

SUPERIOR COURT OF CALIFORNIA - COUNTY OF FRESNO Civil Department - Non-Limited	Entered by:
TITLE OF CASE: Luisa Medina vs. James Kus / WM	
LAW AND MOTION MINUTE ORDER	Case Number: 22CECG02732

Hearing Date: **September 13, 2022** Hearing Type: **Writ of Mandate**
Department: **404** Judge/Temp. Judge: **Cullers, Mark**
Court Clerk: **Tiso, M** Reporter/Tape: **N/R**

Appearing Parties:

Plaintiff:	Defendant:
Counsel: Stuart Leviton	Counsel: Peter Wall
Nathan Hardy-Court Call	Jason Bezis-Court Call

[x] Taken under advisement and ruled on the same day the court now rules as follows: Writ of Mandate is Denied. *See Attached Order**

- Continued to Set for ___ at ___ Dept. ___ for ___
- Submitted on points and authorities with/without argument. Matter is argued and submitted.
- Upon filing of points and authorities.
- Motion is granted in part and denied in part. Motion is denied with/without prejudice.
- Taken under advisement
- Demurrer overruled sustained with ___ days to answer amend
- Tentative ruling becomes the order of the court. No further order is necessary.
- Pursuant to CRC 3.1312(a) and CCP section 1019.5(a), no further order is necessary. The minute order adopting the tentative ruling serves as the order of the court.

[x] Service by the clerk will constitute notice of the order.

- See attached copy of the Tentative Ruling.
- Judgment debtor ___ sworn and examined.
- Judgment debtor ___ failed to appear.
Bench warrant issued in the amount of \$ ___

JUDGMENT:

- Money damages Default Other ___ entered in the amount of:
Principal \$___ Interest \$___ Costs \$___ Attorney fees \$___ Total \$___
- Claim of exemption granted denied. Court orders withholdings modified to \$___ per ___

FURTHER, COURT ORDERS:

- Monies held by levying officer to be released to judgment creditor. returned to judgment debtor.
- \$___ to be released to judgment creditor and balance returned to judgment debtor.
- Levying Officer, County of ___, notified. Writ to issue
- Notice to be filed within 15 days. Restitution of Premises
- Other: ___

FILED

SEP 13 2022

SUPERIOR COURT OF CALIFORNIA
COUNTY OF FRESNO
BY _____ DEPUTY

SUPERIOR COURT OF CALIFORNIA, COUNTY OF FRESNO
CENTRAL DIVISION

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8	LUISA MEDINA, et al.,)	Case No. 22CECG02732
9	Petitioners,)	Department 404
10	v.)	
11	JAMES A. KUS, Fresno County)	ORDER RE: PETITION FOR WRIT OF
12	Clerk/Registrar of Voters, et)	MANDATE
13	al.,)	
14	Respondents.)	
15	HONOR "MIMI" ROBSON, et al.,)	
16	Real Parties in Interest.)	
17)	

The court, having read the Motions and Opposition, and the Reply brief, and accompanying exhibits and declarations, finds as follows:

1. Background Facts

Respondent James A. Kus is the Registrar for the County of Fresno. On August 12, 2022, the last day a jurisdiction was permitted to file a resolution placing a measure on the ballot for the November 8, 2022 General Election ("November Election"), the Registrar received a resolution of the Fresno County Board of Supervisors placing Measure C on the ballot.

1 On August 18, 2022 the Registrar published a notice in *The*
2 *Fresno Bee* of the Measure C election and the August 29, 2022 5:00
3 p.m. deadline to file arguments for and against Measure C. Such
4 arguments are then published in the County Voter Information Guide
5 ("CVIG").

6 On August 22, 2022 the Registrar received an argument against
7 Measure C by the Libertarian Party of California and the
8 Libertarian Party of Fresno County (collectively, "Libertarians").
9 The Libertarians provided documentation establishing that they
10 qualify as a bona fide association of citizens under Elections
11 Code § 9166(b) (2).

12 On August 29, 2022 the Registrar received an argument against
13 Measure C by "No on Measure C 2022" ("Committee"). The Committee
14 also provided documentation establishing that it qualifies as a
15 bona fide association of citizens under Elections Code §
16 9166(b) (3).

17 On August 29, 2022, shortly after 5:00 p.m., the Registrar
18 determined that the two arguments against Measure C had been
19 timely filed, each by a bona fide association of citizens.
20 Because there was limited time for argument authors to prepare a
21 rebuttal argument, the Registrar needed to make a selection
22 immediately.

23 The Registrar submitted a declaration to this court, under
24 oath, which stated that he knew he could not select between the
25 two arguments based on the type of documentation provided by each
26 submitter to qualify as a bona fide association of citizens, or
27 the form of their associations. He also knew that the Elections
28 Code provided no guidance on that issue, and that his office had

1 no existing written policy or procedure for that issue. He stated
2 that believed that, from the beginning of his employment with the
3 County in the Registrar's office, on April 24, 2017, and until
4 5:00 p.m. on August 29, 2022, a Fresno County elections official
5 has not had to select between two bona fide associations of
6 citizens on the issue of inclusion of an argument in the CVIG.

7 To remain politically neutral, or politically unbiased, the
8 Registrar determined not to consider the content of either
9 argument against Measure C. Instead, he decided to select the
10 argument that was first filed with his office. That was the
11 Libertarians' argument. On August 29, 2022, at 5:30 p.m., the
12 Registrar notified the Libertarians of his decision.

13 Petitioners bring this instant Petition for Writ of Mandate
14 challenging the Registrar's first-in-time selection of the
15 Libertarian Argument over the Committee Argument as an abuse of
16 discretion and also because it does not comply with the Elections
17 Code. Petitioners further argue that the Committee Argument,
18 being more specifically tailored against Measure C, should have
19 been chosen over the Libertarian Argument.

20 2. Applicable Law

21 Elections Code § 13314 provides that any elector may seek a
22 writ of mandate alleging that an error or omission has occurred,
23 or is about to occur, in the printing of a CVIG, or that any
24 neglect of duty has occurred, or is about to occur. The court may
25 issue a peremptory writ of mandate "only upon proof of both of the
26 following":

27

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1 (A) That the error, omission, or neglect is
2 in violation of [the Elections Code] or the
3 Constitution.

4 (B) That issuance of the writ will not
5 substantially interfere with the conduct of
6 the election.

7 (Elec. Code, § 13314(a)(2).)

8 The Petitioners have failed to identify an "error [or]
9 omission" in violation of the Elections Code. As Petitioners
10 concede, the Elections Code is silent on the issue as to how the
11 Registrar is to select one of two arguments from submitters of the
12 same type. Petitioners allege that there has been a "neglect of
13 duty" under § 13314(a)(1) due to the Registrar's use of a
14 selection standard "that was an abuse of discretion because it was
15 procedurally unfair." Petitioners do not allege any
16 Constitutional violation.

17 For the Registrar to have neglected his duty, there must have
18 been a clear duty for the Registrar to neglect. The two
19 requirements for mandamus relief in the context of this case are:
20 (1) a clear, present and usually ministerial duty on the part of
21 the respondent and, (2) a clear, present and beneficial right in
22 the petitioner to performance of that duty. (*Barnes v. Wong* (1995)
23 33 Cal.App.4th 390, 394.) Petitioners can point to no "clear,
24 present and usually ministerial duty" that the Registrar was
25 obligated to perform that he did not perform, or neglected to
26 perform, in this case.

27 Petitioners also cite to Elections Code § 9190. That section
28 provides that "any voter of the jurisdiction in which the election
is being held . . . may seek a writ of mandate . . . requiring any
or all of the materials [relating to a county ballot measure] to

1 be amended or deleted." (§ 9190, subd. (b)(1).) The court may only
2 issue a peremptory writ of mandate under that section "upon clear
3 and convincing proof that the material in question is false,
4 misleading, or inconsistent with [Chapter 2 of Division 9 of the
5 Elections Code, relating to County elections], and that issuance
6 of the writ or injunction will not substantially interfere with
7 the printing or distribution of official election materials as
8 provided by law."

9 Petitioners have not alleged, much less offered clear and
10 convincing proof, that the Libertarians' argument against Measure
11 C is false, misleading, or inconsistent with applicable portions
12 of the Elections Code.

13 a. Abuse of Discretion Standard

14 Under the general "abuse of discretion" standard, "[w]here
15 the duty in question is not ministerial, mandate relief is
16 unavailable unless the petitioner can demonstrate an abuse of
17 discretion." (*Alejo v. Torlakson* (2013) 212 Cal.App.4th 768, 780.)
18 "A decision is an abuse of discretion only if it is 'arbitrary,
19 capricious, entirely lacking in evidentiary support, unlawful, or
20 procedurally unfair.'" (Ibid.)

21 "In determining whether an abuse of discretion has occurred,
22 a court may not substitute its judgment for that of the
23 [official], and if reasonable minds may disagree as to the wisdom
24 of the [official's] action, [the official's] determination must be
25 upheld." (*Alejo, supra*, 212 Cal.App.4th at 780 [reviewing acts of
26 the State Superintendent of Public Instruction and two other state
27 departments].) "The courts have nothing to do with the wisdom or
28 expediency of the measures adopted by an [official] to which the

1 formulation and execution of state policy have been entrusted, and
2 will not substitute their judgment or notions of expediency,
3 reasonableness, or wisdom for those which have guided the
4 [official]." (*Pitts v. Perluss* (1962) 58 Cal.2d 824, 835, fn. 4
5 [reviewing act of Director of Department of Employment], quoting
6 *Faulkner v. Cal. Toll Bridge Authority* (1953) 40 Cal.2d 317, 329.)

7 It is well settled that although a court may issue a writ of
8 mandate requiring legislative or executive action to conform with
9 the law, it may not substitute its discretion for that of
10 legislative or executive bodies in matters committed to the
11 discretion of those bodies. (*Common Cause v. Board of Supervisors*
12 (1989) 49 Cal.3d 432, 445.)

13 When the court's "review is for abuse of discretion, such
14 limited review is grounded in the doctrine of separation of
15 powers, acknowledges the expertise of the agency, and derives from
16 the view that courts should let administrative officers work out
17 their problems with as little judicial interference as possible."
18 (*Alejo, supra*, 212 Cal.App.4th at 780, internal quotation marks
19 omitted.)

20 With these precepts in mind, we turn to the circumstances of
21 this case.

22 3. Analysis

23 When a county elections official receives more than one
24 argument against a county ballot measure, section 9166 provides
25 the sole statutory procedure for selecting the one to publish. The
26 procedure is based on the type of submitter, not the contents of
27 the argument. Section 9166 sets forth four types of submitters in
28 order of preference: (1) the board of supervisors, or a member or

1 members of the board of supervisors; (2) the bona fide sponsors or
2 proponents of the measure; (3) a bona fide association of
3 citizens; and (4) individual voters who are eligible to vote on
4 the measure.

5 Nothing in section 9166, or anywhere else in the Elections
6 Code, tells a county elections official what to do when only two
7 arguments have been submitted, and by two submitters of the same
8 statutory preference. Subdivision (c) of section 9166 tells a
9 county elections official what not to do: if both submitters are
10 bona fide associations of citizens, the county elections official
11 may not consider the type of documentation that they submitted to
12 qualify as such associations, or their form of association.

13 The Legislature does not provide a tie-breaking rule in this
14 situation, where the Committee and the Libertarians are both bona
15 fide associations of citizens.

16 When only two arguments against a county ballot measure have
17 been submitted, and both submitters have the same statutory
18 preference, the county elections official must exercise discretion
19 to select an argument for publication in the voter guide. And, to
20 avoid abusing that discretion, the elections official only needs
21 to use a selection method that is not irrational. Whether that
22 selection method is "wise" or "expedient" is immaterial to whether
23 the standard is met. (See, *Pitts*, *supra*, 58 Cal.2d at 835, fn. 4.)
24 The selection method need not be the best one, even if reasonable
25 minds might disagree. (See, *Alejo*, *supra*, 212 Cal.App.4th at 780.)

26 The Registrar's selection method here meets that standard of
27 reasonableness. On August 29, 2022, shortly after 5:00 p.m., when
28 the period for submission of arguments closed, he determined that

1 two arguments against Measure C were timely submitted and that
2 they satisfied the word count limitation. Next, he determined
3 that each submitter--the Libertarians and the Committee--was a bona
4 fide association of citizens under § 9166(b). As provided in §
5 9166(c), he also determined that he could not select an argument
6 by considering the type of qualifying documentation submitted, or
7 the form of association for either submitter. Given these facts,
8 both submitters had equal statutory preference for the publication
9 of their arguments in the CVIG. (§ 9166(a).)

10 The Registrar next made the reasonable decision that he
11 needed to remain politically neutral, or politically unbiased. He
12 further reasonably determined that, to do so, he would not
13 consider the content of either argument. One method to select
14 between arguments without considering their content is to select
15 the one that arrived earlier. That is what the Registrar did.

16 The first-in-time rule is deeply rooted in our culture and
17 legal tradition. There are many examples where the law recognizes
18 first-in-time as a rule of decision between things that are
19 otherwise equal, such as the system of recording priority as it
20 applies to liens on real property (Civ. Code § 2897) or the rule
21 that, as between appropriators of water, "first in time, [is]
22 first in right" (*United States v. State Water Resources Control*
23 *Board* (1986) 182 Cal.App.3d 82, 102).

24 Given the antiquity and diversity of first-in-time rules in
25 our legal tradition, it cannot be unreasonable for a county
26 elections official, encountering the situation that the Registrar
27 found himself in here, to call upon this common rule. With limited

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1 time to decide, and a need to guard against political bias, it was
2 reasonable for the Registrar to turn to the first-in-time rule.

3 That someone else might have used a different reasonable
4 method to select one of the arguments for publication in the CVIG
5 is of no moment. The Registrar need not have used the best
6 possible method. All he was obligated to do was to use a
7 reasonable method, and this court finds that he did.

8 Petitioners argue that the Registrar should have selected
9 their argument because it is "more specifically tailored" and that
10 one is "circumspect" or "particularized" where the other is not.
11 Petitioners can cite to no authority to support this position.

12 The Petitioners state that "nowhere does it state in the
13 [Registrar's Guidelines for Filing Arguments and Rebuttal
14 Arguments for Ballot Measures] that [the Registrar] will apply a
15 first in time rule to select among multiple opposing arguments."

16 In the absence of clear Legislative guidance, the Petitioners
17 do not identify any legal authority that obligates of the
18 Registrar to establish a local rule or procedure for this kind of
19 situation, or otherwise to give prior notice of how a selection
20 will be made. The court "may not rewrite a statute, either by
21 inserting or omitting language, to make it conform to a presumed
22 intent that is not expressed." (*Kaanaana v. Barrett Business*
23 *Services, Inc.* (2021) 11 Cal.5th 158, 171.)

24 The Petitioners argue that the Committee "should have been
25 granted superior submitter status" over the Libertarians, on the
26 ground that the Committee is "equivalent to the proponent of a
27 measure who submits an argument in favor of a measure."

28

1 "Where the Legislature carefully uses a term or phrase in one
2 place but excludes it in another, we will not imply the term or
3 phrase where excluded." (*Pasadena Police Officers Association v.*
4 *City of Pasadena* (1999) 51 Cal.3d 564, 576.)

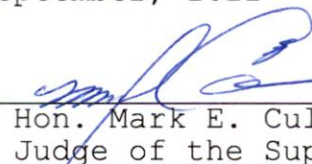
5 Subdivision (b)(3) of section 9166 refers to "a primarily
6 formed committee established to support or oppose the measure"
7 (emphasis added). But just a few lines up in the same section,
8 subdivision (a)(2), relating to preference for publication of
9 arguments, refers only to "bona fide sponsors or proponents of the
10 measure." It does not refer to "bona fide sponsors or proponents
11 or opponents of the measure." If the Legislature intended
12 statutory preference under subdivision (a)(2) to apply equally to
13 a committee that purports to be "equivalent to the proponent of a
14 measure," it could have done so. It did not, however, and the
15 court may not imply that equivalence.

16 4. Conclusion

17 For all the foregoing reasons, the Petition for Writ of
18 Mandate is DENIED.

19
20 IT IS SO ORDERED.

21
22 Dated this 13th day of September, 2022

23  **MARK E. CULLERS**
24 _____
25 Hon. Mark E. Cullers
26 Judge of the Superior Court
27
28

<p align="center">SUPERIOR COURT OF CALIFORNIA - COUNTY OF FRESNO Civil Department, Central Division 1130 "O" Street Fresno, California 93724-0002 (559) 457-2000</p>	<p align="center"><i>FOR COURT USE ONLY</i></p>
<p>TITLE OF CASE: Luisa Medina vs. James Kus / WM</p>	
<p align="center">CLERK'S CERTIFICATE OF MAILING</p>	<p>CASE NUMBER: 22CECG02732</p>

I certify that I am not a party to this cause and that a true copy of the:

Writ of Mandate Minutes/Order

was placed in a sealed envelope and placed for collection and mailing on the date and at the place shown below following our ordinary business practice. I am readily familiar with this court's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service with postage fully prepaid.

Place of mailing: Fresno, California 93724-0002

On Date: 09/13/2022

Clerk, by Maui Tiso, Deputy
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