

1 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA  
2 IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO  
3 BEFORE THE HONORABLE ETHAN P. SCHULMAN, JUDGE PRESIDING  
4 DEPARTMENT NO. 302

5  
6 MICHAEL DENNY; NICHOLAS SMITH;



7 Plaintiffs,  
8 VS.

No. CGC-19-575070

9 JOHN ARNTZ, Director of Elections;  
10 DENNIS HERRERA, City Attorney,

11 Defendants.  
12 \_\_\_\_\_/

13 REPORTER'S TRANSCRIPT OF PROCEEDINGS

14 WEDNESDAY, JUNE 19, 2019

15  
16 A P P E A R A N C E S

17 For the Plaintiffs:

18 Michael Denny,  
19 In Propria Persona

20 For the Defendants:

21 DENNIS J. HERRERA - CITY ATTORNEY  
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26  
27

1 June 19, 2019

10:16 a.m.

2 P R O C E E D I N G S

3 THE COURT: All right. Finally, line number 10 Denny  
4 versus Arntz.

5 MS. STEELEY: Good morning, Your Honor. Tara Steeley for  
6 the City defendants.

7 MR. DENNY: Good morning. I'm Michael Denny, the  
8 plaintiff.

9 THE COURT: Mr. Denny and Ms. Steeley; right?

10 MS. STEELEY: Yes.

11 MR. DENNY: Right.

12 THE COURT: So, Mr. Denny, I... tried, in some detail, to  
13 grapple with the various issues that you raised that were  
14 raised here. And you have a fairly lengthy tentative ruling,  
15 throwing out this complaint.

16 MR. DENNY: Thank you for that.

17 THE COURT: And you're going to tell me why it's wrong,  
18 and I'm all ears.

19 MR. DENNY: Okay. Your Honor, this is a case about public  
20 employees refusing to follow the law and then extricate  
21 themselves from responsibility by legal technicalities.

22 THE COURT: Well, sir, don't read me a speech.

23 MR. DENNY: Okay.

24 THE COURT: I've spent a lot of time on this. I've given  
25 you a tentative ruling.

26 MR. DENNY: Okay.

27 THE COURT: If my logic is flawed, if the authority that  
28 I've relied on doesn't apply, I want to hear that.

1 MR. DENNY: Okay. Then let me get right to the point...

2 First of all, I want to mention that this is the first  
3 time that a case has been brought against an election with  
4 AB 195 enforced, which was in January of 2018. So this is a  
5 brand new thing going on in California.

6 THE COURT: Well, I mean... I spent some time and I read  
7 that legislation.

8 What that did was it extended §13119 of the Elections Code  
9 to ballot measures submitted to the voters that were proposed  
10 by a local governing body such as, in this case, the Board of  
11 Supervisors of the City and County of San Francisco.

12 MR. DENNY: That's correct.

13 THE COURT: Or submitted to the voters as an initiative or  
14 referendum provision.

15 But the Elections Code provision itself, of course, was  
16 not changed, and it predated AB 195 -- or at least it wasn't  
17 substantially changed.

18 MR. DENNY: Well, what it did, Your Honor, is it made  
19 certain provisions and ballots a mandatory offense against the  
20 election, and that would initiate (*sic*) the election.

21 And I'd like to go through the points individually that  
22 you mentioned in your reply. And then hopefully keep that  
23 focused for you.

24 THE COURT: Thank you.

25 MR. DENNY: Okay?

26 Point number one, Your Honor, addressing the Court's claim  
27 that Elections Code 16440 is inapplicable.

28 Under subparagraph B §16440, the entire article of which

1 is -- in part applies to contestants where, quote, "the  
2 defendant has committed any offense against the elective  
3 franchise, as defined in Division 18, commencing with \$18,000"  
4 unquote.

5 Since this is covered in the third point we raise here,  
6 it'll be discussed there.

7 Point two --

8 THE COURT: Well, wait, but the problem there is -- I mean  
9 we'll talk about the offense against the elective franchise  
10 catch phrase later, if that's when you want to talk about it...

11 MR. DENNY: Sure.

12 THE COURT: But the initial problem is *defendant* as  
13 defined in that provision refer to see a candidate; it doesn't  
14 refer to the elections officials that you've named here, such  
15 as the Director of Elections or the City Attorney.

16 MR. DENNY: That's the next point I'm gonna make, Your  
17 Honor.

18 THE COURT: Okay.

19 MR. DENNY: So the point where we contest that the  
20 §16100(c) is inapplicable to these defendants, §16002 is  
21 complicated because when it says in here, when used in  
22 division, *contestant* means any person initiating an election  
23 contest.

24 *Defendant* means that a person whose election or nomination  
25 is contested, those persons receiving an equal or highest  
26 number of votes, all the cases cited by counsel are not  
27 election contests. Even *Friends of Sierra Madre* and *Horwath*  
28 are writs of mandate.

1           Here we cite two real Supreme Court election contests that  
2 were measures and the defendants were not candidates.

3           We cite *Enterprise*, which was a real election contest  
4 against a measure. The opinion in *Enterprise* was written by  
5 none other than legendary justice Stanley Mosk.

6           THE COURT: When you say *Enterprise*, what case are you  
7 talking about?

8           MR. DENNY: Uh... It'll take me a second to find it, Your  
9 Honor...

10           Would you like me to look it up later or keep going?

11           THE COURT: Do you happen to know the case that counsel's  
12 referring to, Ms. Steeley.

13           MS. STEELEY: Your Honor, I believe it's cited on page 4  
14 of the... most-recently filed opposition brief.

15           THE COURT: I see. The 1978 *Enterprise Residents*  
16 *Committee versus Brennan*, okay. That's helpful. Thank you.

17           MR. DENNY: That is correct. Thank you very much.

18           THE COURT: And so what are you arguing that *Enterprise*  
19 tells me here?

20           MR. DENNY: So what it says here --

21           THE COURT: I didn't quite understand.

22           MR. DENNY: First of all, division 18000, in both sections  
23 eighteen two and 18401 sanction any person described by their  
24 acts and not by their capacities.

25           A contestant is not just any person. §16100 requires,  
26 quote, "any elector," unquote.

27           And §16101 requires, quote, "any candidate," unquote.

28           Chapter 2 in division 13100 is comprised of §13100 and

1 13121, which includes §13119.

2 18002, quote:

3 "Every person charged with the performance of any  
4 duty under any law of this state relating to  
5 elections who willfully neglects or refuses to  
6 perform it, or who, in his or her official capacity,  
7 knowingly and fraudulently acts in contravention or  
8 violation of any of these laws," unquote, is subject  
9 to sanctions, that I did not enumerate, in the  
10 interests of brevity.

11 THE COURT: Yeah, I mean the 18000 series basically is a  
12 series that sets forth a number of crimes that... that is acts  
13 that would constitute crimes if they were committed in the  
14 course of an election. I don't --

15 MR. DENNY: That's correct.

16 THE COURT: But what you -- I thought what you were trying  
17 to convince me of here is that I shouldn't hear a demurrer at  
18 all here because of 16440.

19 MR. DENNY: No, no, that's not our intention now, since  
20 we're already into the demurrer.

21 THE COURT: Okay.

22 MR. DENNY: But... so the quote, here's a quote here.

23 "No one can say, with any certainty, what the will  
24 of the voters would have been had they been  
25 presented with a ballot stating the chief purpose of  
26 the measure, free from language that is untrue,  
27 misleading, partial and likely to create prejudice  
28 in favor of the measure," unquote.

1 THE COURT: You quoted that language in your complaint  
2 itself, if I recall correctly.

3 MR. DENNY: That's correct. And this is a very close  
4 paraphrase of the Florida Supreme Court in *Wadhams versus the*  
5 *Board of County Supervisors*, 1990, where they set aside an  
6 election. And here's an actual quote:

7 "No one can say with any certainty what the vote  
8 of the electorate would have been if the voting  
9 public had been given the whole truth, as mandated  
10 by the statute, and had been told the chief purpose  
11 of the measure." Unquote.

12 So now we have two Supreme Court cases.

13 THE COURT: Well, except that, you know, elections law,  
14 like many other types of law, is state by state. And what the  
15 Florida Supreme Court might have said under some statutory  
16 scheme that I know nothing about, is not only not binding on me  
17 with respect to construing the California Elections Code, it's  
18 not even persuasive; it doesn't -- it's neither here nor  
19 there --

20 MR. DENNY: --

21 THE CLERK: With all due respect to the Florida Supreme  
22 Court.

23 MR. DENNY: Excuse me, Your Honor. I'm sorry.

24 THE COURT: So, you know, we can pull inspiring language  
25 from opinions all over the United States and, for that matter,  
26 all around the world, but at the end of the day, what this  
27 lawsuit turns on is construing our state elections code and  
28 reading the cases of the California Supreme Court and the

1 California Courts of Appeal that have construed and applied  
2 those provisions.

3 MR. DENNY: Absolutely, Your Honor, and that's -- you  
4 know, that's why I bring it up, is because this is the first  
5 time no California court has addressed 13119 so far. And so  
6 I'm trying to present sort of a historical view. And the  
7 reason is is that --

8 THE COURT: Uh-huh.

9 MR. DENNY: -- in -- Florida has a law, like AB 195, and  
10 has for some time. But California's law is relatively new.

11 So just to wrap up from the quote from the Florida court:

12 "The voter should not be misled, should have an  
13 opportunity to know and be on notice as to the  
14 proposition on which he is to cast his vote. What  
15 the law requires is that the ballot be fair and  
16 advise the voter sufficiently to enable him  
17 intelligently to cast his vote." Unquote.

18 THE COURT: And so I don't think anybody would disagree  
19 with that general sentiment. The problem is that, in general,  
20 challenges to ballot summaries, titles and summaries and the  
21 like, if they're claimed to be misleading must be brought  
22 before an election, not after an election. And that wasn't  
23 done here.

24 MR. DENNY: I'm going to address that in my next point,  
25 Your Honor.

26 THE COURT: Okay.

27 MR. DENNY: Point 5, Your Honor, where we contested it was  
28 required to bring the challenge before the election.



1 §13119 is mandatory, both before an election and  
2 afterward. It is substantive, not procedural or technical.

3 The following is a concise summary of the law of election  
4 contests in California and every other state. It is from  
5 *Rideout versus Los Angeles*, another real election Supreme Court  
6 contest.

7 Internal citations are omitted for ease of reading. I  
8 have the whole thing here with the highlighted section, if you  
9 would like to have a copy to read with me...

10 THE COURT: Sure. Hand it up, if you don't mind.

11 MS. STEELEY: Copy for me, too. Thank you.

12 MR. DENNY: Quote.

13 "It is appellant's contention that the fact that  
14 the ballots in controversy varied in particulars  
15 stated from the prescribed statutory form in and of  
16 itself invalidated the election.

17 "Two, it is primary principle of law as applied to  
18 election contest that it is the duty of the Court to  
19 validate the election, if possible. That is to say,  
20 the election must be held valid unless plainly  
21 illegal.

22 "Three, accordingly, a distinction has been  
23 developed between mandatory and directory provisions  
24 in election laws. A violation of a mandatory  
25 provision vitiates the election, whereas a departure  
26 from directory provision does not render the  
27 election void if there is a substantial observance  
28 of the law and no showing that the result of the

1 election has been changed or the rights of the  
2 voters injuriously affected by the deviation;

3 "Four, whether or not a provision, the observance  
4 of which is not expressly declared by law to be  
5 essential to the validity of the election is  
6 mandatory or merely directory, depends on the  
7 character of the act prescribed. If the act  
8 enjoined goes to the substance or necessarily  
9 affects the merits or results of the election, it is  
10 mandatory; otherwise directory."

11 And now this text will give us examples of directory  
12 provisions.

13 Provisions describing minor details in regard to the form  
14 of the ballots and things like that are directory. And I'll  
15 try to breeze through this here. It's fairly long.

16 Disenfranchise of the voters for these violation of  
17 violations of the law, for which they have no control;

18 Technicalities, mistakes that were made;

19 Color of ink, printing, those things do not render the  
20 election void.

21 An election was held valid where, in violation of  
22 provisions of election law, marks on the face of the ballot  
23 were discernable on the back, owing to thickness of paper.

24 Again, these are examples of directory provisions on the  
25 ballot, not the kind that counsel keeps referring to.

26 THE COURT: All right. And let me -- I'm sorry to  
27 interrupt. Let me just say for the record that you're reading  
28 from *Rideout versus City of Los Angeles*. This is a 1921

1 decision of our California Supreme Court, reported at 185 Cal  
2 426.

3 MR. DENNY: Never overturned.

4 THE COURT: Fair enough.

5 But I'll just add, I haven't -- I confess I didn't go back  
6 as far as you did in ancient history to look this case up; it  
7 wasn't cited to me, I don't believe. But it predates by  
8 decades, I think, the statutory scheme in the Elections Code  
9 that we're dealing with here.

10 And... as much as we all like to think that the law is  
11 seamless web and has certain principles that animate it over  
12 time, it does change over time. The legislature changes it  
13 over time, and that prompts, in turn, changing case law.

14 So the -- *Rideout* may well have never have been  
15 overturned; that doesn't necessarily mean that the same result  
16 would apply today under a particular provision of the modern  
17 elections code.

18 MR. DENNY: Allow me to continue, please.

19 THE COURT: You may.

20 MR. DENNY: All right. On the other hand, §13119 and the  
21 specific ballot statement under this contest deal with the  
22 direct violation of both the structure and the content of the  
23 question, quote, "shall the measure be adopted?" unquote,  
24 prevents the current fashion of giving the question an advisory  
25 tone and prevents the current fashion of leading off with  
26 titles, advocacy, and argument to favorably influence a yes  
27 vote.

28 THE COURT: Well, so I read that argument. I'm a little

1 perplexed by it, frankly.

2 I mean -- let's assume that we can reach the merits here,  
3 I don't think we can, but... I mean I've looked carefully here  
4 at this ballot proposition and at the provision you're talking  
5 about.

6 So 13119 of the Elections Code now says that "a measure --  
7 "that the ballots used when voting on a measure proposed by a  
8 local governing body"... there's an ellipsis here as I quote  
9 from this language, "shall have printed on them the words,  
10 quote, "shall the measure," paren, "stating the nature  
11 thereof," close paren, "be adopted?" And then a *yes* or a *no*  
12 printed on the opposite side.

13 You know, I looked at the measure here. It doesn't say,  
14 "shall the measure be adopted?" But it does say, "shall the  
15 City issue \$425 million in bonds?" And then there's some  
16 language that explains the duration and terms and cost of those  
17 bonds. And then there's a *yes* or a *no*.

18 How... how is anybody prejudiced by the fact that Prop A  
19 didn't use the words, *shall the measure authorizing the City to*  
20 *issue \$425 million in bonds, et cetera, et cetera, be adopted,*  
21 as opposed to just saying, *shall the city issue \$425 million in*  
22 *bonds?*

23 And what is misleading or prejudicial or... confusing or  
24 anything else about the language that was used?

25 MR. DENNY: Calling it the seawall earthquake safety bond  
26 to protect San Francisco's waterfront, BART and Muni tunnels  
27 and historic piers, roads from earthquakes, floods, and rising  
28 tide levels, by repairing and upgrading the City's

1 hundred-year-old sea wall.

2 Those are the kinds of things that take this and turn it  
3 into a promotion. And in fact it was so promotional that it  
4 was quoted in almost every paid ballot argument in favor of the  
5 bond.

6 It was obviously promotional and it was done to influence  
7 the vote.

8 THE COURT: It was framed in terms of the intent of the  
9 proponents of the bond, which was the Board of Supervisors.  
10 *This is what we intend to do; we intend to issue these bonds in*  
11 *order to protect the waterfront, BART and Muni, et cetera, and*  
12 *to repair the sea wall. That's what we want to do.*

13 That doesn't sound misleading.

14 MR. DENNY: That is not -- excuse me.

15 THE COURT: It doesn't sound misleading to me. It  
16 certainly doesn't sound emotional to me correct. I don't know  
17 if anybody gets emotional about seawalls; I don't.

18 But I'm at a loss to understand the merits argument even  
19 if I were to reach it here.

20 MR. DENNY: If you look at state-wide ballots -- I mean,  
21 first of all, AB 195 has been the law for the state of  
22 California for a long time. I mean the -- I mean the  
23 provisions of AB 195, only AB 195 made it the law for local  
24 governments, also.

25 THE COURT: Right.

26 MR. DENNY: But if you read bond measures on the -- for  
27 the state, they are as dull and boring as can be when compared  
28 to the lively arguments of Proposition A.

1 THE COURT: So this wasn't a dull and boring-enough ballot  
2 proposition; and therefore it violates the Elections Code?

3 MR. DENNY: Well, it was promotional in nature.

4 THE COURT: All right.

5 MR. DENNY: And, to summarize, we know -- we know that all  
6 of 13119 is mandatory because there are criminal penalties for  
7 violation. So, quote:

8 "A violation of a mandatory provision vitiates the  
9 election." Unquote.

10 So there's no real if, ands or buts about it if you're  
11 going to take *Rider* and...

12 THE COURT: *Rideout*.

13 MR. DENNY: *Rideout* and the *City of Los Angeles*, you know,  
14 as a valid case for this -- this measure. And so I'm  
15 respectfully requesting that you deny the demurrer and that we  
16 take this to trial.

17 THE COURT: All right. Thank you, sir.

18 MR. DENNY: Thank you.

19 THE COURT: Ms. Steeley?

20 MS. STEELEY: Your Honor, I can be brief. I don't really  
21 have anything to add, other than what was in our papers.

22 We believe this claim fails because contestants have not  
23 stated any of the grounds set forth in 16100, particularly  
24 16100(c). So unless there's any particular questions, I'm  
25 willing to submit on the tentative.

26 THE COURT: All right. These are interesting issues.

27 Mr. Denny, as I say, I spent sometime on them. I don't  
28 share your view of the merits of the issues that have been

1 raised here.

2 I haven't reached all of the issues that the City has  
3 raised on its demurrer. I didn't find it necessary to do so.  
4 But I am adopting my tentative ruling as the final ruling of  
5 the Court and sustaining the demurrer without leave to amend.

6 Do you have a proposed order or have you sent me one?

7 MS. STEELEY: I sent one and I also have one -- and I also  
8 sent in a proposed judgment.

9 THE COURT: All right. It looks like I have them both....  
10 And I will enter them both.

11 MS. STEELEY: Thank you, Your Honor.

12 MR. DENNY: Thank you, Your Honor.

13 THE COURT: Thank you, both.

14 MS. STEELEY: Thank you.

15 *(10:38 a.m.)*

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1 STATE of CALIFORNIA )  
2 COUNTY of SAN FRANCISCO )


3  
4  
5 I, MARIA ANTONIA TORREANO, DO HEREBY CERTIFY:

6  
7  
8 That the foregoing is a full, true and correct transcript  
9 of the testimony given and proceedings hereinbefore entitled;

10  
11 That it is a full, true and correct transcript of the  
12 evidence offered and received, acts and statements of the  
13 court, also all objections of counsel and all matters to which  
14 the same relate;

15 That I reported the same in stenotype to the best of my  
16 ability, being the duly-appointed, qualified and official  
17 stenographic reporter of said court, and thereafter had the  
18 same transcribed, as herein appears.

19  
20 DATE: July 5th, 2018

21  
22  
23   
24 Maria A. Torreano, CSR, CRR, RMR, CCRR  
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