NOTICE AND DEMAND

TO:

Gregory Diaz, Registrar of Voters, Nevada County
950 Maidu Ave # 210, Nevada City CA 95959

Alison Barratt-Green, County Counsel

RE: School Measures for June 2018 Primary
Election Code Requirements and Proposition 39 Qualifications

March 19, 2018

All code section numbers refer to the Elections Code unless otherwise designated.

A. Executive Summary

The school measures that you are processing for the June Primary election do not meet the requirements of the Elections Code or the qualifications requirements of Proposition 39.

This letter is being delivered to you within the 10-day public examination period following E-88. It is directing you, sua sponte (as the lawyers are keen to say), to file the appropriate writ of mandate as authorized by 9509(b).

B. Bond Counsel

I refer to bond counsel often in this letter. They write the ballot statements, the school measures, the tax rate statement, and almost invariably, the ballot arguments, and very often the rebuttals as well. Why do districts need expensive bond counsel, a very specialized field, to write school measure documents? They don't! The earliest Proposition 39 measures weren't even written by lawyers. Bond counsel have come to write these documents under the caption of "pre-election services." In exchange, they lock in contracts for the specialized bond counsel and disclosure counsel work, contingent upon the school measure passing. This is a conflict of interest in that bond counsel have a stake in the outcome of the election. Until State Treasurer John Chiang put an extremely limited crimp (effective January 1, 2017) in this scourge, bond counsel, financial advisors, and sometimes underwriters would contribute thousands of dollars to campaign committees primarily formed to support school measures. Bond counsel sell their services on the basis of how many elections they have won -- I'm serious. So writing persuasive documents serves there own pecuniary interests and establishes relationships with district staff that go well beyond the pale. You might even say that bond counsel and financial advisors, under the guise of consulting for "pre-election services," violate Government Code 1090. While acting with the decision-making powers of school officials, they have an inappropriate financial interest in the contingency contracts that they create.

C. Elections Code 9500 et seq.

The Elections Code requires that after the filing date deadline (E-88), there be a mandatory 10-day public examination period for the various filed documents.

9500(a) refers to qualified school measures, which include the resolution, ballot statement, full-text, and tax rate statement. 9500(b) refers to the impartial analysis. 9509(a) applies to the

"materials referred to in Sections 9500, 9501, and 9504."

Placing argument or rebuttal argument due dates prior to or within the examination period violates both the letter of the statute and due process.

Bond and parcel tax measures are a privilege afforded districts. It's a local government agency attempting to levy a tax on the public. Clearly, the district is not the party that the examination period is enacted to protect. Any shortening or diminution of the examination period works in favor of the district at the expense of the public. Any skirting of the mandate is a violation of due process of the people for an opportunity to be heard in a meaningful way.

Bond counsel and financial advisors encourage districts to adopt school measures as near to the filing deadline as possible, and then file school measure documents as late as possible for the express purpose of suppressing opposition, but particularly to ensure that opponents have no time to file the pivotal argument against the measure.

Election officials' policies that serve internal purposes or desires for administrative convenience, except in the two criteria for which the legislature has made an exception, are violative of the due process rights of the people.

DEMAND 1.

> That you cease violating the due process rights of the people. Specifically, that you cease and desist from setting argument due dates for district measures prior to E-78.

D. Arguments

A relatively recent and growing bond counsel tactic is to place the argument in favor of the measure, often labelled as "findings," at or near the beginning of the school measure. These "findings" are not intended to be, nor can they legally be, a binding part of the contract the districts ask voters to approve. They have no place in a contract of any sort. Districts, unlike opponents, therefore get two bites at the apple -- once in the unlimited word-count of the school measure, and then again in the ballot argument and rebuttals. Opponents are given no such advantage.

Elections Code 9501 provides for the printing of arguments in connection with a school measure. Each side is allocated one, 300-word argument for printing in the ballot pamphlet. The only ballot materials authorized by Proposition 39 are contained in Section 1(b)(3)(B).

> A list of the specific school facilities projects to be funded and certification that the school district board, community college board, or county office of education has evaluated safety, class size reduction, and information technology needs in developing that list.

A handful of additional statutes mandate certain other statements to be printed in the ballot pamphlet under specific circumstances.

As time passed after the passage of Proposition 39, bond counsel became bolder. They continued to add materials that go further and further beyond the strictures authorized by Proposition 39 and the Elections Code. It's gotten to the point where the ballot measures are a rats nest of argumentative, conflicting, exculpatory, repetitive, sloppily-written language that serves only to sell the measure and dissuade anyone from reading, much less understanding, the proposed contract.

Bond counsel are now boldly inserting argumentative (persuasive) language, in fact the district's entire argument, into the school measure. Opponents are not given a similar opportunity, contrary to the legislative intent in the Elections Code. These tactics violate the due process rights of the people to a fair election process and clear statement of what they are voting for.

All post-election remedies are inadequate. Districts have unlimited taxpayer-funded resources and lawyers willing to bill whatever it takes to bury any civil action. On the criminal side, there is not a single district attorney's office that, even after receiving a verified complaint, has prosecuted district employees for using public resources for school measure election campaign activities under Education Code 7054 and 7058. Nor has a single district attorney's office prosecuted a single case of criminal misuse of bond funds under Education Code 15264 and 15288.

Evidence of Education Code 7054 violations are right under your nose, literally. Just look at the contact information for the person who printed the materials, gathered the signatures, and then appeared at your office to file the arguments and rebuttals.

There are several common tactics to include arguments in the school measure.

1. Repeating Ballot Statement

The heading used with this tactic is often "Introduction." The ballot statement has become a voter-survey tested selling proposition. The Elections Code requires that it be a summary of the school measure. (See discussion of 13119(c) below.)

2. Inserting Full Arguments

Depending on the bond counsel firm writing the school measure, this can take many forms. One firm includes the argument under the heading "PROJECT LIST" using a series a bullet-point-like outline points all in bolded text. The outline is preceded by an argumentative, strident statement ending with "the Board of Education determines that the District MUST:."

Other firms have begun labelling the arguments as "Findings" or "Key Findings."

3. Inserting Accountability Requirements

Some bond counsel insert these in the school measure multiple times. Often they are found at the beginning, always before the alleged project list. Sometimes they are found at the end, often in difficult-to-read all-upper-case letters. Sometimes they are inserted multiple times. How many places in a single school measure should "no salaries" language appear? None -- it's not a specific school facilities project. It's a poll-tested argument for getting a "Yes" vote.

While bond counsel may quote the actual requirement from the law, they often paraphrase the law making the whole measure confusing and conflicting from a legal standpoint. The most outrageous tactic used in these "accountability" requirements is when bond counsel intentionally alters phrases from the actual law in an insidious attempt to assist districts in evading accountability. This tactic is most often used in connection with the Proposition 39 language of Section 1(b)(3)(A). The fashion-of-the-day is to modify the "administrator salaries" phrase by inserting an adjective or two in front of it, turning the phrase into "non-construction related administrator salaries." It is also often used to modify the statutory provisions for the independent citizens' oversight committee.

Inserting these paraphrased or modified requirements is a subterfuge to give districts cover with

the uninformed public and the oversight committee (ah, but I repeat myself) to get away with intentional misuse of bond funds.

The arguments are always found at the beginning of the school measure, where they are most likely to be read. No matter how the argument is labelled, it is completely misleading, biased, argumentative, and prejudicial in favor of passing the school measure. These arguments consist of hundreds of words. The same argument talking points are used again in the argument permitted under 9501.

Including arguments in the school measure violates the law and the due process rights of opponents and adds to the confusion of mixing sales language and contractual language.

E. Exculpatory (Weasel) Language

1. Complete Accountability Avoidance

All the while, the legalese boilerplate, added to school measures in violation of the strict accountability requirements of Proposition 39, is designed to evade accountability at every turn by granting complete and absolute discretion to the district, after the fact, to do or not do anything that the vague promises of the non-specific lists of types of projects at any and all sites don't already accomplish. In a newspaper report of a governing board meeting to adopt an election order in Solano County in 2016, when a member questioned the list as not being specific, he was told by the financial advisor, that the governing board can determine the details of the projects to be funded after the election has been won.

Any lawyer using the language found in a school measure in a commercial contract would be on the fast track to disbarment for malpractice or incompetence or both. It's obscene in the perniciousness of emasculating each and every accountability requirement established by the Smaller Classes, Safer Schools and Financial Accountability Act of 2000, otherwise known as Proposition 39, and its companion legislative enactment, the Strict Accountability in Local School Construction Bonds Act of 2000.

While the theme of "accountability" is pervasive in both the California Constitution and the Education Code, the practices of districts and their advisors have made a sham of the word. The goal of the districts, aided and abetted by bond counsel, is to avoid ALL the accountability requirements. (See my testimony to the Little Hoover Commission hearing on bond oversight in September 2016.) This is most boldly done by adding boilerplate language that makes the allegedly specific list into types or examples of projects and then adding a litany of vague, impossible to read additions to each project, some of which are physical facilities-related and some of which are administration-related, often referred to as soft costs.

By including everything, including, literally, the kitchen sink, in the boilerplate, districts achieve the goal of being able to spend the money on anything they may later wish to buy and then point to a word or phrase that covers it. This is contrary to the Purpose and Intent of Proposition 39 "To ensure that BEFORE they vote, voters will be given a list of specific projects their bond money will be used for."

This trick carries over to, not only the public, but also to the oversight committee and to the allegedly independent auditors. The public has no effective remedy to stop this fraud. You should deny district requests to place school measures on the ballot that don't meet the strict accountability requirements of Proposition 39. Measures that do not meet the clear and unambiguous language of Section 1(b)(3)(B) do not qualify. You took an oath to uphold the California Constitution. Honor it.

The newest wrinkle is that bond counsel are now including huge exculpatory paragraphs to

counter the statutory requirement of 13119(b) in school measures, which are already addressed in the tax rate statement.

The effect of this fraud is that districts propose the maximum allowable bond authorization for a single election without any relation to the costs of the featured (marketed) types of projects. The bond funds become a continuous source of funds for marquee projects, everyday facility maintenance, direct salary and operating cost reimbursements, and freeing up the general fund to increase salaries, benefits, and pensions.

F. Elections Code 13119

AB-195 amended 13119 effective January 1, 2018. Subsections (a) and (b) were modified and subsection (c) was added.

1. 13119(a)

This subsection now explicitly applies to "a measure authorizing the issuance of bonds or the incurrence of debt." The operative language requires the explicit form of the statement that is to appear on the ballot:

> "Shall the measure (stating the nature thereof) be adopted?"

If you permit ballot statements that don't comply with this statute, you are aiding and abetting a violation of the law over which you have a specific duty to enforce.

I have heard some whine that this statute is impossible to comply with. This comes from lawyers who are expert at manipulating the law to promote government interests over the due process rights of the people. Perhaps, these whiners should find a new line of work.

Here is the only example (of 40) of a ballot statement of a bond measure for the primary election ballot that has complied with subsection A.

> Local Middle School Construction Measure. [Shall the measure, to design and build a middle school that provides necessary modern facilities for students including spaces for science, math, art, technology, music and sports, and no money for administrators' salaries, authorize Plumas Lake Elementary School District to issue $20,000,000 in bonds, at legal rates, levy/collect on average $0.12/$100 of assessed value ($1,050,000 annually) while bonds are outstanding, with all funds used locally to construct a middle school, be adopted?

If you are interested, I have created a complete list of every ballot statement filed for the June primary election. You or a designated employee must be a member of the site in order to access this page. In the alternative, you can attempt to collect it yourself from your colleagues.

http://www.bigbadbonds.com/content.cfm?p=measure-statement-list&e=2018-Primary&f=CONTENT03

So, it's not impossible. As Captain Picard was so fond of saying, "Make it so!"

Perhaps the district will be forced to cut out some of the argumentative language prohibited by

subsection (c).

DEMAND 2.

> That you exercise your statutory authority to take the appropriate action to conform each ballot statement to the requirements of 13119(a).

2. 13119(b)

This subsection now explicitly applies when any "proposed measure imposes a tax or raises the rate of a tax." That includes every school measure that is asking for bonds or parcel taxes.

> (b) If the proposed measure imposes a tax or raises the rate of a tax, the ballot shall include in the statement of the measure to be voted on the amount of money to be raised annually and the rate and duration of the tax to be levied.

Although kicking and screaming that this mandate now removes bond counsel's ability to include valuable argumentative language in the ballot statement, bond counsel have begrudingly complied for the most part.

If there are school bond measures in your county that do not comply, they are listed below. Parcel tax measures are not included in my analysis.

DEMAND 3.

> That you exercise your statutory authority to take the appropriate action to conform each ballot statement to the requirements of 13119(b).

3. 13119(c)

Subsection (c) is new. It's clear intent is to prohibit deceptive, unfair, argumentative, and prejudicial language for the only statement that voters see on the ballot that they mark. This change was sparked by Los Angeles County's Measure M (the pot-hole measure) which, in 2016, embroiled the registrar in litigation surrounding the outright deception being propagated by the county government against its people.

Because the people have a misplaced trust in districts, believing them to have benevolent motivations, and because districts and their advisors manipulate the elections process to suppress opposition to school measures, the lies and deception in district-initiated measures has rarely risen above the white noise of generally-acknowledged, governmental corruption.

The new subsection addresses this.

> (c) The statement of the measure shall be a true and impartial synopsis of the purpose of the proposed measure, and shall be in language that is neither argumentative nor likely to create prejudice for or against the measure.

As a bit of background, the issue of deception in the Proposition 39 bonds arena has been widely acknowledged. Kevin Dayton's comprehensive July 2015 "For the Kids: California Voters Must

Become Wary of Borrowing Billions More from Wealthy Investors for Educational Construction" (http://californiapolicycenter.org/wp-content/uploads/sites/2/2015/07/CPC_School_Bond_Study_July_2015.pdf) report was followed by the September 2016 Little Hoover Commission hearings on bond oversight which led to its February 2017 findings and report, "Borrowed Money: Opportunities for Stronger Bond Oversight," Report #236. (http://www.lhc.ca.gov/studies/236/Report236.pdf)

To sum up, briefly, districts hire public opinion pollsters to test the language of the ballot statement that gets the best response. Districts use public resources for these so-called "voter surveys" to develop the campaign arguments best-suited to obtain a "Yes" vote on the question. The statements are not designed to be a summary of the measure. To the contrary, they are designed to use the emotional hot-buttons that elicit a "Yes" vote on the ballot by including key phrases, like "leaky roofs," "lead", "asbestos," "safety," "citizen oversight,", "independent audits," "no administrator salaries," "money that cannot be taken by the state," and, the hands-down favorite, "without increasing tax rates." The statements are riddled with argumentative adjectives like "21st Century," "aging," "critical,", "deteriorating," "essential," "inefficient," "modern," "necessary," "old," "outdated," and "veteran" (for college districts). ALL of this language is meant to persuade and intended to create a bias in favor of the measure.

The ballot statements also imbue school facilities with unnatural qualities, such as "improve the quality of education," "protect quality academic instruction," "affordably prepare, train/retrain students/veterans for quality jobs," "improve student safety/security," "better prepare students for college and careers," "prepare students/veterans for jobs/college transfers," "attract/retain quality teachers," "provide for college/career readiness," and on an on.

For school districts, which are required to report facility conditions in annual School Accountability Report Cards, there is, factually, no evidence of actual facilities with "leaky roofs." Nevertheless, "leaky roofs" appears in measure after from the same district and in every school district in California because it creates a picture, infused with emotional appeal, in people's minds of children sitting in classrooms with water dripping down on them. That creates a prejudice in favor of the measure. There is, invariably, not a single specific facility project identified in the measure that actually has a leaky roof. Any school district that didn't repair leaky roofs when discovered would be grossly negligent if it were to allow such conditions to persist, ultimately resulting in the waste and destruction of public facilities.

DEMAND 4.

> That you exercise your statutory authority to take the appropriate action to remove from the ballot statement any variation of the phrase "no salaries" as a false statement. In every case where it is used, the language of the full-text incontrovertibly, and in multiple places, contradicts the "no salaries" language by stating that bond funds will be used to reimburse the district for the costs of its staff who have any tangential connection with anything conceivably related or anything "necessary" or "incidental" to a project on which bond money is to be spent.

DEMAND 5.

> That you exercise your statutory authority to take the appropriate action to remove from the ballot statement every argumentative or prejudicial phrase or adjective.

DEMAND 6.

That you exercise your statutory authority to take the appropriate action to remove from the ballot statement any variation of the phrase "without increasing tax rates" as a false statement. There is no binding language in the measure that describes how that will be accomplished or what the consequences of that promise are. In other words, as something that does not appear on the school measure, it cannot be part of a synopsis of the measure.

G. Proposition 39

Proposition 39 is an accountability law. It was named the Smaller Classes, Safer Schools and Financial Accountability Act for a reason. The proponents argued that the misuse of bond funds by districts was rampant throughout California. Nothing much has changed, as Governor Brown, in his 2017 budget, cited the rampant misuse of state school bond funds, to delay the sale of bonds under the just passed Proposition 51 until stronger accountability measures could be implemented to protect state funds from misuse.

In a contractual sense, Proposition 39 is an offer to districts to fund school facilities projects under the terms of the offer. The terms are non-negotiable. When invoking Proposition 39 in a school measure, districts agree to and are bound by its terms -- only specified uses, whole categories of excluded uses, and two annual audits paid for out of operating funds, not bond funds. The reality is so far removed from the offer only because you honor requests to put school measures on the ballot that don't qualify under Proposition 39.

The key qualification and key accountability requirement is the "list of the specific school facilities projects to be funded." It it is the only qualification requirement that can be examined prior to a school measure being passed, because the other three qualifications are future promises. Without the list of specifics, we're back to the pre-2001 situation of rampant misuse of bond funds. And trust me on this, we're way past that point, with hundreds of millions of dollars, annually, in Proposition 39 bond funds being appropriated for district general funds, special treatment for firms that either funded the bond election or have a favored relationship with district officials, and marquee projects that the voters never agreed to when they read that the district was going to replace the leaky roofs, remove the asbestos and lead, and fix the plumbing. Bond counsel cleverly omit any mention of even relative allocation of the bond funds to the projects, leaving the district the ability to run out the funds on stadiums, performing arts centers, aquatic centers, and curb-appeal facades while the fundamental facilities remain unimproved.

The only language that Proposition 39 permits is a "list of the specific school facilities projects to be funded."

Without a list of specific projects as the rubric, anything goes and there can be no accountability.

For your reference, the first measures that were written under Proposition 39 are nothing like the ones the greedy districts and bond counsel have crafted in their efforts to avoid accountability.

Santa Clarita Community College District, Los Angeles, Measure C (2001)
http://www3.canyons.edu/host/bond//ballot_measure.asp

State Center Community College District, Fresno, Measure E* (2002)
http://measuree.scccd.edu/pdf/ballotlanguage.pdf *

You can already see the signs of bond counsel creeping in to remove accountability in the boilerplate.

The districts know the plain and ordinary meaning of the words "specific," "school,", "facilities,"

and "project."

With access to your county's complete election records, you can easily go back to see the difference in accountability between the project lists of the early Proposition 39 school measures and those masquerading as "project lists" today. The law hasn't changed.

DEMAND 7.

> That you exercise your statutory authority to take the appropriate action to remove from the full-text of the measure the entire section of arguments/findings, whether or not labelled "findings," that describe the intent or the wishes of the district using argumentative language. The California Constitution mandates that the voters be presented with "a list of the specific school facilities projects to be funded."

DEMAND 8.

> That you exercise your statutory authority to take the appropriate action to remove from the full-text of the measure the legalese boilerplate language that attempts to nullify the accountability mandate of "a list of the specific school facilities projects to be funded" by describing every conceivable extra that is included in the "types of projects" or that contains any language using terms in the nature of "examples" or "without limitation."

It's your duty to enforce the Elections Code to ensure the fairness and the impartiality of the elections process. Deferring to the people to make you do your duty is malfeasance, misfeasance, or nonfeasance in office -- take your pick. Failure to perform your duty brings disrepute on your office and jeopardizes the people's confidence in the entire election system of California.

Sincerely,

Richard Michael, Government Accountability Advocate
California School Bonds Clearinghouse (www.bigbadbonds.com)

P.S. I deem the failure of public officials to respond in writing to legitimate public concerns a marker of a culture of public corruption.

cc:
Jon Coupal, President
Howard Jarvis Taxpayers Association