initiative. According to Bonta's own website, "[t]he ballot initiative process gives California citizens a way to propose *laws*." (https://oag.ca.gov/initiatives (emphasis added).) It is obvious that one law could amend or repeal another. Indeed, the Initiative would amend several provisions of pre-existing law. (App. at 56–59.)

notification rights and student privacy rights (AOB at 13–14), and track record of inserting the word "restricts" or "prohibits" into ballot initiative title and summaries to ensure their failure (AOB at 30–31), "there [is] a reasonable expectation that the same complaining party would be subjected to the same action again." (*Weinstein,* 425 U.S. at 149.)

Finally, there is a material question that remains for this Court's determination: are there bounds that exist preventing an attorney general from holding veto power over California's ballot initiative process? The law says yes—an attorney general cannot provide titles or summaries that are "false, misleading, or inconsistent with the requirements of [the Elections] code." (Elec. Code § 9092.) Instead, such titles and summaries must be "true and impartial" and not argumentative or "likely to create prejudice" either for or against a proposed measure. (Elec. Code § 9051.) Here, Appellants have provided clear and convincing proof that Attorney General Bonta did just that in order to prejudice voters against Appellants' Initiative. The Court should rule on this matter to ensure that the Attorney General's powers

are utilized appropriately.

## III. The trial court's evidentiary rulings are incorrect, and Appellee does not seriously contest the relevance of several excluded statements.

Korey Wells stated that Bonta's false and misleading title and summary was "so alarming," but "fallacious," "carr[ying] intentionally negative connotative language incongruent with the true meaning, intent, and impact of the Initiative;" and that his contacts "have refused to sign and/or donate [to the Initiative] because they do not believe the substance of the Initiative could be so different than a plain-reading of the title and summary." (App. at 326 ¶¶ 4–8.) This is directly relevant because it shows that Bonta's false and misleading title and summary prejudiced voters against the Initiative and caused support to drop. Appellee does not discuss Wells's statement in his Response.

Robert Lee stated that he had spoken to many people who seemed enthusiastic about supporting the Petition until they read Bonta's false and misleading title and summary. (App. at 323 ¶¶ 6–12.) Mr. Lee specifically stated that "although public polling indicated strong majority support for the policies proposed by the Initiative, very few

people approve of the idea of 'restricting rights.'" (*Id.* at ¶ 9.) This is directly relevant because it shows that Bonta's false and misleading title and summary caused support for the Initiative to drop; indeed, how could a summary be "impartial," as it is required to be, if it causes fewer people to support a ballot initiative that would otherwise enjoy strong majority support? Appellee does not discuss Lee's statement in his Response.

Erin Friday's second declaration states that (1) Mr. Wells had emailed the Initiative's supporters asking, "[h]ow do you expect this to have any change [sic] to win with a title that says 'restrict rights'?"; and (2) that potential donors would not contribute to the Initiative due to Bonta's false and misleading title and summary. (App. at 373 ¶¶ 4, 6.) These statements were also excluded "on relevance" grounds. (App. at 009.) These statements are directly relevant because they show that Bonta's false and misleading title and summary caused support for the Initiate to drop. Appellee does not discuss Friday's second declaration in his Response.

The most Appellee musters in opposition to these statements is a boilerplate averment that "[n]o declarations are necessary to make [the] determination" that Bonta's "title and summary is accurate and impartial." (Response at 24.) In fact, these statements all demonstrate that Bonta's title and summary are neither accurate nor impartial, which Appellee fails to refute.

As Appellants demonstrated in their opening brief, Bonta had submitted a number of prepared titles and summaries for other ballot measures. And as Appellants noted, *every single title and summary* that contained the word "restrict" doomed that ballot measure to failure. This goes directly to the question of whether Bonta's false and misleading title and summary in this case was impartial, and Bonta does not seriously suggest otherwise: his discussion of the trial court's refusal to take judicial notice of the other titles and summaries is limited to an observation that he does not challenge that ruling. (Response at 24.)

The only evidence that Bonta specifically attacks on relevancy grounds is Erin Friday's first declaration, which notes that laws similar

to the one proposed by the Initiative had language similar to that of the Initiative. He distinguishes these laws by arguing that those laws need not comply with the California Elections Code. (Response at 25.) That is, of course, a merits argument, not a relevancy one.

Finally, and entirely unaddressed, is the evidence of Bonta's blatant activism on issues involving gender identity policies in schools—where he has consistently opposed parental rights and transparency while championing extreme positions that disregard concerns about fairness, safety, or privacy. Of course this evidence is directly relevant to whether Bonta's title and summary is impartial, as it is required to be, and not simply "accurate," as he alleges in the final section of his brief (for one thing, it explains why he focuses entirely on the alleged "rights" the Initiative "restricts," and not the rights it protects, such as a female student's right to not be forced to undress in front of a biological male). If the trial court's ruling is left to stand, Bonta or any other attorney general could simply weigh a title and summary down with the most detrimental, inflammatory language imaginable, and it would still pass muster as long as it was vaguely true. He also apparently believes that

courts should be barred from looking at both mountains of evidence as to his bias, and mountains of evidence that his misleading summary hurt the Initiative's chances of success.

It is noteworthy that the evidence the trial court failed to consider directly addressed whether the title and summary was "impartial" and "unlikely to create prejudice." As discussed below, the trial court failed to conduct any analysis on that point.

## IV. Neither the title nor summary are accurate or impartial, and both are likely to prejudice voters against the Initiative.

At the outset, Appellants note that the Attorney General does not respond to Appellants' argument and therefore tacitly concedes that the trial court failed to perform half the required analysis—specifically, that it failed to analyze whether the Attorney General's title and summary created prejudice against the proposed measure. (AOB at 8, 17.) Because the Attorney General failed to respond to Appellants' argument, that argument is waived. (*See, e.g., Employers Mutual Casualty Co. v. Philadelphia Indemnity Ins. Co.* (2008) 169 Cal.App.4th

340, 350 ("An appellate court can deem an argument waived if it's not supported by analysis or argument in the appellate briefs.").)

Furthermore, the trial court's failure to analyze key statutory text is reversible error. (*See, e.g., In re Marriage of Stephenson* (1995) 39 Cal.App.4th 71, 82 (trial court in spousal support case "erred in declining to consider earning capacity . . . as well as the other criteria set forth" in the relevant statute).) At minimum, the case must be remanded for the trial court to conduct a full and proper analysis of the statutory text, including the evidence that was improperly omitted.

### A. The title is neither accurate nor impartial, and it is likely to prejudice voters against the Initiative.

In their opening brief, Appellants observed how in *McDonough v. Superior Court* (2012) 204 Cal.App.4th 1169, the court held that one word in a ballot title—"PENSION REFORM"—was impermissibly "argumentative" because it "implicitly characterized the existing pension system as defective, wrong, or susceptible to abuse, thereby taking a biased position in the very titling of the measure itself." (204 Cal.App.4th at 1174–75.) The court in that case noted that the "substitution of the word 'modify' for 'reform'" would be appropriate,

and changed the title to "PENSION MODIFICATION." (*Id.* at 1175.) Bonta's response is merely to note that the *McDonough* court "relied on the dictionary definition of the word 'reform'" and to claim—absurdly—that the word "restricts" "is a neutral term without any definition or connotation that 'evokes a removal of defects or wrongs.'" (Response at 40 (quoting *McDonough,* 204 Cal.App.4th at 1174).)

In any event, Appellants' complaint is not limited to Bonta's use of the word "restricts." Appellants have always clearly identified that the issue in this case is Bonta's inflammatory use of the phrase "restricts *rights*." (AOB (emphasis added) at 7 (Bonta renamed the Initiative from "protect kids" to "restricts rights", 8 (asking the Court to determine whether "restricts rights" creates prejudice), 14 (a member of the public asked Appellants how they "expect[ed] this to have any chance to win with a title that says 'restricts rights'" (alteration in original), 15 (another member of the public reported difficulty gathering signatures for an initiative that allegedly "restrict[ed] rights") (alteration in original).)

And again, despite Bonta's emphasis on whether the phrase "restricts rights" is accurate—it is not, for all the reasons laid out in the Appellants' opening brief at 21–22—the Court must also determine whether his title and summary is "impartial" or likely to prejudice voters for or against it. The trial court failed to make this determination. If it had, it would have ruled that Bonta's title and summary was not impartial.

Bonta simply regurgitates his arguments that the Initiative accurately states that it would "restrict" the rights of students without even acknowledging Appellants' arguments that (1) the Initiative would *protect* the rights of female students to locker room privacy; (2) there is no "right" for a minor to deceive his or her parents; and (3) there is no "right" to ignore or disregard a parent's directions regarding appropriate accommodations for their child. (Response at 41–42; AOB at 21.). Even if it was accurate, Bonta still fails to even argue how it would not prejudice voters against it, as indicated by the evidence presented.

And *Mirabelli v. Olson* does, of course, support Appellants' argument. Contra Bonta's assertion that it "has no application here" (Response at 42), that case lists out a number of harms the Initiative seeks to prevent—or, alternatively, rights it seeks to protect. (AOB at 22.)[4]

### B. The second bullet point in the Attorney General's summary is not accurate.

The second bullet point in the Attorney General's prejudicial summary alleges that there is no exception for student safety. Appellant has now acknowledged the confidentiality exemption twice (App. at 439; Response at 32–33), which should be sufficient to defeat his argument.

Nevertheless, as noted in Appellants' opening brief, there is a provision, incorporated into the Initiative, that provides for confidentiality where "the school counselor has reasonable cause to believe that the disclosure would result in a clear and present danger to

[4] It is hypocritical for Bonta to claim that *Mirabelli* "has no application" because it "involves a First Amendment challenge . . . to a school district policy prohibiting parental notification of a student's gender policy" (Response at 42) while at the same time alleging that this case is not capable of repetition because of AB 1955, which would prohibit such notification policies (Response at 22).

the health, safety, or welfare of the student." (Cal. Educ. Code § 49602.) That is exactly the "exception for student safety" that the Attorney General falsely represented does not exist in the Initiative. Bonta's self-serving classification of this exception as "general confidentiality afforded to student communications with a school counselor" does not change that fact.

### C. The third bullet point in the Attorney General's summary is not accurate.

The third bullet point in the summary alleges that the Initiative "[p]rohibits" all gender-affirming health care. In his brief, Bonta acknowledges that the Initiative allows for certain exceptions. Even his characterization of these exceptions as "very narrow circumstances" does not absolve his misrepresentation, or the trial court's failure to address it. (Response at 35.)

First, Bonta's argument with respect to the provision that grandfathers in children who are currently transitioning is laughable. He says that his "omission of that narrow exception does not render it inaccurate because it does not say that 'all' gender-affirming healthcare is prohibited." (Response at 37.) By that logic, of course, the Initiative

doesn't prohibit gender-affirming care because the provision reads "Health care providers are not permitted to provide sex-reassignment prescriptions or procedures" instead of "Health care providers are not permitted to provide *any* sex-reassignment prescriptions or procedures." (App. at 58). Words "are not construed in a vacuum." (*Johnstone v. Richardson* (1951) 103 Ca.App.2d 41, 46; AOB at 24.) And a reasonable person reading the words from Bonta's summary—"Prohibits gender-affirming health care for transgender patients under 18"—would understand the Initiative to purportedly ban "sex-reassignment prescriptions or procedures" where "the child has already begun a continuous course of sex-reassignment prescriptions or procedures prior to . . . January 1, 2025." It does not. Bonta's summary is false.

Bonta's arguments on overbreadth fare no better. The Initiative does not prohibit all gender affirming care or eliminate the statutory definition. Instead, it prohibits gender-affirming health care that permanently sterilizes minors, such as "puberty blockers, cross-sex hormones or surgical interventions for the purpose of stopping or delaying normal puberty." Bonta complains that this is what *he* means

by "gender-affirming health care," (Response at 36), but, as Appellants pointed out below, "body contouring, hair removal, or trachea shaving" are components of "gender-affirming health care" that the Initiative does not prohibit. (AOB at 21.)

Indeed, the Initiative prohibits the "administration of puberty blockers," the "administration of hormones or hormone antagonists," and "surgery," (App. at 58), but it is silent on the treatments mentioned above. This is because the Initiative's goal is to protect children from harmful and permanent procedures that can delay puberty and/or cause sterility. Although Bonta tries to make the issue far more complicated, the reality is that there are some forms of "gender-affirming health care" that cause sterility or delay puberty, and some that don't; the Initiative focuses only on the former.

Bonta concludes by self-servingly characterizing this analysis as "nitpicking," to make his behavior appear reasonable. (Response at 38.) The Court should not be deceived.

## CONCLUSION

For the foregoing reasons, this Court should reverse the court

below with respect to sections A, D, and E of its opinion. Appellants reiterate their request that this Court order the trial court to determine whether the term "restricts rights" is likely to create prejudice against the proposed measure and consider all relevant evidence on that issue; properly review the overstated impacts and understated scope of the Initiative; and provide Appellants with a true, impartial, neutral title and summary and a new opportunity to continue gathering signatures for the Initiative.

Dated: May 19, 2025

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

I, Emily Rae, am counsel in this matter and I certify that the attached Appellants' Reply Brief has a typeface of 14 points or more and contains 3,304 words, as determined by a computer word count.

Dated: May 19, 2025

*/s/Emily Rae*

Emily Rae

LIBERTY JUSTICE CENTER

## PROOF OF SERVICE

I am employed in the County of Orange, State of California. I am over the age of eighteen years and not a party to the within action; my business address is 5319 University Way, #503, Irvine, CA 92612.

On May 19, 2025, I caused true and correct copies of the following document:

**APPELLANTS' REPLY BRIEF**

to be served by submitting an electronic version of the document via TrueFiling, which provides e-service to all indicated recipients at the email addresses set forth below:

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I further certify that in accordance with California Rule of Court 8.212(c)(1), I caused true and correct copies of the foregoing document to be served on the superior court clerk by mailing a copy to:

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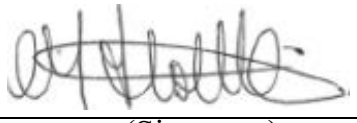
I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on May 19, 2025 Irvine, California.

Carla M. Holland



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