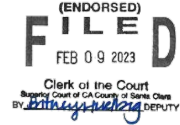




*Office of the City Attorney*  
NORA FRIMMAN, CITY ATTORNEY

February 8, 2023



The Honorable Beth McGowen  
2023 Presiding Judge  
Santa Clara County Superior Court  
191 North First Street  
San Jose, CA 95113

Re: City of San José Response to 2022 Santa Clara County Civil Grand Jury Report, **"If You Only Read the Ballot, You're Being Duped."**

Dear Judge McGowen:

Pursuant to California Penal Code section 933, et seq., please accept the City's response to the 2022 Santa Clara County Civil Grand Jury Report, "If You Only Read the Ballot, You're Being Duped." The City Council approved the City's response to the Grand Jury Report on December 13, 2022. The approved City response and the Grand Jury's Report are enclosed for your review.

Please feel free to contact me if you have any questions. Thank you for your consideration.

Very truly yours,

Nora Frimann  
Nora Frimann (Feb 8, 2023 17:04 PST)

NORA FRIMMAN  
City Attorney



# Memorandum

**TO:** HONORABLE MAYOR  
AND CITY COUNCIL

**FROM:** NORA FRIMANN  
City Attorney

**SUBJECT:** SEE BELOW

**DATE:** December 8, 2022

Approved

Date

/s/ **Nora Frimann**

**12/8/2022**

**SUBJECT: SANTA CLARA COUNTY CIVIL GRAND JURY REPORT:  
“IF YOU ONLY READ THE BALLOT, YOU’RE BEING DUPED”**

**RECOMMENDATION:**

Approve the proposed response to the 2022 Santa Clara County Civil Grand Jury Report entitled, “If You Only Read the Ballot, You’re Being Duped.”

**OUTCOME:**

Approval of this response will satisfy the requirements of Penal Code Section 933, which requires the City Council to respond to Civil Grand Jury reports and provide the response to the presiding judge of the Superior Court.

**BACKGROUND:**

Grand Jury Report

On October 7, 2022, the City of San José (“City”) received the 2022 Santa Clara County Civil Grand Jury’s Final Report, entitled “If You Only Read the Ballot, You’re Being Duped” (“Report”) (attached hereto as “Attachment A”). The Report asserts that it, “has seen ballot question language that is confusing, advocacy-oriented, or simply dishonest” and that, “sometimes voters are being deceived.” To address this assertion, the Report proposes the creation of an oversight person or body, one who has taken an oath to act with integrity, is well versed in the requirements of the law, and is empowered to review and to reject ballot question wording that is false, misleading, or partial to one side. The Report specifically recommends that Santa Clara County Counsel perform this task. Pursuant to California Penal Code sections 933 and 933.05, the Grand Jury requested a response from the City and other jurisdictions that may place measures on the ballot. Specifically, the City was asked to respond no later than January 5, 2023, to Finding 1 and Recommendations 1b, 1c, and 1e of the Report.

The City has prepared a response to the finding and each of those recommendations applicable to the City, in accordance with California Penal Code Sections 933.05(a), which states that the responding person or entity shall indicate one of the following with respect to each finding and recommendation:

*Findings:*

1. The respondent agrees with the finding.
2. The respondent disagrees wholly or partially with the finding, in which case the response shall specify the portion of the finding that is disputed and shall include an explanation of the reasons thereafter.

*Recommendation:*

1. The recommendation has been implemented, with a summary regarding the implemented action.
2. The recommendation has not yet been implemented, but will be implemented in the future, with a time frame for implementation.
3. The recommendation requires further analysis, with an explanation and the scope and parameters of an analysis or study, and a time frame for the matter to be prepared for discussion by the officer and head of the agency or department being investigated or reviewed, including the governing body of the public agency when applicable. This timeframe shall not exceed six months from the date of publication of the grand jury report.
4. The recommendation will not be implemented because it is not warranted or is not reasonable, with an explanation therefore.

**ANALYSIS:**

**GRAND JURY FINDING AND RECOMMENDATIONS AND THE CITY'S RESPONSE**

**Grand Jury Finding 1**

*The Civil Grand Jury finds that in the current environment, which is unregulated at the local level, it is easy for the author of a ballot measure question to write the question in a way that is confusing or misleading to voters.*

City Response to Finding 1

In accordance with Section 933.05(a)(2) of the California Penal Code, the City disagrees with the finding that ballot measure questions are unregulated at the local level. In San José, before approval by the City Council, all ballot measure question titles are prepared and reviewed by the City Attorney in accordance with Division 9, Chapter 3, Section 9203 of the California Elections Code to ensure the ballot title is a true and impartial

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statement of the purpose of the proposed 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. In addition, judicial remedies are available under State Law to adjudicate local ballot measure questions that are argumentative or likely to create prejudice.

Given the existence of the above referenced regulations and the lack of factual allegations within the Report, the City disagrees with the speculative and unsubstantiated finding that it is easy for the author of a ballot measure question to write the question in a way that is confusing or misleading to voters.

Therefore, the City disagrees with Finding 1 of the Report. Further, the City does not agree that additional restrictions and oversight by the County of Santa Clara are necessary.

**Recommendation 1b:**

*Governing entities within Santa Clara County should voluntarily submit their ballot questions to the County Counsel for review prior to submission to the Registrar of Voters, unless and until Recommendation 1d is implemented.*

City Response to Recommendation 1b: THE RECOMMENDATION WILL NOT BE IMPLEMENTED

In accordance with Section 933.05(b)(4) of the California Penal Code, the City does not believe this recommendation is necessary and it will not be implemented by the City. The City will continue to review and approve ballot measure language as authorized under the California Elections Code. In addition, the City Attorney will continue to review ballot measure questions to determine compliance with California Election law.

**Recommendation 1c:**

*Governing entities within Santa Clara County should, by March 31, 2023, adopt their own resolution or ordinance to require submission of their ballot questions to the County Counsel for review prior to submission to the Registrar of Voters, unless and until Recommendations 1d and 1e are implemented.*

City Response to Recommendation 1c: THE RECOMMENDATION WILL NOT BE IMPLEMENTED

In accordance with Section 933.05(b)(4) of the California Penal Code, the City finds this recommendation unwarranted and it will not be implemented by the City. The City will continue to review and approve ballot measure language as authorized under the California Elections Code. In addition, the City Attorney will continue to review ballot measure questions to determine compliance with California Election law.

**Recommendation 1e:**

*Governing entities within Santa Clara County should submit their ballot questions for review by the Good Governance in Ballots Commission pursuant to Recommendation 1d.*

City Response to Recommendation 1e: *THE RECOMMENDATION WILL NOT BE IMPLEMENTED*

In accordance with Section 933.05(b)(4) of the California Penal Code, the City finds this recommendation unwarranted and it will not be implemented by the City. The City will continue to review and approve ballot measure language as authorized under the California Elections Code. In addition, the City Attorney will continue to review ballot measure questions to determine compliance with California Election law. In addition, the County of Santa Clara does not have authority under State law over Charter cities.

**CONCLUSION:**

This memorandum provides an overview of, and response to, the Finding and Recommendations of the Santa Clara County Civil Grand Jury Report entitled, "If You Only Read the Ballot, You're Being Duped." In response to Finding 1, the City disagrees with the Grand Jury's Report which alleges that the drafting of ballot measure question titles is unregulated at the local level. Accordingly, the City will not be implementing the recommendations proposed in the Report.

**EVALUATION AND FOLLOW-UP:**

Upon approval of this memorandum by Council, the City Attorney will submit the memorandum to the presiding judge of the Superior Court. No additional evaluation or follow-up is required.

**CLIMATE SMART SAN JOSE:**

The recommendation in this memo has no effect on Climate Smart San José energy, water, or mobility goals.

**PUBLIC OUTREACH:**

By the very nature of the Grand Jury's report and its release, public outreach requirements have been met. Additionally, upon approval of this memorandum by Council, the City Attorney will submit the memorandum to the presiding judge of the Superior Court.

HONORABLE MAYOR AND CITY COUNCIL

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**COORDINATION:**

This memorandum was coordinated with the City Attorney's Office.

**COMMISSION RECOMMENDATION/INPUT:**

No commission recommendation or input is associated with this action.

**CEQA:**

Not a Project, File No. PP17 008, General Procedure and Policy Making resulting in no changes to the physical environment.

/s/ Nora Frimann \_\_\_\_\_

NORA FRIMANN  
San José City Attorney  
Office of the City Attorney

For questions, please contact Matthew Tolnay, Deputy City Attorney, at (408) 535-1900 or Matthew.Tolnay@sanjoseca.gov.

Attachment A: Grand Jury Report

IF YOU ONLY READ THE BALLOT,  
YOU'RE BEING DUPED



2022 Santa Clara County  
Civil Grand Jury

*October 7, 2022*

**EXHIBIT "A"**  
**(20221213\_0241)**

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## GLOSSARY AND ABBREVIATIONS

<b>Attorney General</b>	The chief law officer who represents a state in legal proceedings.
<b>Ballot Card</b>	The printed ballot, usually on high-grade paper, consisting of the ballot questions and names of individuals running for elected office.
<b>Ballot Measure</b>	Ballot measures are proposals, usually at a county or local level, to enact new laws or repeal existing laws, which are placed on the ballot for approval or rejection by the electorate.
<b>Ballot Proposition</b>	Ballot propositions are proposals, usually at the state level, to enact new laws or constitutional amendments or repeal existing laws or constitutional amendments, which are placed on the ballot for approval or rejection by the electorate.
<b>Ballot Question or Ballot Label</b>	For purposes of this report, Ballot Question or Ballot Label means the 75-word or less statement of a measure that precedes “Yes” or “No” on the ballot card.
<b>Boards and Commissions</b>	Boards and Commissions are made up of residents who volunteer their time and expertise to assist and advise governing bodies in the chosen capacity.
<b>Caselaw</b>	Law or legal precedent established by the outcome of court cases.
<b>County Counsel or Office of the County Counsel</b>	The County Counsel is the chief legal advisor and representative for the county, including the county board of supervisors and all county agencies and departments.
<b>Elections Code</b>	A collection of California laws related to public elections.

**Governing Entity**

A jurisdiction such as a city, county, school district, special district, or political subdivision.

**Home Rule**

The right of self-government that is granted by state constitution or statute to give autonomy to a local government. Home Rule implies that each level of government has a separate realm of authority.

**Public Opinion Pollsters**

Opinion polls are designed to represent the opinions of a population by conducting a series of questions and then extrapolating generalities in ratio or within confidence intervals. A person who conducts polls is referred to as a pollster.

**Registrar of Voters**

The department responsible for the operation, administration, and direction of the elections department, with primary responsibility for the registration of voters, the holding of elections, and all matters pertaining to elections.

**Single Subject Rule**

Per Article II, Section 8(d) of the California Constitution, "An initiative measure embracing more than one subject may not be submitted to the electors or have any effect." Essentially, the rule stands for the notion that where an initiative embraces more than one subject, it can neither be submitted to, nor enacted by, the voters.

**Term Limits**

A specified number of terms (in years) that a person in office is allowed to serve.

**Writ of Mandate**

In California, writs of mandate are used by superior courts, courts of appeal, and the Supreme Court to command lower bodies, including both courts and government agencies, to do or not to do certain things.

## SUMMARY

It is not uncommon for the public to be confronted daily with news and information through multiple sources—traditional television programming, 24/7 cable news, satellite radio, social media, and phone alerts. In the context of elections, voters' busy lives can be overwhelmed with many different voices. County and state voter information guides are required by law to be mailed to every registered voter, but voters today do not have a lot of time to read these resources. As a result, the ballot measure question printed on the ballot itself becomes a key factor in the outcome of an election.

There is an expectation in California law that ballot questions be drafted in a manner that is not false, misleading, or partial to one side.<sup>1</sup> But there are ways to work around it. Among the fifty or so jurisdictions in Santa Clara County that are eligible to put forth a ballot measure, the 2022 Santa Clara County Civil Grand Jury (Civil Grand Jury) has seen ballot question language that is confusing, advocacy-oriented, or simply dishonest. Yes, sometimes voters are being deceived. Many voters cannot comprehend the complicated language or the implications of that "yes" or "no" vote. In a perfect world, voters would have the luxury of time to research these issues. In reality, however, voters almost always rely on the language of the ballot measure question itself.

What can be done about this? The Civil Grand Jury proposes an oversight person or body, one who has taken an oath to act with integrity, is well versed in the requirements of the law, and is empowered to review and to reject ballot question wording that is false, misleading, or partial to one side. Santa Clara County should have a climate whereby governing entities in Santa Clara County are discouraged from using dishonest or deceitful wording in a ballot question, especially when they know it will be reviewed and could be rejected. In so doing, due process will be strengthened. With clearer writing, ballot measure questions will be more transparent and straightforward, which will lead to a better perception of government by the voters. It is time to remove impediments to good governance.

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<sup>1</sup> California Elections Code section 10403 requires a ballot question to “conform to this code governing the wording of propositions submitted to the voters at a statewide election.” The California Elections Code contains Section 9051, which provides that in a statewide election the ballot title and summary of an initiative or referendum must be a “true and impartial statement of the purpose of the measure in such language that the ballot title and summary shall neither be an argument, nor be likely to create prejudice, for or against the proposed measure.” (Elec. C. §9051(c); *see also, McDonough v. Superior Ct.* (2012) 204 Cal. App. 4th 1169, 1172.)

## BACKGROUND

Ballot measures or ballot propositions are proposals to enact new laws or constitutional amendments or to repeal existing laws or constitutional amendments. They are placed on the ballot for approval or rejection by the voting public. The words “ballot *measures*” are often used by county, city, and local governing entities, whereas at the state level, the California State Legislature uses the term “ballot *propositions*” to refer to the same concept. The ballot measure question, which is the subject of this report, refers to the maximum 75-word text that precedes the “Yes” or “No” selection on the ballot card itself. Because most voters never read beyond what is printed on the ballot card, it is of critical importance that ballot measure questions be concise, accurate, and impartial.

Recently, two local newspaper articles highlighted the tactics that governing entities have used to manipulate voters:

- Borenstein, Daniel, *Tricks California Local Officials Use To Trick Voters*, Bay Area News Group, January 21, 2022.
- Mercury News and East Bay Times Editorial Boards, *Stop Deceiving Bay Area Voters on Local Tax Measure Costs*, June 26, 2020, updated September 5, 2020.

As part of its charge, the Civil Grand Jury is responsible for identifying areas within local government that lack good governance or practices. This Civil Grand Jury identified as a problem the choice of wording used in local ballot measure questions. Specifically, the Civil Grand Jury discovered that some local governing entities presenting measures for a public vote create ballot questions that are **purposefully misleading** so they may obtain their desired result. In particular, it was noted that the wording of a ballot question from the June 2022 election, although representing a relatively simple issue, created confusion among the public. When voters found out what the text of the measure actually meant, they felt deceived by the wording of the ballot question. Deception in ballot questions is worth the attention of the Civil Grand Jury. This problem must be remediated to reinstate good governance in the election process.

## METHODOLOGY

The Civil Grand Jury used the following investigative methods:

- Interviews with ten individuals who are well versed in the intricacies of the election process and experts in political science and local governments
- Three published Civil Grand Jury reports: 2021-22 Alameda County, 2021-22 Santa Cruz County, 2021 Santa Clara County
- Editorials from local and regional newspapers: Mercury News, Los Angeles Times, San Francisco Chronicle
- Close reviews of ballot measures, past and upcoming, from the counties of San Mateo, Santa Clara, Santa Cruz, and the City and County of San Francisco
- Legal research of court challenges involving ballot questions

## INVESTIGATION

Throughout this report, the Civil Grand Jury was interested only in the process of ballot measure question drafting, not the substance of the underlying ballot measure itself. **In its research and analysis, the Civil Grand Jury does not examine the merits of the measure, but rather whether the question as drafted is truthful, impartial, and fair.** Ballot questions must conform to statutory requirements and should provide voters with sufficient information and transparency to make informed decisions.

A straightforward ballot question can be summarized this way: A vote for “Yes” means yes and a vote for “No” means no. Unfortunately, it is common for ballot questions to be presented whereby a vote for “Yes” actually means no, and vice versa. This wording is arguably confusing. Inching farther away from confusing questions, the research performed by the Civil Grand Jury found ballot questions that are even worse—they are misleading.

### **Santa Clara Valley Water District’s Measure A**

During the last election in June 2022, the question for Measure A put forth by the Santa Clara Valley Water District (Water District) employed such a tactic:

*Shall the measure amending the Santa Clara Valley Water District Ordinance 11-01 to limit Board members to four successive four-year terms be adopted?*

The Water District had term limits already in place for board members to serve three four-year terms, or 12 years at most. Measure A sought to increase term limits to four four-year terms, or 16 years at most. However, the ballot question hid the fact that a term limit was already in place; it

asked voters whether a term limit of four terms should be adopted, thereby couching the question as a measure to *adopt* term limits generally, which one political science expert described to the Civil Grand Jury as a concept widely favorable to the voting public. The ballot question did not reflect what the Water District wanted to do. The Water District wanted to extend term limits, but it wrote the ballot question without using the words “extend,” “change,” or “increase.” Instead, the Water District characterized the ballot measure as setting term limits, which is a mischaracterization of what Measure A was actually about.

Further, it is notable that in November 1998, the County of Santa Clara placed a substantially similar measure on the ballot using the same tactic. Measure E asked:

*Shall the County of Santa Clara amend section 202 to limit the number of terms a member of the Board of Supervisors may serve to three terms, consisting of four years each?*

Again, the ballot question failed to inform the reader that each member of the County of Santa Clara Board of Supervisors was already limited to two terms and that the ballot measure proposed to *extend* years served, not “*limit*” them. By not being transparent, this tactic of ballot question drafting is tantamount to a lie by omission; it borders on deceiving the public. From Measure E in 1998 to Measure A this year, 24 years later, the climate has not changed.

## Regulations that Govern Ballot Questions

Sections 9100-9190 of the California Elections Code specifically address county-level elections. Other sections of the Elections Code, while they do not specifically address county-level elections, have import and therefore apply as well. The County of Santa Clara has not enacted local ordinance code provisions regarding ballot question language.

Under the Elections Code, the wording of a ballot measure must state the ballot question, or what the Elections Code calls the “label,” in 75 words or less (Elec. C. §9051(b), §10403, §13247). The ballot question must state “the nature” of the measure (Elec. C. §13120). The official who drafts the ballot question “shall give a true and impartial statement of the purpose of the measure in such language that the ballot title and summary shall neither be an argument, nor be likely to create prejudice, for or against the proposed measure” (Elec. C. §9051(c)). **In other words, ballot measure questions shall not be false, misleading, or partial to one side.**

## Who is Responsible for Writing Ballot Questions?

Today, ballot questions are rarely written “from scratch.” Residing in the public domain are hundreds, if not thousands, of boilerplate questions spanning the universe of issues typically faced by government and public agencies. Putting a measure on the ballot usually starts with selecting

an existing template, preferably one that had been used successfully within a reasonable timeframe and geographic proximity to the one at hand. Tweaks are then made to the chosen template to fit the measure being proposed.

Governing entities are ultimately responsible for approving the final text of the ballot question, but the actual selection of words is often the calculated and carefully calibrated work product of hired election experts, consultants, and attorneys. These outside consultants often rely on public opinion pollsters to determine the type of proposal and wording to put before voters that would achieve the desired outcome. Often, this includes using “feel good” wording that is shown to resonate with voters: “reduce crime;” “funds spent locally;” “all money locally controlled;” and “with citizen oversight.” Results from public opinion polls often dictate the structure and selection of words used within the ballot question, which is then voted on and, if successful, adopted by the governing body such as a city council, a county board of supervisors, the board members of a school district, or any governing body of a government entity operating within the county. During the course of this investigation, the Civil Grand Jury learned that local measures on the ballot that governing entities choose wording likely to be most successful at the ballot box over clarity of language to the voter.

For purposes of this investigation, the Civil Grand Jury focused on ballot questions relating to local ballot measures, not state propositions, because according to the California Elections Code, the state attorney general is responsible for providing ballot questions for state propositions. In contrast, there is no similar requirement that a certain officer provide the ballot question for local elections, so it is instead drafted by the proponent of the measure at the local level.

## **Advocacy and Tactical Wordplay Result in Poorly Drafted Ballot Questions**

It has been widely observed today that the 75-word ballot questions are being used as advocacy pieces, at the expense of fairness and impartiality. In an aptly titled [report](#) published in June of last year, the Alameda County Civil Grand Jury advocated for “*The Need for Accuracy and Impartiality of Ballot Measure Questions.*” The jury explained how and why the desire to achieve a certain outcome has tainted the process to produce ballot measure questions that are not accurate and impartial:

In general, we found ballot questions suffer from a “proponent’s bias” that is a natural outgrowth of the typical process through which questions are selected, drafted, and proposed. ... In general, we found that ballot questions too often fall short of what voters have a right to expect in terms of transparency and impartiality, even when satisfying minimum legal standards.

## IF YOU ONLY READ THE BALLOT, YOU'RE BEING DUPED

The jury in Alameda reviewed and provided an in-depth analysis of six ballot questions to reach their conclusion. In so doing, they exposed the “tricks of the trade”—wording chosen for the sole purpose of increasing the odds of success at the polls. Adopting the same methodology as the Alameda report, the Civil Grand Jury reviewed past and upcoming ballot measure questions from local jurisdictions within Santa Clara County. The Santa Clara County Civil Grand Jury observed the same tricks and tactics used by governing bodies to deceive voters:

- (1) Using “feel-good” words to garner voter approval. Measure F, November 2020, said “all funds spent locally,” which is meaningless when one pauses to think about it.
- (2) Adding favorable language even where it plainly does not apply. Measure F, November 2020, said “independent audits, citizens’ oversight” where the underlying ordinance implementing the measure makes no mention whatsoever of audit and oversight requirements.
- (3) Adding misleading words to lead voters astray. Measure S, November 2020, said “until ended by voters,” falsely implying that the measure itself provided for repeal or that voters would have an opportunity to repeal the tax when they did not; Measure L, November 2020, conveyed the same with “can be ended by voters.” Measure A, March 2017, said “[funds] cannot be taken away by the State,” falsely implying that the state may access local funds when it may not.
- (4) Manipulating words to divert voters from what is actually at issue. Upcoming Measure N, November 2022, which seeks authorization of \$572 million in school bonds costing approximately 3 cents per \$100 of assessed valuation, states “no increase in tax rates.”
- (5) Omitting relevant information necessary for voters to make informed decisions. Measure AA, November 2016, and Measure H, November 2014, made no mention of the tax increase that would be required to fund the school bonds that were at issue.
- (6) Putting multiple issues on a single measure, ostensibly violating the single subject rule. Measure H, November 2020, sought to increase card room tax and the number of card tables allowed in gambling facilities.

At the writing of this report, the following measures slated for the upcoming November 2022 election also rely on at least one of the tactics described:

E	“all funds spent locally with no money taken by the State and spent elsewhere” - see (1) and (3) above.
G, H, J, L	“until ended by voters” - see (3) above.
I	“Shall the City Charter be amended to add the City's ethics and elections commission (Board of Fair Campaign and Political Practices) to the Charter; remove requirements that members of the Planning, Civil Service, and Salary Setting Commissions be electors and/or citizens; remove gender-specific language; and require the City Council to adopt equity values, standards, and assessments in making certain decisions?” - see (6) above.
O	“all money staying local” - see (1) above.



Along the same lines, it is worth noting that in June 2022, the Santa Cruz County Civil Grand Jury released its [report](#), “*Words Matter: Did Measure G Deceive Voters?*” The question confronting the jury was whether the County of Santa Cruz was honoring the provisions in the ballot measure following its passage. The jury concluded that the ballot question behind the November 2018 Measure G was misleading after its investigation and research revealed no basis whatsoever for including the words “annual audits and independent citizens oversight” within the ballot question. Arguably, these words were used for no purpose other than to elicit good feelings in the voter.

## **The Elephant in the Room: Big Money**

Elections cost money—lots of money. In an [article](#) published June 30, 2002, updated June 22, 2022, CalMatters put it succinctly: “*Ballot measures are big business.*” The Civil Grand Jury learned that cost is a major factor in the decision to get to the ballot. San Jose’s *Mercury News* reported that the Water District’s Measure A from the June 2022 election cost taxpayers \$3.2 million.

Once the decision is made by the government entity to spend the money to go to ballot, a lot of pressure is put on the entity to do whatever it takes to secure a win. For this reason, proponents of ballot measures stay focused on the result, hiring high-priced election consultants, attorneys, and opinion pollsters to carefully frame the ballot question to achieve the desired outcome. Successful elections will reward those that are behind them. It does not take much imagination to understand how this practice has evolved to become “high stakes.” For example, a school district superintendent who has successfully secured funding through school bond measures may parlay these wins to rally support for a more prestigious role or a position at a larger public institution.

On the other hand, if a measure fails, individuals’ livelihoods are at stake because someone will likely have to take the blame for it—usually either someone on staff or the board proponents of the governing body. This is why proponents advocate so strongly, often—as exemplified above—sacrificing context, clarity, truthfulness, and transparency in ballot question wording in favor of pure advocacy. The Civil Grand Jury learned from those in the ballot question business that it is understood that the drafter will make sure the statement is “lawful,” but it is also understood that it will not necessarily provide full disclosure.

## **Eroding the Public’s Trust**

Many voters in Santa Clara County felt that they were tricked by the Water District based on how Measure A was worded. The Civil Grand Jury compiled the following descriptors of Measure A from local news sources and through its interviews: “deceitful,” “deceptive ballot language,” “designed to confuse voters,” “dishonest,” “false,” “hiding the ball,” “lacks integrity,” “lie by omission,” “misleading,” “not ethical,” “not transparent,” “not clear,” “violates the norm,”

“violates standards of good governance,” “board must be held accountable,” “board should resign,” “board violated its fiduciary duty,” “board violated the trust of the people,” “board wasting money,” “failure of character,” “failure to represent its constituents,” “fraudulent misappropriation of public funds,” “misled the public for political gain,” “self-serving hoodwinking of the electorate,” “self-serving dishonesty,” “unacceptable in a democracy.”

Public opinion made it clear that where a ballot question fails to provide voters with sufficient information to make an informed decision, it does so at the expense of public trust. Forming distrust between government and its citizenry hurts. What the Water District did through Measure A has severe ramifications because it creates distrust between the government agency and the people the agency is supposed to serve and protect. Going forward, Santa Clara County residents will likely question the integrity and ethical behavior of the Water District. Once the bonds of trust have been weakened, citizens are less inclined to trust the actions and decisions of this agency and more inclined to ask, “If the Water District cannot be trusted to be truthful on the ballot, how can we know them to be truthful in other matters?”

With the passage of Measure A, many residents lost confidence in the Water District. It may take a long time to regain trust from the community. While the Civil Grand Jury appreciates the desire of a government entity to advocate for itself when putting ballot measures up for a public vote, ballot questions cannot be false, misleading, or partial to one side. Based on Civil Grand Jury research and reports, too many local measures fail to meet this standard in favor of advocacy and “proponent’s bias.”

### **Lack of Oversight Results in Poorly Drafted Ballot Questions**

Despite the number of hands that touch a proposal from inception to ballot card, the Civil Grand Jury was surprised to discover that there is no filter or oversight by an appropriate official prior to the adoption of ballot question wording. At the state level, the “Attorney General gives a true and impartial statement of the purpose of the measure in such language that the ballot title [e.g., the ballot question] and summary shall neither be an argument, nor likely to create prejudice, for or against the proposed measure” (Elec. C. §9051(c)). But the Attorney General does not have jurisdiction over *local* measures and thus does not provide the ballot question. When it comes to local measures, the Civil Grand Jury learned that there is not a similar role performed by an official, like the Attorney General, that can provide the wording for ballot questions. Rather, when the ballot question is submitted to the Santa Clara County Registrar of Voters, their review is narrowly limited to enforcement of the 75-word limit. Staff at the County Registrar of Voters manually count the number of words to ensure that the word cap has not been stretched. They do not monitor the content of the ballot question.

At the local level, the County of Santa Clara Office of the County Counsel performs legal services that are most analogous to the Attorney General's role at the state level with respect to elections. Further, County Counsel has expertise in election law and advises the County of Santa Clara Registrar of Voters. The County Counsel does not, however, have authority over cities and political subdivisions within the boundaries of the county. Therefore, when a city, school district, or special district places a local measure on the ballot, they are permitted under current law to draft the language themselves. They have every incentive to adopt wording proposed by their polling consultants, who will give weight to "feel good" words over simplicity, transparency, and impartiality. Fundamentally, the government entity's self-interest dictates the ballot question wording.

## **The Current Sole Remedy—Initiating a Court Challenge—Falls Short**

Under current legislation, there is no realistically expedient method to challenge problematic ballot questions. When a measure is to be placed on the ballot for an upcoming election, it is subject to a 10-day public examination period during which any voter in the jurisdiction may file a lawsuit to amend the language of the measure. California Elections Code section 9295 sets forth the procedure:

*During the 10-calendar-day public examination period provided by this section, any voter of the jurisdiction in which the election is being held, or the elections official, himself or herself, may seek a writ of mandate or an injunction requiring any or all of the materials to be amended or deleted. The writ of mandate or injunction request shall be filed no later than the end of the 10-calendar-day public examination period.*

*A peremptory writ of mandate or an injunction shall be issued only upon clear and convincing proof that the material in question is false, misleading, or inconsistent with the requirements of this chapter, and that issuance of the writ or injunction will not substantially interfere with the printing or distribution of official election materials as provided by law.*

There are several reasons why the 10-calendar-day public examination period to object in a formal court setting does not work well:

- (1) The public tends not to hear about ballot measures until it is too late. This is due in part to a dearth of media coverage of local news, a result of the consolidation of local news outlets by media conglomerates. It is no secret that in today's news environment, local news coverage has been reduced significantly. Furthermore, ten days is a very short window to react, let alone mount a court challenge to remediate.

- (2) Ten days is much too short a time to locate an attorney well versed in the laws and processes of elections to file a lawsuit in this specialized field.
- (3) Even if an attorney can be available within the 10-day window, it is not within the means of the average person to afford the attorney fees necessary to pursue a remedy.
- (4) Voters challenging the wording in a ballot question face an uphill battle because the courts give deference and considerable latitude to the original author. Further, courts uphold the ballot measure question if it substantially complies with the requirement not to be “false, misleading, or partial to one side.” (See Bibliography, *Amador* and *McDonough* decisions.)
- (5) There is practically no recourse to fix non-conforming ballot questions after the 10-calendar day public examination period has passed. (See Bibliography, *Denny* decision.)
- (6) Even the single subject rule—a state constitutional doctrine—has been watered down by case law; hence it is no longer vigorously enforced. (See Bibliography, *Amador* and *Harbor* decisions.)

When confronted with challenges to ballot measures, the courts have stated:

- Relief under a writ of mandate may be granted "only upon clear and convincing evidence" that the challenged election material is "false or misleading or otherwise inconsistent with the provisions." (See Bibliography, *McDonough* decision.)
- The test is not whether the ballot question could be more complete. (See Bibliography, *Martinez* decision.)
- The ballot title need not be the “most accurate,” “most comprehensive,” or “fairest” that a skilled wordsmith might imagine. (See Bibliography, *Yes on 25, Citizens for an On-Time Budget* decision.)
- The courts are not free to change an accurate statement to reflect their interpretation of the common sense understanding of the language. (See Bibliography, *Yes on 25, Citizens for an On-Time Budget* decision.)
- The courts are not free to wordsmith the ballot question and change it just because they believe it could be better. (See Bibliography, *Martinez* decision.)
- The courts must give deference to the official who drafts the ballot question; “all legitimate presumptions should be indulged in favor of the propriety” of the drafter’s actions. (See Bibliography, *Becerra* decision.)

## Solutions

The Civil Grand Jury has learned that the sole legal remedy currently available to right a wrong when it comes to ballot measure questions is insurmountable for the average citizen. Nonetheless, the Civil Grand Jury notes that there could be two potential mechanisms to improve the current process.

## 1. Task an appropriate official to review ballot measure questions

Current law requires that the individual who drafts the ballot question do so in a way that is not false, misleading, or partial to one side. In order to meet this requirement, an objective, neutral third party is needed to speak on behalf of the voting public, ideally someone who is well versed in the law, has a fiduciary duty to uphold the law, and has taken an oath to act with integrity. **The Civil Grand Jury recommends that County Counsel perform this task. Further, the Civil Grand Jury recommends that the County of Santa Clara Board of Supervisors should endorse the County Counsel to act in a role, like that of the Attorney General, to provide for ballot question wording for all local measures.**

What this might look like: After the governing entity ratifies the concept behind the proposed measure, as is the practice today, the entity's lawyer, whether a city attorney, school district attorney, or special district attorney, would draft a ballot question that is impartial, unbiased, and non-argumentative. The proposed ballot question would then be submitted to the County Counsel, who would be charged with overseeing the narrow task of ensuring that the wording of the question is not false, misleading, or biased in favor of one view. Most importantly, County Counsel would also be authorized to reject non-conforming or deficient wording and to compel revisions. Only when the ballot question at issue conforms to statutory requirements would County Counsel approve it for use.

## 2. Create an independent oversight commission to review ballot questions

It is not unusual for jurisdictions to convene independent advisory commissions to assist in county governance. The County of Santa Clara alone boasts over 75 boards and commissions, ranging from an Advisory Commission on Consumer Affairs to a Youth Task Force.

For purposes of overseeing conformity of ballot measure questions, the Civil Grand Jury recommends that the County form a Good Governance in Ballots Commission (Good Governance Commission). This advisory commission should act quickly to review and comment on ballot questions or provide recommendations to remediate questions that are false, misleading, or partial to one side. The composition of the Good Governance Commission should, at a minimum, include an attorney member of the California State Bar, either to participate as a full member or act as an ex officio member without voting privileges. Because County Counsel is the attorney to most Santa Clara County advisory boards and commissions, it could therefore be tasked to help members of this commission navigate the intricacies of California's statutory requirements.

Apart from the obvious benefits—non-partisanship and public representation—another advantage of having a single commission perform the task of reviewing ballot questions would be to maintain consistency across all governing entities. Regardless of whether a city, county, school district, or

other jurisdiction puts forth the measure, the output from a neutral, uninterested third party would probably help eliminate the rhetoric and advocacy inherent in the current practice.

To be successful, the Good Governance Commission should ideally have the ability to review and to reject language that is biased and partial. The power of rejection is crucial because it would also likely have the effect of encouraging the governing entity to self-police. It must not be merely optional for governing entities to submit their ballot questions for review. If the commission were granted mere advisory powers, then it would have very limited impact; it is reasonable to surmise that most, if not all, governing entities would choose to decline to submit their ballot questions for consideration in the interest of the time required to add a layer of review.

Unfortunately, adoption of a Good Governance Commission that has the power to reject language would require passage of a state law that would enable the County of Santa Clara to have an express grant of power to impose a requirement on other entities. This is because “[t]he board of supervisors has no inherent powers; the counties are legal subdivisions of the state, and the county board of supervisors can exercise only those powers expressly granted it by Constitution or statutes and those necessarily implied therefrom” (*Hicks v. Board of Supervisors* (1977) 69 Cal. App. 3d 228, 242). In general, absent other express authorization, one governmental entity cannot regulate another.

Put another way, charter cities operate under home rule, which means that they do not answer to the county the city is located in. For example, the County of Santa Clara Board of Supervisors does not have jurisdiction to compel the City of Gilroy, a charter city, to abide by a county ordinance. Absent some legislative authorization, the County of Santa Clara cannot impose a mandatory review process for ballot questions on other entities. For this reason, the Civil Grand Jury urges the County to pursue legislative solutions to facilitate a process by which the County Counsel would be required to review and approve local measure ballot questions before they are voted on.

## **Formation of a Good Governance in Ballots Commission**

The Civil Grand Jury believes that having an independent oversight commission with advisory powers will improve the local electoral process. It puts pressure on governing bodies, sending the message that their ballot questions are being monitored for clarity, truthfulness, fairness, and impartiality.

The Alameda Civil Grand Jury report provides detailed instructions around the formation, structure, and operation of an oversight committee. This can be found in Appendix B of their June 2021 report. Last, but not least, another possibility is to lean on an existing Santa Clara County advisory body, the [Citizens' Advisory Commission on Elections](#), to create a subcommittee focused

on ballot question integrity and good governance. Because time is of the essence when it comes to the elections process, the subcommittee must act within the short turnaround timeframe established by state statutes and county ordinances.

There do not appear to be any advocates for transparent and neutral language. Action must be taken. Having the Office of the County Counsel review and approve ballot questions to ensure conformity to statutory requirements would be a good start. Convening a citizen-led, independent oversight Good Governance Commission is another solution.

### CONCLUSION

Civil Grand Juries are charged to help government develop practical solutions to improve government operations. Poorly worded ballot questions may not be illegal, but if they withhold information to shield what is really at issue, they are unethical. There are insufficient workable checks and balances to prevent this ongoing issue from being curtailed. Not doing anything about this only adds to the distrust of government. The Civil Grand Jury recommends that elected officials be held accountable—ballot questions must be transparent and clear in order to enable today's voters to make informed decisions. The Civil Grand Jury wants governing entities to know that the public is paying attention and will not tolerate questions that are anything less than truthful, impartial, and fair. Further, ballot measure questions need to be straightforward, understandable, transparent, and honest.

## FINDINGS AND RECOMMENDATIONS

### Finding 1

The Civil Grand Jury finds that in the current environment, which is unregulated at the local level, it is easy for the author of a ballot measure question to write the question in a way that is confusing or misleading to voters.

### Recommendation 1a

The Board of Supervisors should ask the County Counsel to review all ballot questions submitted to it pursuant to Recommendation 1b.

### Recommendation 1b

Governing entities<sup>2</sup> within Santa Clara County should voluntarily submit their ballot questions to the County Counsel for review prior to submission to the Registrar of Voters, unless and until Recommendation 1d is implemented.

### Recommendation 1c

Governing entities<sup>3</sup> within Santa Clara County should, by March 31, 2023, adopt their own resolution or ordinance to require submission of their ballot questions to the County Counsel for review prior to submission to the Registrar of Voters, unless and until Recommendations 1d and 1e are implemented.

### Recommendation 1d

The County should create an independent, citizen-led oversight commission like the recommended Good Governance in Ballots Commission as described in the “Solutions” section of this report. The Commission should be implemented by August 1, 2024.

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<sup>2</sup> There are approximately 50 governing entities within Santa Clara County. The Civil Grand Jury has elected to address these recommendations to the County, cities, and a select number of special districts and school districts that have historically the most measures on the ballot for response. The Civil Grand Jury encourages all governing entities to adopt these recommendations.

<sup>3</sup> *Id.*



**Recommendation 1e**

Governing entities<sup>4</sup> within Santa Clara County should submit their ballot questions for review by the Good Governance in Ballots Commission pursuant to Recommendation 1d.

**Recommendation 1f**

The County should, by March 31, 2023, take appropriate action to request that the state legislature consider amending current law to require the County Counsel to review and approve local ballot measure questions before they are voted on.

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<sup>4</sup> *Id.*

**REQUIRED RESPONSES**

**Pursuant to California Penal Code § 933(b) et seq. and California Penal Code § 933.05, the County of Santa Clara 2022 Civil Grand Jury requests responses from the following governing bodies:**

<b>Responding Agency</b>	<b>Findings</b>	<b>Recommendations</b>
County of Santa Clara Board of Supervisors	1	1a, 1b, 1d, 1f
City of Campbell	1	1b, 1c, 1e
City of Cupertino	1	1b, 1c, 1e
City of Gilroy	1	1b, 1c, 1e
City of Los Altos	1	1b, 1c, 1e
Town of Los Altos Hills	1	1b, 1c, 1e
Town of Los Gatos	1	1b, 1c, 1e
City of Milpitas	1	1b, 1c, 1e
City of Monte Sereno	1	1b, 1c, 1e
City of Morgan Hill	1	1b, 1c, 1e
City of Mountain View	1	1b, 1c, 1e
City of Palo Alto	1	1b, 1c, 1e

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<b>Responding Agency</b>	<b>Findings</b>	<b>Recommendations</b>
City of San Jose	1	1b, 1c, 1e
City of Santa Clara	1	1b, 1c, 1e
City of Saratoga	1	1b, 1c, 1e
City Sunnyvale	1	1b, 1c, 1e
Santa Clara Valley Water District	1	1b, 1c, 1e
Valley Transportation Authority	1	1b, 1c, 1e
El Camino Healthcare	1	1b, 1c, 1e
Foothill-DeAnza Community College District	1	1b, 1c, 1e
San Jose Unified School District	1	1b, 1c, 1e
East Side Union High School District	1	1b, 1c, 1e
Cupertino Union School District	1	1b, 1c, 1e

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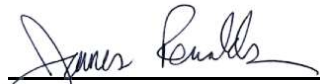
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**Interviews:**

The Civil Grand Jury conducted interviews with ten individuals between June 28, 2022, and August 22, 2022.

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This report was **ADOPTED** by the Santa Clara County 2022 Civil Grand Jury on  
this 7<sup>th</sup> day of October, 2022.



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Mr. James Renalds  
Foreperson






# Grand Jury Report Cover Letter and Memo in Response

Final Audit Report

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