THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION ONE

Michael Denny, Contestant and Appellant, v. John Arntz, appointed Director of Elections and Dennis Herrera, elected City Attorney, Defendants and Respondents.	Court of Appeal No. A158029 (Super. Ct. No. CGC-19-575070)

Appeal From an Order
Of The Superior Court, County of San Francisco
Hon. Eric Schulman, Judge

APPELLANT'S OPENING BRIEF

Michael Denny
3329 Cabrillo St
San Francisco, CA
415-608-0269

Appellant
Pro-per

TO BE FILED IN THE COURT OF APPEAL

AP

T OF APPEAL SAN FRANCISCO APPELLATE DISTRICT, DIVISION FIRST

COURT OF APPEAL CASE NUMBER: A158029

Y OR PARTY WITHOUT ATTORNEY: MICHAEL DENNY

STATE BAR NUMBER:

ME:

ADDRESS: 3329 CABRILLO ST

SAN FRANCISCO

STATE: CA ZIP CODE: 94121

ONE NO.: 415-608-0269

FAX NO.:

DDRESS: MIKE@DENNY.COM

Y FOR (name):

SUPERIOR COURT CASE NUMBER: CGC19-575076

LLANT/ IONER: MICHAEL DENNY

ONDENT/ JOHN ARNTZ, DIR OF ELECTIONS

~~PARTY IN INTEREST:~~ DENNIS HERRERA, CITY ATTY

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

k one): ☒ INITIAL CERTIFICATE ☐ SUPPLEMENTAL CERTIFICATE

e: Please read rules 8.208 and 8.488 before completing this form. You may use this form for the initial icate in an appeal when you file your brief or a prebriefing motion, application, or opposition to such a n or application in the Court of Appeal, and when you file a petition for an extraordinary writ. You may use this form as a supplemental certificate when you learn of changed or additional information that m sclosed.

s form is being submitted on behalf of the following party *(name)*:

☒ There are no interested entities or persons that must be listed in this certificate under rule 8.208.

☐ Interested entities or persons required to be listed under rule 8.208 are as follows:

Full name of interested entity or person	Nature of interest *(Explain):*

☐ Continued on attachment 2.

undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other ociation, but not including government entities or their agencies) have either (1) an ownership interest of 10 perce e in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices uld consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

11/24/19

HAEL DENNY

▶ MD

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER

STATEMENT OF THE CASE

Voters have a right to and deserve honest ballots.

The California Supreme Court observed in *Lockyer v. City and County of San Francisco* (2004) 33 Cal.4th 1055, "There is no justification for forcing private parties to go to Court in order to require agencies of government to perform the duties they have sworn to perform." Unfortunately, when government officials on the public payroll are unwilling to hold each other accountable, only individuals willing to sacrifice their own time and resources can do so

Fundamentally, this case is not about any one particular local measure election. It is about the ubiquitous contempt demonstrated by local governing bodies in nearly every county, city, special district, and school district in California, by the elections officials ("A clerk or any person who is charged with the duty of conducting an election." ELEC 320(a).) who conduct the local measure elections, and by the county counsel and city attorneys charged with informing the voters of the legal consequences of the local measures. It is about the unconscionable willingness, over many decades, of these public servants to abuse their powers to hold unfair elections with dishonest ballots and other election materials in direct contravention and open defiance of the statutes enacted to prevent such abuse. The question here today is "Why don't all these government officials follow the law?" When millions and billions of dollars of potential taxes are there for the taking, the answer is obvious. Money and power are potent corrupting forces.

Throughout this brief Appellant and Contestant Denny is referred to as

Contestant. The Respondents and Defendants are referred to as Defendants or, individually, as Defendant Arntz or Defendant Herrera. References to sections of the Elections Code are preceded by ELEC. References to sections of the San Francisco Municipal Elections Code are preceded by SFMEC. References to sections of the Code of Civil Procedure are preceded by CCP. Since the 1996 repeal and enactment of the Elections Code, the election contest procedure is found in Division 16 of the Elections Code with sections beginning at 16000. In the immediately prior repeal and enactment of the Elections Code in 1961, the election contest procedure is found in Division 20 with sections beginning at 20000. References to sections of the 1961 enactment are followed by the corresponding 1996 section number in brackets. The original election contest procedure was enacted as Article VI of Chapter 38 of the Statutes of 1850 with sections numbered 51 through 74. References to sections of the original election contest rules are preceded by ACT and followed by the corresponding 1996 section number in brackets to the extent possible.

California Constitution Article XIII-A, Section 1(a) ("Proposition 13") limits "The maximum amount of any ad valorem tax on real property shall not exceed One percent (1%) of the full cash value." California Constitution Article XIII-A, Section 1(b)(2) ("Proposition 46") provides an exception that the Proposition 13 limitation "... shall not apply to ad valorem taxes or special assessments to pay the interest and redemption charges on ... (2) Bonded indebtedness for the acquisition or improvement of real property ...."

Contestant filed an election contest ("Contest") in accordance with the procedures specified by Division 16 of the Elections Code on April 5, 2019. (1 CT 6.) The purpose of the Contest was to set aside the November 8, 2018 election for Proposition A ("Election") of the City and County of San Francisco ("City"), a $425,000,000 Proposition 46 bond measure.

The statement of the Contest set out each of the five required jurisdictional elements of ELEC 16400. The particular grounds are all under the third clause of ELEC 16100(c), "That the defendant ... has committed any other offense against the elective franchise defined in Division 18 (commencing with Section 18000)."

Lawyers for the Defendants ("Counsel") filed a purported demurrer ("First Demurrer") for Defendants on April 22, 2019 with a hearing scheduled for May 21, 2019 ("First Hearing"). (1 CT 56.) With objection, Contestant filed a reply on May 9, 2019. (1 CT 299.) At the hearing, the judge, over objection, told Contestant to meet and confer with Counsel. Contestant complied and Counsel filed a second purported demurrer ("Second Demurrer") for Defendants on May 28, 2019 with a hearing scheduled for June 19, 2019 ("Second Hearing"). (1 CT 322.) Contestant filed a reply to the Second Demurrer on June 10, 2019. (1 CT 568.)

At the Second Hearing, the judge heard argument (3 CT 703.), dismissed Contestant's oral arguments as "old law," and then ruled to sustain the Second Demurrer. (2 CT 593.)

STATEMENT OF APPEALABILITY

This appeal is from the judgment of the San Francisco County Superior Court ("Trial Court") sustaining the Second Demurrer. It is authorized by ELEC 16900. ("Any party aggrieved by the judgment of the court may appeal therefrom to the court of appeal ...")

STATEMENT OF FACTS

From a procedural perspective, the facts are as follows.

From the point after filing the Contest, the clerk, the court, the judge, and Counsel, immediately went off track, acting without jurisdiction, and began a regular civil case under the Code of Civil Procedure, ignoring each and every element of the election contest procedure.

At the outset, "the clerk of the superior court" of San Francisco County ("Clerk") did not "notify the superior court" of the filing. (ELEC 16500.) Subsequently, "the presiding judge" did not "designate the time and place of hearing, which time shall be not less than 10 nor more than 20 days from the date of the order." (ELEC 16500.) ("Order" is a remnant of ACT 59[16500] and refers to the "order of a special term.")

Defendants were required to proceed under Article 3, Chapter 5 of Division 16. (ELEC 16440(b).) Defendants had the option to file an answer (ELEC 16443) or a "demurrer or objection" by affidavit (ELEC 16444) "within five days" after receipt of the Contest. Defendants did neither. Instead, Counsel, with the support of the Trial Court, proceeded entirely under the Code of Civil Procedure.

Counsel filed the First Demurrer that was not an affidavit of the Defendants 18 days after the Defendants had been served with the Contest. The Trial Court scheduled the First Hearing 47 days after the Defendants had been served with the Contest. Counsel filed the Second Demurrer that was not an affidavit of the Defendants 54 days after the Defendants had been served with the Contest. The Trial Court scheduled the Second Hearing for 76 days after the Defendants had been served with the Contest.

From the perspective of the subject of the Contest of the Election, the facts are follows.

Defendant Arntz printed and circulated voter information guides containing purported official materials containing advocacy, using public moneys, exceeding the limited advocacy allowed by ELEC 9280 under the concept of a digest. (SFMEC 610.) (1 CT 219.)

Defendant Arntz printed and circulated voter information guides containing non-official materials containing express advocacy, using public moneys, exceeding the limited advocacy allowed by ELEC 9282 and ELEC 9285 under the concept of paid arguments. (SFMEC 560.) (1 CT 223.)

Defendant Arntz printed and circulated ballots where the ballot statement did not conform to the mandatory (after election) provisions of ELEC 13119(a) and ELEC 13119(c) in violation of ELEC 18401 and ELEC 18002. (1 CT 219.)

Defendant Arntz printed and circulated ballots where the ballot statement contained prejudicial language (ELEC 13119(c)) in excess of the 75 words

allowed by ELEC 13247 in violation of ELEC 18401 and ELEC 18002.

For the purpose of showing a pattern of behavior of abuse on the ballot, Contestant requests that this court take judicial notice of the sample ballot and the measure materials for local measure elections held on November 5, 2019 that were printed and circulated by Defendant Arntz under Evidence Code sections 451(f), 452(g), 452(h), and 453.

For the purpose of showing a continuing pattern of behavior of abuse on the ballot, Contestant requests that this court take judicial notice of the sample ballot and the measure materials for local measure elections held on March 3, 2020 that will have been printed and circulated by Defendant Arntz under Evidence Code sections 451(f), 452(g), 452(h), and 453.

The scorpion can't change its nature. The pattern of behavior of Defendant Arntz over all four elections since the effective date of ELEC 13119 is unmistakable. Law? What law? We don't need to follow no stinkin' law!

ARGUMENT

I. THE SUPERIOR COURT OF SAN FRANCISCO COUNTY ERRED WHEN, WITHOUT AUTHORITY OR JURISDICTION, IT FORCED THE CONTEST INTO ITS CIVIL CASE STRUCTURE.

A. Standard of Review.

In sustaining the Second Demurrer, the Trial Court found no facts. The standard of review is *de novo* as all issues are, purportedly, matters of law. "On appeal from a dismissal after an order sustaining a demurrer, we review the order

de novo, exercising our independent judgment about whether the complaint states a cause of action as a matter of law." *Lazar v. Hertz Corp.* (1999) 69 Cal.App.4th 1494, 1502.

In *Horneff v. City and County of San Francisco* (2003) 110 Cal.App.4th 814, the court expounded further upon the scope of a *de novo* review.

> In evaluating the ruling on the city's demurrer, "we examine the complaint de novo to determine whether it alleges facts sufficient to state a cause of action under any legal theory, such facts being assumed true for this purpose." (McCall v. PacifiCare of Cal., Inc. (2001) 25 Cal.4th 412, 415.) "'We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed.' [Citation.] Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context." (Blank v. Kirwan (1985) 39 Cal.3d 311, 318.)

B. An Election Contest Is Not A Civil Case.

Election contests do not arise from the common law or equity jurisdiction of the court. An election contest, and therefore the Contest, is not a civil proceeding. It is a special proceeding.

California, in its 1849 Constitution, and the Legislature, in its first act governing elections in 1850, set out the jurisdiction and procedure of an election contest.

"Special" case refers to the 1849 California Constitution. "The County Courts shall have such jurisdiction, in cases arising in Justices Courts, and in special cases, as the Legislature may prescribe, but shall have no original civil jurisdiction, except in such special cases." California Constitution, Article VI, Sec.

9 (1849). It refers to a type of case not known to the common law or equity jurisdiction of the courts, but rather, a jurisdiction created by the Legislature. While the County Courts and Justice Courts no longer exist, the nature of an election contest remains as a remedy created, in its entirety, by the Legislature, and thus completely prescribed by the legislative scheme. In the treatise, Weinberg, *The Resolution of Election Disputes* (2nd ed. 2008), Weinberg agrees and devotes a whole chapter to the authority for election challenges in the United States. Weinberg asserts, agreeing with the California Supreme Court, that "There is no common law basis for election challenges." Weinberg, *supra*, p. 1.

Election contests are special proceedings created by the Legislature and strictly limited to the procedure that the Legislature has prescribed. All other proceedings are, thus, proscribed.

The proceedings are summary. The goal is to get to a trial and judgment quickly. *Dorsey v. Barry* (1864) 24 Cal. 449

The filing and serving of the Contest initiated the special proceeding.

The Supreme Court, in *Dorsey*, held that a motion for a new trial was prohibited in an election contest. In reaching that holding, it found that

> Court had jurisdiction by virtue of its organization, but it falls within the class of "special cases" provided for by section nine of Article VI of the Constitution, the jurisdiction of which may be conferred upon that Court by the Legislature. In Saunders v. Haynes, 13 Cal. 150, it is said that "the statute of 1850 creates a special proceeding wholly distinct in form and substantially different from the common law remedy." The Act itself provides a complete mode of procedure, leaving but little, if anything, dependent upon implication or the common law powers of the Court.

Further *Dorsey* found that

> The written statement of contest, the filing of it in the Clerk's office, the fixing of the time of hearing, the process and its service, the attendance of witnesses, the continuances, the hearing by the Court, the fees of officers and witnesses, the liabilities of the parties therefor, the judgment for costs and the manner of collecting the same, the dismissal for insufficiency of the proceedings or for want of prosecution, the judgment and the appeal therefrom, are all specially provided for in the Act.

In *Anderson v. County of Santa Barbara* (1976) 56 Cal.App.3d 780, the court held that a motion for summary judgment, a recognized civil procedure, was prohibited in an election contest. The court articulated a test based on the provision of ELEC 16602.

> Thus, if the summary judgment process of Code of Civil Procedure section 437c is compatible with Elections Code section 20085[16602], summary judgment is available in election contests. If the process is not compatible, then it is not available by reason of section 20085[16602]'s language incorporating general rules only "so far as ... applicable."

ELEC 16602 is identical to its predecessor, considered in *Anderson*. It provides that

> In the trial and determination of election contests, the court shall be governed by the rules of law and evidence governing the determination of questions of law and fact, so far as the same may be applicable. It may dismiss the proceedings if the statement of the cause of the contest is insufficient, or for want of prosecution.

While Contestant agrees with the holding in *Anderson*, the Contestant contends that the test was an unnecessary artifice. First, ELEC 16602 begins with a limiting clause which Contestant contends limits the applicability of the provision to "trial

and determination" (judgment). There has been no trial or judgment of the Contest on its merits. Second, "the rules of law and evidence governing the determination of questions of law and fact" implicitly exclude the rules of procedure both in the predicate and in the object. Thus, *Anderson's* test is not needed to make a determination on the "applicability" of a CCP rule, because it limits that test to matters of law and evidence and not procedure. When the legislature includes some things, but not others of a similar character, it is presumed that the exclusion is intentional and this court may not rewrite the statute to change that intent.

Contestant contends that no rules embodied in the CCP may be applied to an election contest, except those explicitly included. In the entirety of Division 16, only CCP 446 is incorporated in relation to the Contestant's verified pleading (affidavit).

The Trial Court has no civil or other jurisdiction over an election contest except that provided for by the Legislature.

C. Election Contest Time Periods

ELEC 16401 provides four separate statutes of limitation -- (a) six months, (b) 20 days, (c) 10 days, and (d) 30 days. Primary elections (ELEC 16421.) and recounts (ELEC 16462.) are both special cases and have a "five days" limitation. The "six months" period applies to the Contest. Each of these limitations are calculated from neither the election date nor the certification date, but from the "declaration of the result of the election" which can be later than certification.

However, this raises the question of when the Clerk's duty to notify the

superior court arises. Waiting until the end of the period for all of the limitations denominated in days is reasonable as a time-saving administrative rule. Waiting the full six months does not have that same time-saving characteristic. Were the Clerk to wait the full six months, the statutory scheme would treat 31 days the same as 184 days. Such delays would conflict with the overall statutory scheme commanding the courts to quickly resolve election contests.

ELEC 16500 commands the Clerk to notify the superior court "[w]ithin five days after the end of the time allowed for filing statements of contest." ACT 59[16500] is the antecedent to ELEC 16500.

> Upon such statement being filed, it shall be the duty of the clerk to inform the County Judge thereof, who shall give notice and order a special term of the Court of Sessions to be held at the Courthouse of the proper county on some day to be named by him, not less than ten nor more than twenty days from the date of such notice, to hear and determine such contested election.

ACT 56[16400,16401] is the antecedent to ELEC 16401.

> When any such elector shall choose to contest the right of any person declared duly elected to such office, he shall file within twenty days after the return day of such election, with the County Clerk as Clerk of the Court of Sessions, a written statement, setting forth ....

ACT 59[16500], although not explicitly setting a time for the Clerk to notify the court, implied immediacy -- "Upon such statement being filed." Under ACT 56[16400,16401], there was only a single, 20-day statute of limitations in which to file an election contest. Over time, the Legislature provided different statutes of limitation for different situations. Contestant contends that an appropriate and

reasonable application of the command to the Clerk that would satisfy the overall legislative scheme and yet not be administratively burdensome would be that the Clerk should provide notice within five days of the filing of an election contest during the lengthy five months (beyond the initial 30 days) available for filing. This staggered approach would result in election contests filed early in the six months likely being resolved before the end of the period. The court would not be overly burdened with a backlog of potential contests all requiring immediate attention at the same time.

II. THE TRIAL COURT ERRED IN IMPOSING RULES FROM THE CODE OF CIVIL PROCEDURE ON THE CONTEST.

Because the CCP does not apply to the Contest, the Trial Court erred in imposing various CCP rules.

An election contest differs from other special proceedings in that the Legislature not only provides a special remedy, but also provides an entire, self-contained, soup to nuts, mini code of procedure in Division 16.

In *Anderson*, the court considered the applicability of a motion for summary judgment in an election contest. It held that such a motion was incompatible with an election contest and held it inapplicable.

Using its test, *Anderson*, *supra* at 786-787, looked to the time frame allowed by CCP 437c and concluded it was incompatible.

> There is an inherent inconsistency between the summary judgment procedure of Code of Civil Procedure section 437c and the process of determination mandated by the Elections Code sections dealing

with contests. The procedures for contest of an election (Elec. Code, § 20050[16400] et seq.) are vestiges of those prevailing in 1850. They require that, except where the charge is bribery, the statement of contest must be filed within 30 days after declaration of result of the election (§ 20051[16401]), that within five days after the end of the period for filing statements of contest the county clerk notify the superior court of the county of all statements filed (§ 20080[16500]), and that the court designate a time and place of hearing on the notice not less than 10 nor more than 20 days from the time of the clerk's notice (§ 20080[16500]). The clerk must issue a citation to the defendant to appear which must be served at least five days prior to the date of hearing (§ 20081[16501]). Preserving the special session of court concept that prevailed in the 19th Century, the scheme requires that the court "continue in special session to hear and determine all issues arising in contested elections." (§ 20086[16603].) The court is required to file its findings of fact and conclusions of law and to pronounce judgment within 10 days after the contest is submitted. (§ 20086[16603].) While the court may "adjourn from day to day" until trial of the election contest is concluded, it may not grant continuances except for good cause, and then only for a time not exceeding 20 days. (§ 20083[16600].)

Thus the statutory scheme governing election contests requires that trial commence no later than 45 days from the time that notice of the contest is filed with the county clerk. Nowhere in the time limit is there leeway for the pretrial skirmishing and motion practice that has become commonplace in today's traditional lawsuit. In stark contrast, Code of Civil Procedure section 437c prohibits a motion for summary judgment until 60 days from the date of a general appearance have expired. By the time the 60 days has run, the trial of the election contest must have been commenced and often will have been concluded. It is not possible to reconcile Code of Civil Procedure section 437c's limitation upon moving for a summary judgment with the time limitations upon commencement of trial of an election contest. Rather than infer a legislative intent to carve out an unstated exception to section 437c, we must construe that statute and Elections Code section 20085[16602] together. Since section 20085[16602] requires that general procedural rules pertain to election contests only if "applicable," the fair construction is that the Legislature intended, when it enacted Code of Civil Procedure section 437c, that its provisions were not available in election contests. (See Packard v. Craig (1896) 114 Cal. 95, 98, holding that a motion for a new trial may not be made in an election contest.)

A. Division 16 precludes the use of the "meet and confer" procedure of CCP 430.41.

Even using the test and reasoning in *Anderson*, the "meet and confer" procedure cannot be compatible. CCP 430.41 provides that "The parties shall meet and confer at least five days before the date the responsive pleading is due." To top it off, when a meeting can't be arranged, the demurring party is granted an automatic 30-day extension added to the end of the original 30 days.

Since the optional responsive pleadings in an election contest under ELEC 16100(c), ELEC 16443 and ELEC 16444 apply. ELEC 16443 requires filing a response "within five days." ELEC 16444 requires that "No special appearance, demurrer or objection may be taken other than by the affidavits". During the same five days, the Clerk is commanded to notify the court and the presiding judge is commanded to set a hearing within 10 days, but no later than 20 days from the notice.

B. Division 16 precludes the use of ex parte hearings procedure of the CCP.

Even using the test and reasoning in *Anderson*, similarly, the ex parte hearing procedure allows a separate hearing with notice and scheduling requirements that add time to the procedure.

C. Division 16 precludes the use of the demurrer procedures of the CCP 430.40.

Even using the test and reasoning in *Anderson*, similarly, the demurrer procedure allows for filing up to 30 days after service. Then there is the motion to

rule on the demurrer, discussed under sub-heading E, below. This is well beyond the maximum of 25 days required for the hearing of the contest to begin.

E. Division 16 precludes the use of motions under CCP 1005.

Even using the test and reasoning in *Anderson*, similarly, a motion requires a hearing at some future date. The moving papers must be served either 16 or 21 court days before the hearing. Opposing papers must be served either 9 or 14 court days before the hearing. And reply papers must be served 5 or 10 days before the hearing.

The hearing on any motion, on its own, is an additional, *ultra vires* procedure that is outside the court's limited jurisdiction under Division 16. The minimum of 21 court days, puts the hearing 28 days (assuming no holidays) out from the notice and once again well beyond the 25 days required for the hearing of the contest to begin.

F. Division 16 precludes the use of the civil action classification system under CCP 403.40.

Even using the test and reasoning in *Anderson*, similarly, the reclassification procedure allows for a motion and hearing to order reclassification. (See sub-heading E.)

Even after notice of the order to reclassify, the court may take further action only after 30 days without payment. Besides the 30 days without payment, there is also a concurrent provision for an appeal to the court of appeal which may delay a case for months or perhaps even years. No matter how you slice it, this is well

beyond the maximum of 25 days required for the hearing of the contest to begin.

Besides the procedural delays inherent in a motion to reclassify, the issue of whether an election contest is a special proceeding of a civil nature.

Beyond that issue is the issue of whether the entirety of the specific procedural system laid out in Division 16 can be overridden by any statutes unless done so explicitly. Unlike other special proceedings, an election contest does not derive its jurisdiction from common law civil jurisdiction arising out of an obligation or an injury.

The 30 days allowed for the payment of the additional fees before the court will further deal with the election contest puts the hearing, once again, well beyond the 25 days required for the hearing of the contest to begin.

III. THE ORDER SUSTAINING THE DEFENDANTS' SECOND DEMURRER IS VOID AS THE COURT LACKED JURISDICTION.

Because CCP 430.40 and other CCP rules are not incorporated into Division 16, the Trial Court lacked jurisdiction and therefore authority to consider the Second Demurrer. Furthermore, the Trial Court lacked jurisdiction because the Second Demurrer was not an affidavit of either of the Defendants. The Second Demurrer is barred due to its untimely filing more than five days after service of the Contest.

The Legislature has placed a high burden on the Defendants to challenge an election contest based on a demurrer. ELEC 16403 creates a presumption in favor an election contest. "A statement of the grounds of contest shall not be rejected nor

the proceedings dismissed by any court for want of form, if the grounds of contest are alleged with such certainty as will advise the defendant of the particular proceeding or cause for which the election is contested."

The fact that Counsel argues so vehemently and specifically against the Contest demonstrates the sufficiency of the Contest.

IV. THE DEFENDANTS' SECOND DEMURRER DIDN'T PROVIDE ANY GROUNDS ON WHICH A DEMURRER COULD BE BASED.

Even if the Second Demurrer was permitted by Division 16, the Second Demurrer did not articulate any ground on which a demurrer could be sustained.

In addition, Contestant contends that a demurrer in an elections contest is limited to the elements that are required by an election contest. Those elements are defined in ELEC 16400 and are a contestant with standing, a defendant, the election being contested, one or more grounds defined in ELEC 16100, and the date from which the statute of limitations are to be measured.

Any demurrer must accept the facts alleged in the Contest. In the case of the Second Demurrer, Counsel argues based on different facts. Even under CCP 430.10, a valid ground must exist - lack of jurisdiction, lack of standing, collateral estoppel, wrong parties, no cause of action alleged, or uncertainty.

The California Supreme Court has already ruled that the Defendants are proper parties as "persons" within the meaning of ELEC 18002 and ELEC 18401 for an election contest. In *Canales v. City of Alviso* (1970) 3 Cal.3d 11, the court considered a ballot measure election contest where, for obvious reasons, none of

the defendants were candidates. The court held that "Thus subdivision (d) of section 20021[16100], which permits contests based on "illegal votes," can be the basis of a ballot measure election contest, and no reason appears why subdivision (c) should not also apply to such elections." Similarly, in *Enterprise Residents Etc. Committee v. Brennan* (1978) 22 Cal.3d 767, the court found no issue when the Shasta County Registrar was the defendant.

In the Second Demurrer, Counsel argues the law and the facts of the case and does a poor job of it. None of the cases cited by Counsel are election contests. None of the legal arguments and conclusions are based on the holdings of the cited cases. Any reference in those cases to election contests would, therefore, be dicta. While those courts may have discussed various topics, the election contest issues were not raised, and the court therefore did not address them. None of the cases are authority for the propositions for which Counsel claim they stand. "It is axiomatic that cases are not authority for propositions not considered." *People v. Ault* (2004) 33 Cal.4th 1250, 1268, fn. 10.

V. A CONTEST AGAINST A MEASURE BROUGHT UNDER ELEC 16100(c) IS PERMITTED.

First in *Canales* and then in *Enterprise*, the California Supreme Court has held that an election contest lies against a measure and that the defendants need not be candidates. Any other analysis would lead to the absurd conclusion that an election contest could never lie against a measure, since there are no candidates,

VI. A DEMURRER IN AN ELECITON CONTEST IS LIMITED TO OBJECTIONS PROVIDED FOR IN DIVISION 16.

The complex rules and case law connected with a demurrer under CCP 430.10 do not apply to an election contest. The bases of a demurrer for an election contest are, however, contained in Article 1, Chapter 5 of Division 16. Of relevance to the Contest are ELEC 16400, ELEC 16401, and ELEC 16403.

ELEC 16400 provides that an election contest must contain five elements. If one of those elements were missing, it might be the basis of a demurrer. Most of those elements, if missing, are curable.

ELEC 16401 provides the statute of limitations for various situations. There are two more found elsewhere in Division 16 that are not relevant here, as discussed earlier. If the relevant statute of limitations, six months for the Contest, had run, it would likely be an incurable condition and would result in sustaining a demurrer alleging that ground.

ELEC 16403, also discussed earlier, provides a more generalized basis for a demurrer. In general, the first clause indicates that demurrers, in general, are disfavored. The last clause, however, provides that lack of "certainty" as to what a Contestant is alleging as grounds. In *Salazar v. City of Montebello* (1987) 190 Cal.App.3d 953, the candidate Contestant finished fifth in a three seat election. She alleged, under ELEC 20021[16100](c) an offense against the elective franchise in that the sixth place finisher should not have been on the ballot. The court spent a lot of time trying to find a valid ground but, ultimately sustained the

demurrer

Contestant contends that if Defendants had filed an affidavit and if it had been filed within five days of service of the Contest, and if it had alleged a proper grounds as discussed herein, it might have been sustained. Defendants did none of those things. Instead they plowed through and argued desired facts and law based on dicta.

A demurrer in an election contest is limited to grounds permitted in Division 16. The Trial Court erred in sustaining the Second Demurrer.

VII. AN ANSWER OR DEMURRER TO AN ELECTION CONTEST BROUGHT UNDER ELEC 16100(c) MUST BE BY AFFIVIDAT.

By incorporating Division 18 (Penal Provisions) of the Elections Code into the grounds of an election contest through ELEC 16100(c), the possible defendants include "any person," including government officials and corporations.

The CCP provisions for optional exemption from verified pleadings (affidavit equivalent) for certain individuals apply only to proceedings in civil actions and not to a special proceeding like the Contest.

In contests brought under ELEC 16100(c), the procedures contained in Article 3 of Chapter 5 of Division 16 are invoked through ELEC 16440(b).

Let's face it, with the limited grounds for a demurrer in an election contest, "any person" can choose whether to answer or demur. There is no obligation to do either. There is no obligation to put oneself in jeopardy of criminal prosecution by doing either. "Any person" is not subjected to any violation of rights. All that will

happen is that the election contest will proceed without an answer or demurrer. The worst possible situation is that the election will be set aside, which violates no right of "any person."

VIII. ELEC 13119 IS MANDATORY BEFORE THE ELECTION AND MANDATORY AFTER THE ELECTION.

With respect to the Election, there is no dispute as to the material facts. All the ballots and voter information guides for all the elections consolidated for the November 8, 2018 election day contained the same ballot statement on the ballot and the same voter information guide materials for the Election.

The fact that the language of the ballot statement used on the ballot for the Election is beyond dispute. The conclusion that it does not conform to ELEC 13119 is a matter of law and within the purview of this court. The conclusion that ELEC 13119 is mandatory, and NOT directory, after an election is also a matter of law within the purview of this court. Those two conclusions of law will dispose of the Contest. The law in California, as formulated by the California Supreme Court, is that "a violation of a mandatory provision vitiates the election" despite the Trial Court's perfunctory dismissal of *Rideout v. City of Los Angeles* (1921) 185 Cal. 426 as "that's a very old law" at Contestant's oral argument. (3 CT 712-713.)

The entire statement of the law of election contests in *Rideout, supra* at 430-431 is as illuminating as it is concise. Citations are removed for readability. Emphasis added for the most salient points.

> It is a primary principle of law as applied to election contests that it

> is the duty of the court to validate the election if possible. That is to say, the election must be held valid unless plainly illegal. [Citation.] Accordingly, a distinction has been developed between mandatory and directory provisions in election laws; a violation of a mandatory provision vitiates the election, whereas a departure from a directory provision does not render the election void if there is a substantial observance of the law and no showing that the result of the election has been changed or the rights of the voters injuriously affected by the deviation. [Citations.] Whether or not a provision, the observance of which is not expressly declared by law to be essential to the validity of the election, is mandatory or merely directory, depends upon the character of the act prescribed. If the act enjoined goes to the substance or necessarily affects the merits or results of the election, it is mandatory; otherwise directory. [Citations.] Provisions prescribing minor details in regard to the form of ballots are held to be in a large measure directory, in so far as the voter is concerned, upon the theory that, where there are errors on the part of those intrusted with the preparation of ballots, the disenfranchisement of voters for these violations of the law over which they have no control would result in defeating the will of the people by technicalities, unless it appears that the mistakes in fact operated to prevent a free, fair and honest election. [Citations.] It has been held that violations of statutes prescribing the dimensions of the ballots and the character of type and color of ink to be used in printing them do not, in themselves, render the election void; and an election was held valid where, in violation of the provisions of the election law, the marks on the face of the ballots were discernible on the back thereof, owing to insufficient thickness of the paper. [Citation.] An erroneous omission to print on the ballots instructions for voting a straight ticket and the erroneous designation of an office on the ballot as "councilman" instead of "trustee" were held not to invalidate the election. [Citation.]

The discussion of the distinction between directory and mandatory is supportive of the conclusion that the ballot statement -- its language and its form (typographical emphasis and embellishment included) -- is a substantive matter that affects how the voter perceives the local measure and influences the voter's decision.

So, what's the problem? Simply put, the local governing bodies are rife with officials, employees, and advisors who directly benefit, through money, prestige, or power, from the passage of local measures, especially those imposing taxes. They have stuck up their collective middle finger to the voters and the Legislature and flouted the law, just as they have done for the already-existing law. It is not in their interest to provide a neutral forum. The achievement of the passage of local measures, especially for school and college districts, has driven a comprehensive array of hangers on through memberships in lobbying organizations that include vendors who divide the pie when tax measures pass, such as the Coalition for Adequate School Housing (C.A.S.H.), the California School Boards Association (CSBA), the Association of California School Administrators, and a bevy of other purportedly non-profit alphabet soup organizations.

All the while, the election officials, in every county, have turned a blind eye to the abuse and shrugged off any responsibility for the abuses that are completely within their purview to stop. Running elections for local measures is a very lucrative source of revenue for the Defendants, transferring taxpayer dollars from one agency to another.

A. The Ballot Statement for the Election Does Not Conform to ELEC 13119(a).

Contestant asserts that, as a matter of law, the ballot statement for the Election does not conform to ELEC 13119(a). The Legislature, in its ultimate wisdom, has mandated the form of the ballot statement for all local measure elections no matter

how they get to the ballot ("by a local governing body or submitted to the voters as an initiative or referendum measure"). Beginning with elections in 2018, all local ballot measure ballot statements must be in the form "Shall the measure (stating the nature thereof) be adopted?". This is so straight-forward as to be indisputable. The Legislature even used quotation marks. Simply using the words in the ballot statement is not sufficient. There is no wiggle room for the canard of "substantial compliance." There is conformity or non-conformity. It is black or white. After decades of local governing bodies flouting the law of the ballot statement (ELEC 10403 and ELEC 9051), the Legislature finally put a stop to local governing bodies pernicious practice of using the ballot for advocacy with sales pitches. ELEC 13119(a) boxes them in and shuts out all of the exploits that have been used in the past.

ELEC 13119(a) is not merely a procedural nicety, it is a substantive provision that forecloses the possibility that local governing bodies have any leeway in subverting the clear intent of the law. There is a reason that statewide measures that follow ELEC 9051(c) are emotionless and dry and local measures exude emotional appeal. Local governing bodies have been rigging elections in their favor for decades using a neutral forum (the ballot) for all manner of sales pitches. Evidence is easily supplied by the California Elections Data Archive (CEDA) (https://csus-dspace.calstate.edu/handle/10211.3/210187) at California State University, Sacramento. CEDA has archived all local measures for cities, counties, and school and college districts since 1996. The archive includes the ballot

statement, although it may omit titles, as is the case for the measure under scrutiny in *McDonough*. It's unfortunate that it does not catalog the ballot statement abuses of special districts, but that is not in its directive from the Secretary of State whose office funds the work of the archive.

B. The Ballot Statement for the Election Does Not Conform to ELEC 13119(c).

Contestant asserts that, as a matter of law, the ballot statement for the Election does not conform to ELEC 13119(c). The Legislature, in its wisdom, has, without changing ELEC 10403(a)(2) and ELEC 9051(c), doubled down by adding a nearly identical, but expressly direct, mandate to stop ballot statement abuse for local measures.

Contestant asserts that, as a matter of law, ELEC 13119 is mandatory after an election. There are no cases where an appellate court has reviewed ELEC 13119, since it became effective for elections held after January 1, 2018.

With respect to election contests, for over 150 years, California courts are in agreement with courts across the United States. In *Rideout*, the plaintiff asked that a municipal bond election be set aside based on printing irregularities in the form of the ballot. The court held that these minor irregularities, while mandatory before the election, became directory after the election. *Rideout*, very succinctly, restates the law as it exists today.

In general, there is always a statute involved. In California, most election-related statutes are encoded in the Elections Code. The Elections Code itself

defines the word "shall" as "mandatory" and "may" as permissive. (ELEC 354.) For the purposes of an election contest, however, that is not the end of the matter, because the courts make a distinction based on the point in time at which the statute comes under review. Thus, while a permissive ("may") statute is always permissive, a mandatory ("shall") statute may change its character from pre-election to post-election. To the statutes that change character, they do not become permissive, but directory, a lesser degree of mandatory, for the purposes of election contests.

The analysis that a court goes through to determine what is mandatory and what is directory is two-fold. First, it determines whether the provision has expressly been made mandatory after the election by the Legislature. One such example is ELEC 8062, connected with candidate petition signatures, where it states "The provisions of this section are mandatory, not directory ..."

Second, when not expressed, the court examines whether the provision is procedural or substantive in nature. Procedural provisions, examples of which are mentioned in *Rideout,* typically concern errors in technical matters. As *Rideout* formulates the test for a directory provision, "Provisions prescribing minor details in regard to the form of ballots are held to be in a large measure directory, in so far as the voter is concerned, upon the theory that, where there are errors on the part of those intrusted with the preparation of ballots, the disenfranchisement of voters for these violations of the law over which they have no control would result in defeating the will of the people by technicalities, unless it appears that the

mistakes in fact operated to prevent a free, fair and honest election." A characteristic of a provision that is directory after the election is one that a voter wouldn't distinguish as an error, like paper, ink, and font color. Nevertheless, even a technical error could be mandatory under some circumstances.

A substantive provision, according to *Rideout,* is one that "goes to the substance or necessarily affects the merits or results of the election." The presentation of the ballot statement, both the words and layout (typographical enhancements), is substantive. If the words sell the voter on voting one way or another it goes to the results of the election. Titles (which have never been authorized for measures placed on the ballot by local governing bodies), especially ones that argue or take a point of view, are especially effective at influencing a vote. (See the cases cited below.) Browsing through the ballot statements archived by CEDA demonstrates the myriad ways in which sales pitches are delivered on the ballot. Typographical enhancements like all caps, bolding, underlining, italics, and even bullets are used profusely to get that desired yes vote. You can be sure, however, that you will never see the tax amount stressed typographically -- the local governing bodies only stress points that favor a yes vote. The point here is that the language used on the ballot and the way it is presented affects the vote. While there may be degrees of effectiveness, violating the provisions of ELEC 13119 will effect the results of an election. Therefore, ELEC 13119 is mandatory, and not directory, after an election. The Fourth Cause of the Contest describes some of the offending language.

Unsurprisingly, Counsel never addresses the most salient grounds under ELEC 13119. ELEC 13119 is a completely revised and specific provision that addresses the ballot statement itself. The language of ELEC 13119(c) closely parallels the language of ELEC 9051 which also applies to the ballot statement in the Election through its incorporation by ELEC 10403.

Appellate courts have already rejected language in ballot statements very similar (because this abuse has been going on for decades all over California) to the ballot statement of the Contest.

In *Huntington Beach v. Superior Court* (2002) 94 Cal.App.4th 1417, the court considered the ballot statement for a Huntington Beach tax measure. It took issue with language designed to evoke an emotional response in favor of the measure by appealing to the voter's sense of fairness.

> Likewise, the description of the measure on the ballot is inaccurate when it asks the voter whether an ordinance requiring AES to pay "the same utility tax paid by all residents and businesses in Huntington Beach" should be adopted. The reference to "same utility tax" is misleading using an objective standard of verifiability, because the plant is already paying the "same" tax as everyone else. The proposed tax is one that only the AES facility *could* pay.

It struck the entirely of the prejudicial language, resulting in "Amendment of Gas Tax by Removing Electric Power Plant Exclusion. Shall the ordinance repealing the Gas Tax exclusion for electric power plants be adopted?" appearing on the ballot. Subsequently, the measure failed decisively.

In support of its holding to reverse the sustaining of a demurrer in *Stanson v. Mott* (1976) 17 Cal.3d 206, the court reasoned "a public agency may not expend

public funds to promote a partisan position in an election campaign. ... Since plaintiff specifically alleged that public funds were expended for "promotional," rather than "informational," purposes, his complaint stated a valid cause of action ...."

The *Stanson* court went further in describing the principles involved.

> Underlying this uniform judicial reluctance to sanction the use of public funds for election campaigns rests an implicit recognition that such expenditures raise potentially serious constitutional questions. A fundamental precept of this nation's democratic electoral process is that the government may not "take sides" in election contests or bestow an unfair advantage on one of several competing factions. A principal danger feared by our country's founders lay in the possibility that the holders of governmental authority would use official power improperly to perpetuate themselves, or their allies, in office (see, e.g., Madison, The Federalist Papers, Nos. 52, 53; 10 Richardson, Messages and Papers of the Presidents (1899) pp. 98-99 (President Jefferson)); the selective use of public funds in election campaigns, of course, raises the specter of just such an improper distortion of the democratic electoral process.

The court in *Huntington Beach* recognized that the ballot is fundamentally different than other materials connected with an election. It "is necessarily a neutral forum."

Stanson dealt with external campaign materials, not the official ballot and voter information guide, fully paid for with public moneys. Certainly, if public moneys can't be spent for explicit campaign materials, like the paid arguments in the Second Cause, the ballot cannot be a forum for the government to take sides and bestow an unfair advantage on itself.

In *McDonough v. Superior Court* (2012) 204 Cal.App.4th 1169, the court

considered the ballot statement for a San Jose charter amendment measure. It correctly made the connection between the mandate ("shall conform") of ELEC 10403(a)(2) and ELEC 9051(c) which mandates that it "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." This language is substantially similar to the language of ELEC 13119(c) - "The statement of the measure shall be a true and impartial synopsis of the purpose of the proposed measure, and shall be in language that is neither argumentative nor likely to create prejudice for or against the measure."

The *McDonough* court simply struck the opening language "To protect essential services, including neighborhood police patrols, fire stations, libraries, community centers, streets and parks, shall the Charter be amended ..." and replaced it with "Shall the Charter be amended ..."

Although the issue of the propriety of the lack of authority for a ballot title was not before the courts, each measure had a title and each court carefully examined locked-and-loaded trigger words. In *Huntington Beach*, the court changed "Exemption" to "Exclusion." "The use of the word "exemption" in the very title of the measure as it appears on the ballot itself is misleading and should be stricken. The word is a form of advocacy in what is necessarily a neutral forum." In *McDonough* the court changed "REFORM" to "MODIFICATION."

It took eagle-eyed voters who were closely tracking those measures to make

the obscure connection between ELEC 10403 and ELEC 9051. In those cases, the offending language was stricken during the short mandatory public examination period after the filing date through the use of petitions for writs mandates. While ELEC 10403 may also be grounds for an election contest under ELEC 16100(c) based on the offense against the elective franchise of ELEC 18002, ELEC 13119 is clearly directed at the election official and is included in the chapter that ELEC 18401 sanctions.

As the court observed in *Lockyer*, voters should not have to depend on the honesty and integrity of government officials to be guaranteed a fair and informed choice at the ballot box. If the officials can't or won't do it voluntarily, then the courts must step in to force them. Unless, of course, honest elections are no longer in favor by the powers that be.

Indisputably, ELEC 13119 is mandatory before the election, just as ELEC 10403, and the courts in *Huntington Beach* and *McDonough* determined. As the analysis in those cases demonstrates, those courts would very likely have found it mandatory after and election as well.

Indirectly, the Legislature has also made ELEC 13119 mandatory after an election by providing a sanction for failure to conform ballots to it in ELEC 18401 as a misdemeanor.

IX. ISSUES EVADING REVIEW

The Contest raises several claims that may not be ultimately resolved, even by

a successful election contest where the election is set aside.

If the court finds any of these claims moot, the court may exercise its discretion to resolve these claims because they pose issues of continuing public interest that are likely to recur and these claims present questions capable of repetition yet evading review.

After an election, there is no practical remedy. Before an election, there is nothing to challenge. It is only during the short 10-day mandatory public examination periods following the filing deadline where these claims are ripe. Printing and circulating the ballots and voter information guides stops any action. Once printed, any potential remedy evaporates as being moot.

A. The Digest Prepared for Each Measure Is a Partisan Summary Substituted for an Impartial Analysis.

The City has devised a document called a digest to substitute for the impartial analysis that is used in every other county for local measures. The Contestant contends in the First Cause that the digest is not, in fact, impartial.

The Ballot Simplification Committee ("BSC") is tasked with simplifying or dumbing down what starts out as an impartial analysis for the purported purpose of making it more understandable. The members of the BSC are all political appointees nominated by partisan organizations. They serve at the pleasure of the politicians who appoint them. SFMEC 600. The qualifications of the members, by design, do not include legal knowledge.

In every other county in California, an impartial analysis is written by a city

attorney or the county counsel.

The digest for the Contest appears in the voter information guide in the same position of prestige as the impartial analysis appears for all other counties in California. (1 CT 219.) It appears right after the ballot statement, a position intended it imbue it with authority, placed before all other voter information guide materials.

For the corresponding impartial analysis, "The city attorney shall prepare an impartial analysis of the measure showing the effect of the measure on the existing law and the operation of the measure." (ELEC 9280.). It is not a summary ("digest"), but an analysis of the legal impact of the measure. The ballot statement is already a summary of the measure. The digest is, apparently, just a longer summary.

The only guidance the BSC is given is that "When preparing a digest, the Committee shall give consideration to the analyses prepared by departments pursuant to Section 350 of this Code." SFMEC 610(b). In fact, the only analysis prepared is by the Defendant Herrera's office.

The BSC is charged with preparing a digest of 300 words, unless it thinks it needs more. SFMEC 515(b). The BSC must also make it readable at an eight grade level. SFMEC 515(c).

The BSC accepts input from the public as well as other city officials, including elected officials.

Basically, the BSC can write anything it wishes, and it does. This results is a

digest containing partisan material that naturally reflects the BSC members' political leanings completely subsidized by public moneys. The BSC is accountable to no one during the short period of time before an election when it convenes.

The digest deprives the voters of a legal analysis in favor of another sales pitch under the illusion of simplicity. The statement included below the digest that it is impartial belies the fact that the BSC has no duty to provide an impartial analysis. It's deceptive and fraudulent. The digest concept presumes the voters are incapable of making decisions without help. The officially selected arguments are already written to appeal to the lowest common denominator partisan advantage. The fact that the official arguments uses the same points as the digest further illustrates the bias inherent in the process. The arguments, however, are clearly understood and labeled to be for partisan purposes. The digest is deceptively mislabeled.

As *Stanson, supra,* holds, public moneys cannot legally be used by the City to take sides or bestow an unfair advantage on itself. The court should stop the deceptive digest and restore the impartial analysis used in every other county.

B. Paid Arguments Paid for by Public Monies Violate Public Policy.

Paid arguments are printed and circulated in the voter information guide for measure elections like the one subject to the Contest. (1 CT 223.) The City is the only jurisdiction in California that provides such a service.

It is self-evident that paid arguments are express advocacy. That's what election campaigns are for.

The voter information guide is a "limited public forum." *Huntington Beach*, *supra*. Except for the token payment, the administering of the procedures and the printing and circulating are wholly subsidized by public moneys.

Stanson, discussed above in point VIII.B., held that "a public agency may not expend public funds to promote a partisan position in an election campaign." It doesn't matter whether the partisan position is for or against the measure.

Paid argument participants gain in several ways. For the time it takes to write an argument and make a token payment, the full resources of Defendant Arntz's office take care of all production, printing, and circulating to half a million voters. The cost of such services performed by private firms are several orders of magnitude greater that the nominal fee for a paid argument. But that's not all. The participant doesn't have to raise and manage campaign funds. It doesn't have to manage the production and mailing of the material. It arrives at the voters home under the aegis of an official document and thereby arrives precisely at the same time as the official materials. It's as if Defendant Arntz is running a campaign for the participant. For those with limited resources, that's exactly what it is. For those with great resources, it's a no-brainer to expend a small amount to receive such a huge benefit.

Besides public policy, paid arguments violate the prohibition of ELEC 13303(b) that: "Only official matter shall be sent out with the county voter information guide as provided by law."

The court should strike down the City's entire process of soliciting and placing

paid arguments alongside official materials in the voter information guide.

C. Exceeding the Statewide Ballot Word Count to Add Partisan Language Should Be Prohibited.

All statewide measure ballot statements and all local measure ballot statements are subject to a 75-word limit (ELEC 13247.) -- except those of the City.

For any measure, a voter has information about the measure from the ballot statement, the voter information guide materials (impartial analysis, tax rate statement for bonds, arguments, and, just for good measure, the actual text of the measure itself), and the campaigns for and against to the extent that they materialize.

What possible reason exists for lengthening the ballot statement? The only reason to place more information on the ballot is to sell the voter, rather than encouraging the voter to actually read the official materials, which are always available. What might the additional information be? With certainty, it will be only information that the City wants the voter to see. In other words, reasons to vote "correctly," facilitated by a longer sales pitch at the point the voter makes the decision.

There is no justification for longer ballot statements except for partisan advantage that favors the City. The City, after all, writes the longer ballot statements. Advocacy on the ballot is already prohibited, as discussed elsewhere.

Initiatives and referendums, no matter how complex, placed on the ballot by voters themselves, are limited to 75 words by default. The unrestricted word count,

since the City can apparently "waive" the word count limit at will, violates the right to equal protection of the laws. Only one class of ballot statements, those placed on the ballot by the City have that advantage.

The court should prohibit the City from placing ballot statements that are longer than 75 words on the ballot, no matter what the reason.

CONCLUSION

The ballot statement for the Election failed to conform to the mandatory provisions of ELEC 13119. (Third and Fourth Cause.)

The voter information guide, a limited public forum, for the Election presented unofficial materials containing explicit advocacy in the form of paid arguments. The printing and circulating of the paid arguments was paid for by public moneys, excepting a token payment that is *de minimus* in relation to the value received. Explicit advocacy is limited to one set of arguments and rebuttals. (First Cause)

The voter information guide, a limited public forum, for the Election presented purportedly official materials containing advocacy under the guise of simplifying what would otherwise be a legal analysis by a lawyer. The simplification process considers input from both proponents and opponents, including the politically appointed, partisan Ballot Simplification Committee itself, making the digest another vehicle for advocacy wholly subsidized by public moneys. (Second Cause)

Both statewide measures and local measures are limited to 75 words for the ballot statement. The ballot statement exceeded the mandatory word count limit.

Exceeding the limit enlarges the room for advocacy on the ballot. (Fifth Cause.)

Defendants have made no attempt to follow the law with respect to the ballot. Defendants have not ceased their behavior of weaponizing the ballot to favor those in power since the filing of the Contest

At the November 5, 2019 election, the Defendants have demonstrated further contempt for the laws requiring fair and honest elections, by among others, Proposition A (same letter designation as used by the Election) for another Proposition 46 bond.

Contestant prays that this court set aside ("vitiate") the Election, as a matter of law.

In the alternative, the Contestant prays that this court:

1) vacate the Trial Court's order sustaining the demurrer;

2) grant leave for the Contestant to amend the Contest by adding a sixth ground based on the restriction in Proposition 46 that the measure purports to impose *ad valorem* taxes for bonded indebtedness for purposes other than "the acquisition or improvement of real property."

3) request that a replacement judge be assigned by the Chief Justice under the authority of Article VI, Section 6 and that the judge assigned has never received supplemental judicial benefits under Government Code 68220, or, in the alternative, instruct the presiding judge to assign a judge other than the Trial Court judge below;

4) instruct the Clerk to refile, *nunc pro tunc*, the Contest as a special

proceeding and assign it a case number reflecting that status;

5) instruct the Clerk to perform all the duties set out for the Clerk in ELEC 16500, ELEC 16501, and, to the extent required, ELEC 16502.

6) instruct the presiding judge to perform the duties set out for the presiding judge in ELEC 16500;

7) hold that both the First Demurrer and the Second Demurrer be stricken;

8) hold that the ballot statement for the Election does not conform to requirements of ELEC 13119; and

9) hold that ELEC 13119 is mandatory after any election held after January 1, 2018;

Contestant further prays that, should the court consider any of these claims moot, the court exercise its discretion to resolve these claims because they pose issues of continuing public interest that are likely to recur and those claims present questions capable of repetition yet evading review. Specifically, Contestant requests that this court

1) hold that the City's scheme of including advocacy deceptively disguised as an impartial digest is prohibited;

2) hold that the City's scheme of including express advocacy in the form of paid arguments is prohibited; and

3) hold that the ballot statement for a local measure may not exceed 75 words in length when counted in accordance with the rules set out in ELEC 9.

Respectfully submitted,

DATED: November 26, 2019

By 
Michael Denny

CERTIFICATE OF COMPLIANCE

Pursuant to rule 8.204(c) of the California Rules of Court, I hereby certify that this brief contains 10,511 words, including footnotes. In making this certification, I have relied on the word count of the computer program used to prepare the brief.

By