

The Ballot Initiative Transparency Act: The Impact on Public Involvement in California's Initiative Process

In September 2014, California implemented the Ballot Initiative Transparency Act (Senate Bill 1253, or BITA)¹ which introduced reforms that create new opportunities for public involvement in California's citizens' ballot initiative process.² BITA provides Californians with a 30-day online public comment period, as well as new guidelines regarding the timing of joint informational legislative hearings. BITA also allows initiative proponents the opportunity to withdraw their measures before they qualify for the ballot.

The goal of the 30-day online public comment period is to allow Californians an opportunity to provide feedback on proposed initiatives before they make it onto the ballot. Under BITA, the Attorney General's website must post the text of the proposed initiatives, as well as provide for the submission of public comments.³ Any comments submitted during the public comment period are to be sent to initiative proponents, who then have five days after the end of the public comment period to make amendments to their initiatives.

While joint legislative public hearings existed before BITA, initiative proponents must now report when they have collected 25% of the signatures required for their initiatives to qualify for the ballot. Once that signature threshold is reached, BITA requires that a joint legislative public hearing take place no later than 131 days prior to the date of the election when the measure is to be voted on. The goal of this new time frame is to provide Californians an opportunity to learn about, and offer input on, proposed ballot initiatives, as well as to provide the legislature an earlier opportunity to consider seeking a legislative compromise with initiative proponents.

Before BITA, initiative proponents were not allowed to withdraw their initiative once it had been filed with the appropriate elections official. Under BITA, however, initiative proponents have the right to withdraw their measure at any time before the measure qualifies for the ballot.



The focus of this policy brief is to examine the impact of BITA on public involvement in the 2016 ballot initiative process, the first election cycle since the reforms took place.

We address the following questions:

1. To what extent and how is the public utilizing BITA's 30-day public comment period?
2. What was the level of public engagement in the joint legislative public hearings mandated by BITA?
3. Following BITA, what opportunities are there to improve public involvement in the ballot initiative process?

In order to answer these questions, the California Civic Engagement Project (CCEP) analyzed comments received by the State of California's Department of Justice on the California Attorney General's website during the 30-day public comment period (these comments were provided to the CCEP through a public records request).⁴ In addition, the CCEP examined the joint legislative public hearings required under BITA for proposed initiatives that reached the 25% signature threshold. We also conducted in-depth confidential interviews with key players in California's 2016 ballot initiative process.

1. To what extent and how is the public utilizing the 30-day public comment period under BITA?

One of the main purposes of the new public comment period is to allow Californians an early opportunity to review proposed ballot initiatives and offer suggestions on them, while allowing initiative proponents time to submit amendments informed by these suggestions. This process is intended to improve the initiatives before they appear on the November ballot. However, it is worth noting that public awareness of the initiatives, and the opportunity to comment on them, may sometimes be limited by the fact that the public comment period for ballot initiatives takes place before most public outreach efforts are actually carried out.

Study Highlights

1. During the 30-day public comment period, 74% of proposed ballot initiatives received at least one comment.
2. Only 13.6 % of comments offered suggestions on how to improve a proposed initiative.
3. Overall, joint legislative public hearings for proposed ballot initiatives received little attention from the public or media.

Our study of the 2016 ballot initiative process revealed several interesting results.⁵ During the new 30-day public comment period mandated by BITA, the public comment system received a total of 1,010 public comments on the 125 initiatives submitted for consideration in the November 2016 election.⁶ Of the 125 proposed initiatives, over 26% received no public comments. Seventy-four percent received at least one comment, 34% received four or more comments, 10% received 10 or more comments, and just 4% received 25 or more comments.

The number of public comments varied greatly from initiative to initiative. For instance, just three initiatives—the Sodomite Suppression Act, the Voter Empowerment Act of 2016, and the Safety for All Act—collectively received 58% of all the comments submitted. Of the 15 initiatives that qualified for the ballot, 10 received only one to four public comments, and only two received more than four public comments.

a) Main types of online public comments on ballot initiatives

The public comments submitted were made up of five main types: arguments, comment system critiques, initiative process critiques, positions, and suggestions.⁷ This breakdown is shown in Figure 1.

Over 52% of comments made some form of argument for or against an initiative, and 32% took a clear position (neutral, in support of, or against it). Although one of the purposes of this public comment period was to give the public an opportunity to submit feedback on how to improve the proposed initiatives, only 13.6% of the comments submitted offered any such suggestions.

The following is an example of a suggestion that was submitted for the initiative that became Proposition 64, the California Marijuana Legalization Initiative, also referred to as the Adult Use of Marijuana Act (AUMA):

Several concerns remain and the following suggestions are intended to provide constructive improvements to AUMA and provide wording that could still be integrated into the initiative: 1. Penalties for providing marijuana to those under 21, Section 11360 (p. 53) A. Clarification is needed re: ‘Unlawful transportation, importation, sale, or gift.’ It appears that providing marijuana to someone under 21 falls under ‘unlawful sales or gifts’ that can be punished by up to a \$500 fine and/or 6 months in jail. Providing marijuana to those under 21 should be separated out [sic] as more egregious than unlawful sales to an adult or unlawfully transporting marijuana.

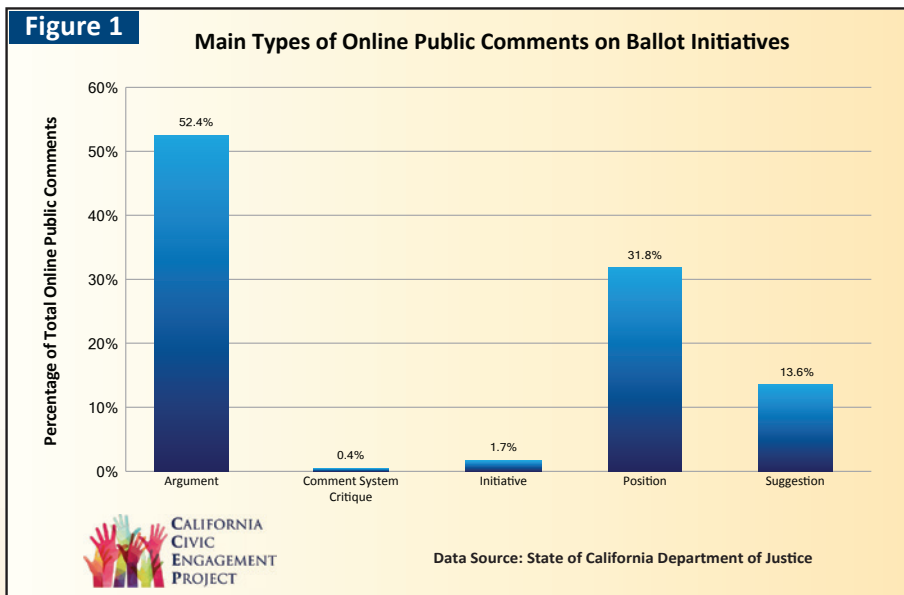
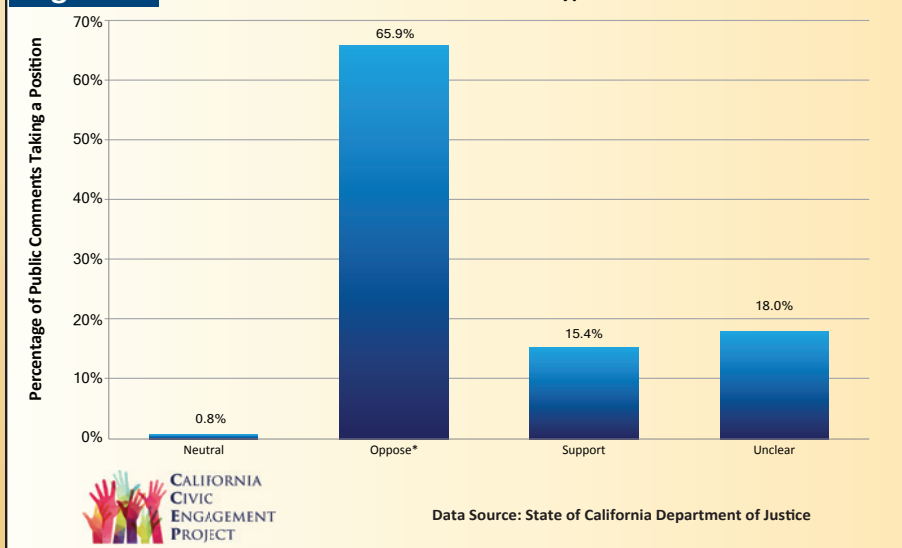


Figure 2 Ballot Initiative Public Comments: Types of Positions Taken

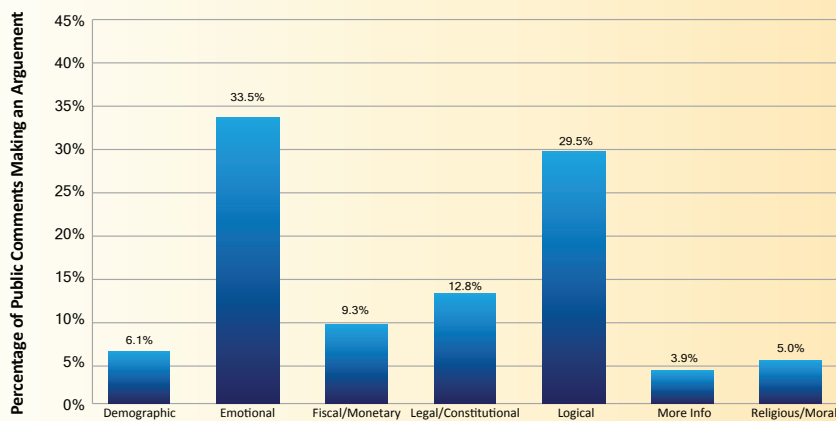


b) Types of positions taken

Overall, those who participated in this new public comment process commented more often on initiatives they opposed than initiatives they supported, as shown in Figure 2. Nearly two-thirds of public comments expressed opposition to an initiative, while only 15% expressed support. Some controversial initiatives tipped the numbers in a negative direction. For example, the controversy generated by the Sodomite Suppression Act contributed to a high percentage of oppositional comments.⁸ When the Sodomite Suppression Act comments were separated from the data, the number of comments expressing opposition decreased from 66% to 54.5% of all comments.

Figure 3

Ballot Initiative Public Comments: Types of Arguments



Data Source: State of California Department of Justice

c) Types of arguments made

Californians who submitted arguments offered a variety of bases for their claims, as summarized in Figure 3. The most common type of argument was an emotional appeal: this type made up one-third of all comments. We use the term emotional here, not to diminish the import or seriousness of these comments, but rather to describe a type of comment that seeks to persuade readers by expressing or appealing to emotions. The following is an example of an emotional type of response to the proposed initiative, “Public Employees. Pension and Retiree Healthcare. Benefits. Initiative Constitutional Amendment,” which sought to eliminate constitutional protections for current public employees’ vested pension and retiree healthcare benefits:

When I first pinned on a badge and went to work to protect all the citizen [sic] of California from all the bad guys both foreign and domestic, I was promised a fair retirement for putting my life on the line on a daily basis. Unlike some good friends who died in the line of duty I was able to retire but I paid the price for it with a bad back two heart attacks and a whole slew of other health problems. Now in my twilight years you want to even complicate my life even more and move me from my home to a card board box at 5th and Central in down town Los Angles [sic] next to the Fred Jordan Mission. Gee thanks a lot.

Californians may have trouble accessing the online public comment platform, since there is no direct link to it on the Attorney General’s website.

Of the arguments based on emotional appeals, 29% included humor or sarcasm, and one-fourth included name-calling or threatening language. The following is an example of the latter type, and was submitted in response to the Sodomite Suppression initiative: “What kind of sick, disgusting lunatic even proposes this nonsense? The person who submitted this thing should be disbarred, fired, and fined for wasting the time and energy of the employees and legislators of the state of California.”

The next most common argument contained logic-based appeals either for or against an initiative.⁹ Nearly 30% of comments used this element in their argument. For example, one logic-based argument made in favor of the Death Penalty Procedures initiative, which came to be known as Proposition 66, read: “Voters support reform of California’s death penalty. It has become ineffective because of waste, delays, and inefficiencies. Fixing it will save California taxpayers millions of dollars every year, assure due process protections for those sentenced to death, and promote justice for murder victims and their families.”

As for the remainder of comment types submitted, nearly 13% of the arguments made included legal or constitutional rationales, 9.3% cited fiscal concerns, and 5% cited moral or religious beliefs. Nearly 4% of comments requested more information about the initiative and its possible impacts. Demographic comments, or comments that referenced a demographic group in some way, made up 6.1% of the comment types.

d) Factors limiting the impact of public comments on the initiative process

Our research also brought into focus aspects of the system that may have limited the public’s participation in the initiative process, and—if unchanged—may continue to do so in the future. One example is the public comment platform. Californians may have trouble accessing the online public comment platform since there is no direct link to it on the Attorney General’s website.¹⁰ Also, the Attorney General’s office is not required by BITA to promote the online public comment system to the public. This could have an ongoing impact on how many California voters are aware of the existence of the online public comment process. Furthermore, while the submitted public comments are made available to proponents of initiatives, members of the general public must make a public records request with the Attorney General’s Office for viewing. This could discourage initiative opponents and other members of the public from accessing potentially useful information contained in these comments.

In addition to the limiting factors around the comment platform itself, another barrier may be the complex legal language used to write ballot initiatives. Such language may have proved confusing or difficult to decipher for many voters. As one legislative insider noted, “if the idea is for the average voter or citizen or even grassroots group to sort of be able to dive into that and offer substantive comments, that would be really challenging given the nature of how these things are written.” Other interviewees we spoke to agreed, explaining that the comment process was not as accessible to Californians as it was to organizations with lawyers and lobbyists, who can decipher legal language.

e) Skepticism regarding the public comment process

The public comment process may become more widely used in the future if awareness of it increases. Still, several capitol insiders remain skeptical that it will have any real influence on the initiative process.

To start, initiative proponents are not mandated to make any changes to their initiatives following the public comment period. If they do make changes, these changes are not required to reflect the public comments submitted in this process. This raises the question of how and whether public comments actually make a difference in shaping these initiatives. This is a question that is difficult to answer on the basis of data from only one election cycle.

Some capitol insiders confided that proponents might not even care what commenters have to say. “I think that the vast majority of proponents know exactly what they are doing,” a legislative staff member said. “Whether anyone else agrees with them or not, they are very deliberate about how they are drafting their initiatives. They might not be overly interested in what folks have to say about it.” Furthermore, one senior legislative staffer expressed that changes made to an initiative during the public comment period were more likely to be due to poll testing results, rather than actual public comments—unless the public comments came from affected special interest groups.

Another legislative insider told us that the proponents of the initiative that became Proposition 57, The Parole for Nonviolent Crimes Initiative, did not amend their measure in response to the public comments they received, but rather did so for other reasons.

In addition to questioning the impact of public comments, some legislative insiders wondered whether commenters were knowledgeable enough to provide valuable feedback. “You really need to have educated yourself, know all the background, what are the concerns, what is the point of view of all the other stakeholders,” one legislative insider noted. “Only then maybe do you have something worthwhile to contribute to the discussion. You open it up to the public and what are you going to get? It’s not going to be high-quality contributions.”

It should be noted that these data do not reflect the thoughts and opinions of all key players in the ballot initiative process. However, they do provide insight into how some arguably influential capitol players feel about the public comment process.

f) Research findings

Some critics believe that the public comment process has not sufficiently impacted the actions of initiative proponents. However, our research offers a more nuanced picture. For instance, some initiative proponents reported receiving feedback from smaller organizations via the online public comment system. This provided them with an opportunity to hear from representatives of organizations that they typically did not interact with. Other initiative proponents were surprised by how little commentary they received, but hoped that as public awareness of opportunities for public comment increased, more people would be able to engage in the initiative process. Ultimately, we found that the impact of the public comment period varied depending on the characteristics of each initiative, including how polarizing or controversial the initiative was, and whether its proponents were open to feedback.

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2. What was the level of public engagement in the joint legislative hearings?

BITA allows the state legislature to hold joint legislative public hearings earlier in the initiative process than they were held before BITA was put in place. This change was carried out in order to provide the legislature an earlier opportunity, and more time, to consider seeking a legislative compromise with initiative proponents. These hearings utilize the same format as those used by other legislative public hearings in the state. In most cases, these hearings are filmed and made publicly available.

For the most part, the joint legislative public hearings on proposed ballot initiatives garnered little attention from the public or media. For instance, during the hearing for the initiative that became Proposition 65, or the Dedication of Revenue from Disposable Bag Sales to Wildlife Conservation Fund Initiative, only two people offered public comments. Overall, we found that public commenters at the hearings were typically not unaffiliated persons, but rather paid advocates representing organizations or advocacy group volunteers.

a) The impact on the citizen's initiative process

Overall, the initiative process during the 2016 election cycle appears to have not been strongly impacted by the introduction of the earlier joint legislative public hearings mandated by BITA.

Some attribute this to the timing of the hearings in the initiative process. According to one legislative staff person, “having public input at that point in the process isn’t as constructive as it could be if there were either more flexibility in the process, or if that public input came at an earlier point in the process.” In short, while the hearings were scheduled earlier in the process than they had been before, they may still not have been scheduled early enough to have had a significant impact.

Several insiders noted that it was difficult to amend initiatives based on public feedback received at the hearings, since the hearings were held after the final amendments to the initiatives were already submitted.

However, others noted that in the future, the hearing reforms introduced by BITA may have a more pronounced impact on controversial or popular initiatives, granting citizens’ groups and other groups an earlier opportunity to organize, rally their bases, educate the public, and disseminate their messages. “There are some issues that naturally draw people out because they care about it [sic],” one senior legislative staff member noted. “But if people don’t care about an issue, it’s really hard to make them care or incentivize them to care, because they just don’t.”

b) Differences in interpretation

It is important to note that the language used in BITA regarding the requirement of holding joint legislative public hearings has invited conflicting interpretations. These have to do with whether joint legislative public hearings are required to be held for every measure that reaches the 25% signature threshold, regardless of whether that measure will ultimately qualify for the ballot. According to section 12 of SB 1253:

(a) The proponents of a proposed initiative measure shall submit a certification, signed under penalty of perjury, to the Secretary of State immediately upon the collection of 25 percent of the number of signatures needed to qualify the initiative measure for the ballot.

(b) Upon the receipt of the certification required by subdivision (a), the Secretary of State shall transmit copies of the initiative measure, together with the circulating title and summary as prepared by the Attorney General pursuant to Section 9004, to the Senate and the Assembly. Each house shall assign the initiative measure to its appropriate committees. The appropriate committees shall hold joint public hearings on the subject of the measure not later than 131 days before the date of the election at which the measure is to be voted upon.

For instance, one legal scholar interpreted BITA to mean that any initiative, regardless of its chance at qualifying for the ballot, should receive a joint hearing once it reached the 25% signature threshold. Yet several senior legislative staffers offered a different interpretation. They posited that only an amendment to the California Constitution could require the legislature to hold such hearings.¹¹ They also argued that in their interpretation of BITA’s changes, only initiatives that seemed likely to appear on the ballot required a hearings. This interpretation may be informed by the previous law, which required hearings to be held for initiatives that were certified to appear on the ballot.

In what may be a reflection of this perceived ambiguity in the bill’s language, we found that the joint legislative public hearings under BITA during this first election cycle were not held consistently. Disagreements of this kind may have practical consequences for how bills are treated. For instance, seven citizens’ initiatives that reached the 25% signature threshold actually were not accorded a joint legislative public hearings—presumably because they were not expected to qualify for the ballot.

There are conflicting interpretations of the language used in BITA regarding the timing of joint legislative public hearings.

3. What opportunities are there to improve public involvement under BITA?

Engaging Californians in the ballot initiative process is challenging. With BITA, Californians are able to utilize an online public comment system to help initiative proponents draft what they believe will be more effective proposals. Our research points to several ways public engagement in this process could be increased.

a) Recommendations for increasing public engagement

- **Make the public comment platform easier to find.**

Currently, the Attorney General's office is not required by BITA to publicly promote the online public comment system, and there is no direct link to the site on the Attorney General's website. Publicly promoting the site and enabling easier access to it could help Californians use the site in greater numbers.

- **Prompt and guide commenters using the online public comment system.**

The current online public comment system is relatively unstructured, and does not guide users as to what type of feedback to provide. Prompting commenters to give specific suggestions on how to improve an initiative and/or recommend alternatives could result in more targeted and constructive feedback.

- **Make joint informational hearings more accessible.**

Regarding attendance, the joint legislative public hearings mandated under BITA have been low-profile, low-attendance events. One source reported that many people may have found it hard to travel to Sacramento for these hearings.

One new approach to consider would be to hold these hearings in various communities throughout California. Another approach, suggested by some of our interviewees, would be to use communications technology to create an online, interactive, interface. This could open the hearings to people who want to participate, but cannot easily travel to the capitol. Both these approaches could help raise awareness of the hearings, and spur greater interest and participation in them.

- **Make the format of the hearings more inclusive.**

Change the format of the hearings to create a more inclusive engagement process that allows for more constructive, less pro forma, conversations between the legislature, initiative proponents, and others involved in the ballot initiative process. This could encourage more public input in the discussion, as well as produce more thoughtful and useful dialogue.

- **Clarify BITA's requirements for joint legislative public hearings.**

We recommend clarifying BITA's requirements so that changes mandated under it are interpreted and applied correctly and consistently. We recommend that the legislature consider adopting stronger measures in order to ensure compliance with BITA's hearing requirements.

b) Conclusions about public engagement in California's citizens' initiative process under BITA

BITA has provided new opportunities for Californians to engage in the initiative process. The two major changes impacting public engagement have been: the creation of an online public comment system, and the opportunity for people to participate in joint legislative public hearings on proposed initiatives before these initiatives qualify for the ballot.

The public did make use of the new online public comment opportunities provided by BITA. However, three initiatives accounted for the largest share of comments, namely the Sodomite Suppression Act, the Voter Empowerment Act of 2016, and the Safety for All Act. Together, these received 58% of all submissions. Meanwhile, other less controversial initiatives received relatively few comments. This initial disparity aside, we believe that improving the public comment system structure, and finding ways to make joint legislative public hearings more accessible and known, will have a valuable impact on future initiatives, independently of their specific content. Over time, BITA's reforms are likely to increase public involvement, as people and organizations become more familiar and engaged with the newly configured process. Ultimately, these improvements could lead to more constructive public feedback, and policies that better address public needs.

Notes

1. California Senate Bill 1253 (Ballot Initiative Transparency Act, or BITA), approved September 27, 2014, introduced reforms to California's citizens' ballot initiative process, and was first put into effect during the 2016 California initiative process. See the California Legislative Information site: https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140SB1253
 2. For information about the initiative process, see the California Secretary of State's Initiative Guide: <http://www.sos.ca.gov/elections/ballot-measures/how-qualify-initiative/initiative-guide/>
 3. For more information about the California Attorney General's website, see: <https://oag.ca.gov/>
 4. The CCEP conducted a multi-method research study using data collected from in-depth confidential interviews with key players in California's ballot initiative process, and analyzed all public comments received by the State of California Department of Justice during the 30-day online public comment period. For more information on the Freedom of Information Act, see: <https://www.foia.gov/>
 5. We engaged in a directed content analysis of the public comment data, creating coding categories both preset and open; we started with a list of preset codes derived from the conceptual framework and the list of research questions, and then we identified themes and categories that emerged from the data. This analysis was conducted by one researcher and then peer-reviewed by another to help guard against the potential for lone researcher bias, and to help provide additional insights into the analysis.
 6. There were 125 proposed ballot initiatives during the 2016 election cycle. However, it should be noted that, in general, during this process, some proponents submit multiple versions of their initiative idea in order to see what title and summary it will receive, while others sometimes submit their initiative ideas even when they are not committed to running a campaign for them. After BITA's implementation, 15 citizens' initiatives qualified for the ballot (the other two initiatives, which came to be known as Proposition 52 and Proposition 67, entered circulation before BITA was implemented and therefore have no public comment data). See the California Secretary of State's website for information about these propositions: <http://voterguide.sos.ca.gov/en/propositions/>. Furthermore, while 15 initiatives qualified for the November 2016 ballot, of these 15, three received no public comments: Propositions 52, 57, and 67.
 7. The comments we analyzed were collected and stored at the State of California Department of Justice's website.
 8. The Sacramento Superior Court ruled that former California Attorney General Kamala Harris did not have to advance the Sodomite Suppression Act. For more details, see: <http://www.sacbee.com/news/politics-government/capitol-alert/article25356514.html>
 9. Public comment data was coded by argument type. However, some comments submitted contained multiple types of arguments. Therefore each argument type used in a comment was coded individually.
 10. In order to access the public comment page on the Attorney General's website, visitors must go through the following steps:
Step 1: Go to California Attorney General's website: <https://oag.ca.gov/>
Step 2: On home page, scroll down and click "ballot initiatives"
Step 3: Click "active measures"
Step 4: Click "submit comment" on the measures you wish to leave a comment
- Please note that these steps reflect the Attorney General's website as of March 2018, and the public can only leave comments on an initiative for the 30 days following the date when the initiative was recorded as having been submitted for a title and summary.
11. For more information about amending the California Constitution, see: <https://leginfo.legislature.ca.gov/faces/codesTOCSelected.xhtml?tocCode=CONS&tocTitle=+California+Constitution+-+CONS>

CCEP Ballot Initiative Transparency Act Research Team

Mindy Romero, Ph.D, CCEP Director
Jennifer Puza, CCEP Research Associate
Joseph Barry, CCEP Research Assistant

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About the California Civic Engagement Project (CCEP)

The California Civic Engagement Project was established at the UC Davis Center for Regional Change in 2011. The CCEP conducts research to inform policy and on-the-ground efforts for a more engaged and representative democracy, improving the social and economic quality of life in communities. The CCEP is engaging in pioneering research to identify disparities in civic participation across place and population. Its research informs and empowers a wide range of policy and organizing efforts in California aimed at reducing disparities in state and regional patterns of well-being and opportunity. Key audiences include public officials, advocacy groups, political researchers and communities themselves. To learn about the CCEP's national advisory committee, or review the extensive coverage of the CCEP's work in the national and California media, visit our website at <http://ccep.ucdavis.edu>



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CCEP Advisory Committee

Kim Alexander

President and Founder
California Voter Foundation

Matt A. Barreto

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Shakari Byerly

Partner and Lead Researcher, EVITARUS

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College of Agricultural and Environmental Sciences
University of California, Davis

Jonathan Fox

Professor
School of International Service
American University

Luis R. Fraga

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Transformative Latino Leadership
Professor of Political Science
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Chancellor's Professor of Education and Political Science
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Bruce Haynes

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University of California, Davis

Jongho Lee

Associate Professor, Department of Political Science
Western Illinois University

Peter Levine

Associate Dean for Research
Lincoln Filene Professor of Citizenship & Public Affairs
Jonathan M. Tisch College of Civic Life
Tufts University

Matt Mahan

Cofounder and CEO
Brigade

James Muldavin

Executive Director
California Center for Civic Participation and Youth
Development

Samuel Molina

California State Director
Mi Familia Vota

Karthick Ramakrishnan

Professor of Public Policy
University of California, Riverside

Ricardo Ramirez

Associate Professor, Department of Political Science
University of Notre Dame

Jason Reece

Director of Research
Kirwan Institute

Cruz Reynoso

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Dan Schnur

Director
American Jewish Committee Los Angeles Region