COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION TWO

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| MICHAEL DENNY,<br><br>Plaintiff/Appellant,<br><br>vs.<br><br>JOHN ARNTZ, Director of Elections; DENNIS HERRERA, City Attorney,<br><br>Defendants/Respondents. | Case No. A158029<br><br>San Francisco County Superior Court No. CGC-19-575070 |

# BRIEF OF RESPONDENTS JOHN ARNTZ AND DENNIS HERRERA

The Honorable Ethan P. Schulman

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## CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

☒ There are no interested entities or persons to list in this Certificate per California Rules of Court, Rule 8.208.

☐ Interested entities or persons are listed below:

| Name of Interested Entity or Person | Nature of Interest |
|---|---|
| 1. | |
| 2. | |
| 3. | |
| 4. | |

Please attach additional sheets with person or entity information if necessary.

Dated: December 23, 2019

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## INTRODUCTION

To preserve the finality of elections, California law only allows elections to be contested on the narrow grounds provided in California Elections Code Section 16100, such as where a winning candidate bribed the precinct board, where illegal votes were cast, or where there was an error in the vote-counting programs. Absent such unusual circumstances affecting "the integrity of the election process," election results cannot be challenged under the Elections Code. (*Friends of Sierra Madre v. City of Sierra Madre* (2001) 25 Cal.4th 165, 192; *Gooch v. Hendrix* (1993) 5 Cal.4th 266, 277.) After an election, "[s]trict rules embodied in the Elections Code govern a court's review of a properly contested election. 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." (*Friends of Sierra Madre*, at p. 192.)

Appellant Michael Denny's ("Appellant's") challenge to the election results fails because he did not state a claim based on any of the permissible grounds for a post-election contest under Section 16100. Appellant's complaint challenges Proposition A, which authorized the City to issue bonds to fund repairs and improvements to the City's 100-year old Embarcadero Seawall and Embarcadero infrastructure. According to Appellant, the voter pamphlet and ballot question for Proposition A were not impartial, but instead used "promotional" words, extra words, typographical emphasis, and paid arguments to convince voters to support the measure. But Appellant's claims all fail because Section 16100 does not allow post-election challenges based on alleged deficiencies in the impartial analysis. As California courts have consistently held, "there [is] no statutory basis in the Elections Code to attack the outcome of an election based on deficiencies in the impartial analysis." (*People ex rel. Kerr v. County of Orange* (2003) 106 Cal.App.4th 914, 932.) Instead, "if you want to

attack an impartial analysis, the pre-election period is when you need to do it." (*Ibid*.) Likewise, any challenge to the ballot question needed to be brought *before* the election. (*Kilbourne v. City of Carpinteria* (1976) 56 Cal.App.3d 11, 16 [holding that "correcting ballot errors" is "something which obviously must be done before the election"].) Here, Appellant had every opportunity to challenge the ballot question and voter information pamphlet before the election. Having failed to do so, Appellant cannot raise any challenges to Proposition A's ballot question and voter guide now.

Further, even if Appellant could bring a post-election challenge to Proposition A's ballot question and voter guide under the Elections Code, Appellant's claims are untimely. Appellant's complaint – which he filed over four months after City officials certified the results of the election – failed to comply with the 30-day limitations period set forth in California Elections Code Section 16401, and the 60-day limitations period set forth in California Code of Civil Procedure Section 860, *et seq.*

Finally, Appellant's claims also fail because the California Legislature expressly validated all actions by the City seeking authorization for bonds (including Proposition A) in the Third Validating Act of 2018.

For these reasons, the trial court correctly sustained the demurrer to Appellant's complaint. Because Appellant cannot cure the fatal defects in his complaint through any amendments, the trial court also properly did not allow leave to amend. Director of Elections John Arntz and City Attorney Dennis Herrera (collectively, "Respondents") respectfully request that the Court affirm the trial court's judgment in its entirety.

## STANDARD OF REVIEW

"On appeal from a judgment dismissing an action after sustaining a demurrer without leave to amend, the standard of review is well settled. The

reviewing court gives the complaint a reasonable interpretation, and treats the demurrer as admitting all material facts properly pleaded." (*Patrick v. Alacer Corp*. (2008) 167 Cal.App.4th 995, 1003, as modified on denial of reh'g (Nov. 21, 2008) (*quoting Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 966–967). "The court does not, however, assume the truth of contentions, deductions or conclusions of law." (*Ibid*.) "The judgment must be affirmed 'if any one of the several grounds of demurrer is well taken.'" (*Ibid*.) "However, it is error for a trial court to sustain a demurrer when the plaintiff has stated a cause of action under any possible legal theory. And it is an abuse of discretion to sustain a demurrer without leave to amend if the plaintiff shows there is a reasonable possibility any defect identified by the defendant can be cured by amendment." (*Ibid*.) "The burden is on the plaintiff . . . to demonstrate the manner in which the complaint might be amended." (*Gutkin v. University of Southern California* (2002) 101 Cal.App.4th 967, 975–976 [quoting *Hendy v. Losse* (1991) 54 Cal.3d 723, 742].) "[I]f no liability exists as a matter of law, we must affirm that part of the judgment sustaining the demurrer, and if the plaintiff cannot show an abuse of discretion, the trial court's order sustaining the demurrer without leave to amend must be affirmed." (*Id.* at p. 976.)

## STATEMENT OF FACTS

### I. PROPOSITION A ASKED THE VOTERS TO AUTHORIZE THE CITY TO ISSUE BONDS TO FUND REPAIRS AND IMPROVEMENTS TO THE EMBARCADERO SEAWALL AND OTHER INFRASTRUCTURE.

Proposition A asked the voters whether the City and County of San Francisco should be authorized to issue up to $425 million in bonds to fund repairs and improvements to the 100-year old Embarcadero Seawall and Embarcadero infrastructure. (Comp. ¶ 57.) Voters were informed that the improved seawall and infrastructure would better protect the City (particularly the Embarcadero area from Fisherman's Wharf to AT&T Park) from earthquakes,

major storms, and sea level rise due to climate change, and would preserve the Embarcadero as an important evacuation and supply route in the event of a natural disaster. (CT 490-492.) Proposition A was supported by a broad coalition, including, San Francisco's Mayor, the unanimous Board of Supervisors, numerous current and former City officials, the San Francisco Giants, San Francisco Chamber of Commerce, environmental groups (including Save the Bay, Sierra Club, and the San Francisco League of Conservation Voters), Tenant and Affordable Housing Advocates, workers unions, public transit agencies, the Alice B. Toklas LGBT Democratic Club, and the San Francisco Republican Party. (CT 490-497.) Proposition A was opposed by the Libertarian Party of San Francisco. (CT 492.)

## II. THE VOTER INFORMATION PAMPHLET INFORMED VOTERS ABOUT PROPOSITION A.

The Board of Supervisors created the San Francisco Ballot Simplification Committee ("BSC") to draft fair and impartial digests for each local measure appearing on the ballot. (S.F. Municipal Elections Code §§ 515, 600.) BSC digests are published in the Voter Information Pamphlet, which is sent to every registered voter in San Francisco. (*Id.*, § 502.)

BSC digests must be written at "the closest proximity to the eighth grade level of readability as possible." (*Id.*, § 515, subd. (c).) Each digest must include four subsections, which must appear in the digest in the following order: (1) The Way It is Now; (2) The Proposal; (3) A 'Yes' Vote Means; and, (4) A 'No' Vote Means. The City Attorney's Office prepares the initial draft of each digest, which the BSC edits at public meetings. (*Id.*, § 620.) At BSC meetings, members of the public have the opportunity to provide written and oral comments about each digest. (S.F. Admin. Code, § 67.15, subd. (a).)

To prepare the Proposition A digest, the BSC conducted public meetings on July 30, 2018 and August 3, 2018, during which the public had an opportunity to provide public comment about the proposed digest. (RJN Ex. B.) Appellant did not provide any public comment.

Following its public meetings, the BSC approved the full digest for Proposition A, which states:

> **The Way It Is Now**: The 100-year-old Embarcadero seawall is the foundation of approximately 3 miles of San Francisco's northeastern waterfront. The seawall supports Muni, BART, and power and water utilities. The seawall no longer adequately protects The City from tides, floods and rising sea levels. The seawall is also not protected from earthquake damage.
>
> Through the Port of San Francisco, The City is responsible for maintaining the seawall. The City plans to modernize, upgrade and repair the seawall over the next 30 years. The Port's recommended plan is estimated to cost up to $5 billion, and The City seeks to finance the first phase.
>
> To pay for large capital projects, The City relies on several funding sources, including borrowing money by selling general obligation bonds. The City uses property tax revenues to pay the principal and interest on these bonds.
>
> **The Proposal**: Proposition A would authorize The City to borrow up to $425 million by issuing general obligation bonds to modernize, repair and upgrade the Embarcadero seawall. The Citizens' General Obligation Bond Oversight Committee would review the spending of general obligation bond revenue proceeds.
>
> The City will conduct a public process to determine the specific projects to modernize, repair and upgrade the seawall. The bond will fund ongoing design and construction improvements that address the most significant earthquake and flood risks to the seawall.
>
> Proposition A would allow an increase in the property tax to pay for the bonds, if needed. It is City policy to limit the amount of money it borrows by issuing new bonds only as prior bonds are paid off. Landlords would be permitted to pass through up to 50 percent of any resulting property tax increase to tenants.
>
> **A "YES" Vote Means**: If you vote "yes," you want The City to issue up to $425 million in bonds to modernize, repair and upgrade the Embarcadero seawall.
>
> **A "NO" Vote Means**: If you vote "no," you do not want The City to issue these bonds.

(CT 490.) Beneath that digest in the Voter Information Pamphlet, the following words appear, in bold: "The above statement is an impartial analysis of this measure. Arguments for and against this measure immediately follow. The full text begins on page 104. Some of the words used in the ballot digest are explained starting on page 58." (*Ibid.*)

Following the digest, the Voter Information Pamphlet includes the Controller's statement, Proponent's Argument in Favor of Proposition A, Rebuttal to Proponent's Argument in Favor of Proposition A, Opponent's Argument Against Proposition A, Rebuttal to Opponent's Argument Against Proposition A, and Paid Argument In Favor of Proposition A. (CT 490-497.) The Voter Information Pamphlet states that "No Paid Arguments Against Proposition A Were Submitted." (CT 497.) The Voter Information Pamphlet included the full text of Proposition A. (CT 530-532.)

## III. THE VOTERS APPROVED PROPOSITION A DURING THE NOVEMBER 6, 2018 ELECTION.

On July 26, 2018, Mayor London Breed approved the Ordinance enacted by the San Francisco Board of Supervisors that selected the ballot language for Proposition A and waived the applicable word limit requirements set forth in San Francisco Municipal Elections Code Section 510(c). (CT 545-557.) The Ordinance adopted the following ballot language for Proposition A:

> SAN FRANCISCO SEAWALL EARTHQUAKE SAFETY BOND, 2018. To protect the waterfront, BART and Muni. buildings, historic piers, and roads from earthquakes, flooding and rising seas by: repairing the 100 year old Embarcadero Seawall; strengthening the Embarcadero; and fortifying transit infrastructure and utilities serving residents and businesses; shall the city issue $425,000,000 in bonds, with a duration up to 30 years from the time of issuance, an estimated tax rate of $0.013/$100 of assessed property value, and estimated annual revenues of up to $40.000,000, with citizen oversight and regular audits?
>
> The City's current debt management policy is to keep the property tax rate from City general obligation bonds below the 2006 rate by issuing new bonds as older ones are retired

> and the tax base grows, though the overall property tax rate may vary based on other factors.

(CT 17, 554.)

During the election held on November 6, 2018, San Francisco voters approved Proposition A with 82.70% "yes" votes. (CT 08, 369.) Director of Elections John Arntz certified the results of the election on November 27, 2018. (CT 347-420.)

## IV. APPELLANT FILED A COMPLAINT CHALLENGING PROPOSITION A.

On April 5, 2019, Appellant filed this action *in pro per*, seeking an order setting aside the voters' adoption of Proposition A during the November 6, 2018 election. Despite the widespread support for Proposition A, Appellant alleges that the election results should be set aside for five reasons. In the First Cause of Action, Appellant alleges that the digest prepared by the City's Ballot Simplification Committee was not impartial. (CT 09-11.) In the Second Cause of Action, Appellant alleges that the City should not have included paid ballot arguments in the Voter Information Pamphlet, even though paid ballot arguments are expressly authorized by San Francisco Municipal Elections Code Section 560 and are routinely included in the Pamphlet for most, if not all, ballot measures. (CT 11-16.) In the Third Cause of Action, Appellant alleges that the ballot question for Proposition A violated the California Elections Code by not including the phrase "shall the measure … be adopted?" (CT 16-18.) In the Fourth Cause of Action, Appellant alleges that the ballot question was not impartial, and that the title "SAN FRANCISCO SEAWALL EARTHQUAKE SAFETY BOND, 2018" should not have been printed in all upper case letters. (CT 18-21.) In the Fifth Cause of Action, Appellant alleges that the ballot question for Proposition A was too long. (CT 21.)

Based on those claims, Appellant seeks a judgment setting aside Proposition A. (CT 22.) Appellant also seeks "an order directing Defendant Arntz and successors in office to reject any future resolution from a 'local government body' where the ballot statement does not strictly conform to the disclosure and fairness requirements of Elections Code 13119." (*Ibid*.) Appellant "further prays that this court . . . retain jurisdiction over Defendant Arntz and successors in office until results have been declared for the next primary or general election which the governor has yet to declare." (*Ibid.*) Finally, Appellant seeks an order referring "to the San Francisco County District Attorney for prosecution Defendant Arntz and every other person liable under Elections Code 18401 for printing and circulating every ballot containing local measures that did not conform to Elections Code 13119 for all elections held in 2018 and 2019." (CT 22-23.)

## V. THE TRIAL COURT SUSTAINED THE DEMURRER WITHOUT LEAVE TO AMEND.

On April 22, 2019, Respondents filed a demurrer to all of the causes of action pled in the Complaint, and noticed the demurrer for hearing on May 21, 2019. (CT 56.) On May 21, 2019, the Court declined to hear the demurrer because Appellant had refused to meet and confer as required by California Code of Civil Procedure Section 430.41, and instead ordered Appellant to satisfy that requirement.

After Appellant satisfied the meet and confer requirement, Respondents filed another demurrer to the complaint on May 28, 2019, and noticed the demurrer for hearing on June 19, 2019. On that date, the trial court sustained the demurrer without leave to amend. (CT 593-597.) The trial court held that "none of the grounds giving rise to a post-election challenge under Elections Code section 16100 applies." (CT 596.) The court further explained that Appellant's

reliance on Elections Code Section 16100(c) is misplaced because: (1) that section applies only to the conduct of candidates in an election; (2) failing to provide an impartial analysis is not an "offense against the elective franchise" within the meaning of Section 16100(c); and, (3) Appellant failed to show that any alleged violations of the law effected the outcome of the election, as required by Section 16100(c). (CT 595-96.) The trial court explained that Appellant was required to bring his challenge to Proposition A before the election. Because he failed to do so, any attempt to amend the complaint would be "futile." (CT 597.) The trial court also held that the demurrer was procedurally proper and rejected Appellant's procedural objections. (CT 594.)

## ISSUES TO BE DECIDED

Should the Court of Appeal affirm the trial court's decision sustaining the demurrer without leave to amend where the Complaint fails to state any of the grounds for a post-election challenge under California Elections Code Section 16100, the Complaint is untimely, and the Complaint's causes of action all fail under the Third Validating Act?

## DISCUSSION

### I. THE TRIAL COURT PROPERLY SUSTAINED THE DEMURRER BECAUSE APPELLANT FAILED TO STATE A POST-ELECTION CHALLENGE UNDER CALIFORNIA ELECTIONS CODE SECTION 16100.

#### A. Appellant Cannot State A Post-Election Challenge To Proposition A Based On Alleged Flaws In The Ballot Question And Voter Information Pamphlet under Section 16100(c).

"California law makes it hard to overturn elections. The reasons are fundamental. Voters, not judges, mainly run our democracy. It would threaten that core tenet if one person who did not like the election result could hire lawyers and with ease could invalidate an expression of popular will." (*Owens v. County of Los Angeles* (2013) 220 Cal.App.4th 107, 124 [citations omitted].) For that reason, an election contest may only be brought based on the seven specific

grounds enumerated in California Elections Code Section 16100. Section 16100 provides:

> Any elector of a county, city, or of any political subdivision of either may contest any election held therein, for any of the following causes: (a) That the precinct board or any member thereof was guilty of malconduct. (b) That the person who has been declared elected to an office was not, at the time of the election, eligible to that office. (c) That the defendant has given to any elector or member of a precinct board any bribe or reward, or has offered any bribe or reward for the purpose of procuring his election, or has committed any other offense against the elective franchise defined in Division 18 (commencing with Section 18000). (d) That illegal votes were cast. (e) That eligible voters who attempted to vote in accordance with the laws of the state were denied their right to vote. (f) That the precinct board in conducting the election or in canvassing the returns, made errors sufficient to change the result of the election as to any person who has been declared elected. (g) That there was an error in the vote-counting programs or summation of ballot counts.

Section 16100's seven grounds are "the exclusive statutory grounds for post-election challenges." (*McKinney v. Superior Court* (2004) 124 Cal.App.4th 951, 954; see also *Friends of Sierra Madre, supra,* 25 Cal.4th at p. 192.) Allowing post-election challenges in those limited circumstances allows the court to remedy misconduct that affects "the integrity of the election process," while generally preserving the finality of elections. (*Friends of Sierra Madre,* at p. 192.)

Here, although Appellant's Complaint purports to be an "election contest," the Complaint does not allege a claim based on any of the statutory grounds set forth in Section 16100. Appellant did not allege facts to show any malconduct or errors by a precinct board or member, that illegal votes were cast, that a person elected to an office was not eligible to obtain that office, that any bribes were offered, or that there were any errors in vote-counting. In fact, Appellant does not allege that there were any flaws in the election at all. (CT 06-24.)

Instead, Appellant contends that the information provided to the voters in the ballot and voter information pamphlet was not impartial, and may have unduly swayed voters. But, even if that were true, Section 16100 does not allow post-election challenges to be brought based on alleged deficiencies in the impartial analysis. As California courts have consistently held, "there [is] no statutory basis in the Elections Code to attack the outcome of an election based on deficiencies in the impartial analysis." (*People ex rel. Kerr, supra,* 106 Cal.App.4th at p. 932.) Indeed, as the Supreme Court has made clear, "the requirement that there be an impartial analysis of a ballot measure applied only to preelection activities. A failure of the city attorney to comply with the requirement was not a basis for a postelection contest . . . ." (*Friends of Sierra Madre, supra*, 25 Cal.4th at p. 193 [citing *Horwath v. City of East Palo Alto* (1989) 212 Cal.App.3d 766, 773-74].)

Although California law does not allow Appellant to bring a post-election challenge based on alleged flaws in the voter information pamphlet and ballot, Appellant had the opportunity to challenge those materials *before the election.* The California Elections Code and San Francisco's Municipal Elections Code provide for a 10-day public examination period where members of the public may review the voter information pamphlet before it is printed. (S.F. Muni. Elec. Code § 590; Cal. Elec. Code, § 9295.) During that 10-day period, "any voter of the jurisdiction in which the election is being held, or the elections official, himself or herself, may seek a writ of mandate or an injunction requiring any or all of the materials to be amended or deleted." (Cal. Elec. Code, § 9295(b)(1).) Any "writ of mandate or injunction request *shall be filed no later than the end of the 10-calendar-day public examination period*." (*Ibid.* [emphasis added].) Similarly, California Elections Code Section 13314(a)(1) provides that "[a]n elector may seek a writ of mandate alleging that an error or omission has

occurred, or is about to occur, in the placing of a name on, or in the printing of, a ballot, county voter information guide, state voter information guide, or other official matter, or that any neglect of duty has occurred, or is about to occur." All such challenges to the ballot must be brought before the election. (*McKinney, supra,* 124 Cal.App.4th at p. 957.)

California law does not allow Appellant (or anyone else) to pass up those pre-election remedies, and then challenge the results of an election if his preferred side does not prevail. The "rule" in California is that "one cannot pass up a preelection remedy in favor of a post-election challenge." (*McKinney, supra,* 124 Cal.App.4th at p. 957.) Voters cannot "close their eyes and not check an election for irregularities—here, for example, apparent with the mailing of the sample ballot—and wait to see" what the election results will be. (*Id*. at p. 960; see also *Soules v. Kauaians Nukolii Campaign Committee* (9th Cir.1988) 849 F.2d 1176, 1180, 1182 [applying laches in Hawaiian case where appellants sought federal overturning of state election because of the importance of requiring pre-election challenges to prevent "sandbagging on the part of wily plaintiffs"].) To hold otherwise "would seriously destabilize California election law, which has the advantage of specifically encouraging preelection challenges precisely in order to avoid this sort of instability." (*McKinney,* at p. 960.)[1] Therefore, Appellant was

[1] Appellant does not allege any "malconduct that rose to constitutional levels" in the voters' approval of Proposition A. (*McKinney, supra,* 124 Cal.App.4th at p. 959.) But, even if Appellant had done so, those claims would fail because Appellant failed to exercise pre-election remedies. (*Id*. at p. 960.) Further, Appellant has not alleged any facts to satisfy the "very high" bar "for a litigant to successfully mount a post-election challenge to a ballot measure using a due process rationale" based on alleged flaws in the voter or ballot materials. (*People ex rel. Kerr, supra,* 106 Cal.App.4th at p. 934 ["Simply as a matter of general principle, the idea that by 'constitutionalizing' deficiencies in voter summaries you can undo an election is really quite antithetical to the democratic process."].) Appellant has offered nothing to show that the materials for Proposition A were "so inaccurate or misleading as to prevent the voters from making informed choices." (*Horwath, supra,* 212 Cal.App.3d at p. 777.) Nor could he, because "[w]here, as here, the voters are provided the whole text of a proposed law or ordinance, we ordinarily assume the voters voted intelligently on

required to make "a pre-election effort to cure any deficiency and thereby prevent any alleged misleading of the voters before it happened." (*People ex rel. Kerr, supra*, 106 Cal.App.4th at p. 932; see also *Kilbourne, supra,* 56 Cal.App.3d at p. 16 [holding that "correcting ballot errors" is "something which obviously must be done before the election…."; the Election Code does not "clothe the courts with the power to invalidate an election already conducted and to order another election" based on ballot errors].)

In short, Appellant cannot now raise challenges to the ballot and voter pamphlet that he could have brought – and indeed was required to bring – before the election.[2]

### B. Appellant Cannot State A Claim Pursuant To Section 16100(c) Because He Does Not Challenge The Actions Of Any "Defendant."

Appellant has not pled an election contest pursuant to Section 16100 for an additional reason. Appellant asserts that he stated a claim under Section 16100(c), but that section allows an election contest only where the "defendant has given to any elector or member of a precinct board any bribe or reward, or has offered any bribe or reward for the purpose of procuring his election, or has committed any other offense against the elective franchise defined in Division 18 (commencing with Section 18000)." A "defendant" is defined to mean a *candidate in the election.* (Cal. Elec. Code, § 16002 [defining "defendant" as

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the matter." (*Owens, supra*, 220 Cal.App.4th at p. 126.) Here, the voters were provided with the full text of Proposition A in the Voter Information Pamphlet. (CT 259-261.)

[2] Appellant claims that this Court should decide whether Proposition A's ballot question and voter guide were impartial, but the cases Appellant relies on are easily distinguishable because they all involved *pre-election* challenges. (See, e.g., *Huntington Beach City Council v. Superior Court* (2002) 94 Cal.App.4th 1417, 1423 [resolving claims to ballot and voter guide brought before the election]; *McDonough v. Superior Court* (2012) 204 Cal.App.4th 1169, 1171 [resolving challenge to ballot title and ballot question brought before the election].)

"that person whose election or nomination is contested or those persons receiving an equal and highest number of votes, other than the contestant, where, in other than primary elections, the body canvassing the returns declares that no one person has received the highest number of votes for the contested office."].) Thus, by its plain terms, Section 16100(c) applies only where a candidate has offered a bribe or otherwise "has committed any other offense against the elective franchise defined in Division 18 (commencing with Section 18000)." (Cal. Elec. Code, § 16100(c).) Here, Appellant has not alleged any facts to show that any candidate did anything at all that could violate Section 16100(c).

Appellant argues that construing Section 16100(c) to apply only to the conduct of candidates would mean that "an election contest could never lie against a measure," but that is plainly incorrect. (App. Br. at p. 18.) Measures can be challenged in post-election actions on any of the other grounds in Section 16100, including where a precinct member was guilty of misconduct or made errors likely to change the results of the election, where illegal votes were cast, or where there was an error in the summation of ballot counts. (*See* Cal. Elections Code, §§ 16100(a), (d-f).) It is only subsection (c) of Section 16100 that the Legislature limited to candidates' conduct.

Appellant notes that California courts construed the prior version of Section 16100(c) to allow election contests where proponents of a ballot measure made "[i]llegal offers of consideration" (*i.e.*, bribes) to secure the passage of the measure, and the challenger seeks a recount. (See *Canales v. City of Alviso* (1970) 3 Cal.3d 118, 129–130.)[3] In the case of a recount, the *Canales* court held

[3] Appellant also cites *Enterprise Residents etc. Committee v. Brennan* (1978) 22 Cal.3d 767, but that case is inapposite. In *Enterprise Residents*, the Court did not consider Section 16100(c) or its predecessor statute, but instead considered whether a portion of the Elections Code not at issue here gives a contestant the right to compel a recount where "he challenges the election is that the ballots have been incorrectly counted and the statement of contest alleges facts to support that claim." (*Id*. at p. 769.) Further, in *Enterprise Residents*, the

that 16100(c) could apply to ballot measures pursuant to Section 16000, which authorizes the court to apply the general election contest of Division 16 "to the recount of votes cast on a ballot measure, insofar as they can be made applicable." (*Canales*, at p. 130; Cal. Elec. Code § 16000.) The *Canales* court held that the provisions of Section 16100(c) could be "made applicable" to a ballot measure in a recount case as long as courts recognize that "a ballot measure is not rendered unworthy of passage by the misdeeds of its proponents." (*Canales*, at p. 130.) Thus, "[i]llegal offers of consideration should not void an election unless it is shown that the result would have been different without their influence-i.e., if they prevented the expression of the majority will. By requiring a contestant of a ballot measure election who relies upon subdivision (c) to show that a defendant who offered valuable consideration thereby affected the outcome of the election, subdivision (c) "can be made applicable" to "the recount of votes cast on a ballot measure," as can subdivision (d), within the meaning of section 20089" [now Section 16000]. (*Ibid.*)

The *Canales* courts extension of Section 16100(c) to ballot measures in recount cases does not apply here because Appellant has not sought a recount.[4] Further, even if this Court were to construe Section 16100(c) to allow challenges to ballot measures in this case (despite the plain language of that Section and Section 16002), Appellant would be required to show that the alleged violations of Section 16100(c) affected the outcome of the election. (*Canales, supra*, 3 Cal.3d at p. 130.) "When a contestant seeking to overturn a ballot measure election, as opposed to a candidate election, relies on subdivision (c), he or she

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contestant alleged that the errors alleged affected the outcome of the election. (*Id.* at p. 770.) No such issues are presented in this case.

[4] Indeed, the procedural provisions Appellant invokes, Sections 16440-16444, according to the title of the section, apply only to "Contests Other Than Recount."

must demonstrate that the forbidden act affected the outcome." (*Horwath, supra,* 212 Cal.App.3d at p. 774.) Appellant admits in the Complaint that he cannot satisfy that requirement. (CT 22 ¶ 85 [alleging that "[n]o one can say with any certainty what the will of the voters would have been if they had been . . . presented with a ballot stating the chief purpose of the measure free from language that is untrue, misleading, partial and likely to create prejudice in favor of the measure."]) Indeed, as the trial court correctly held, there was nothing misleading about the ballot question and voter pamphlet for Proposition A.[5] (CT 714-716.) Further, voters could not have been reasonably deceived by the summaries of Proposition A contained in the digest or ballot question because the voters were also given the full text of Proposition A. (CT 530-532.) "Where, as here, the voters are provided the whole text of a proposed law or ordinance, we ordinarily assume the voters voted intelligently on the matter." (*Owens, supra,*

[5] Because Appellant has not stated any of the grounds for a post-election challenge under Section 16100, the Court need not consider whether Appellant's claims would have had merit if they had been brought before the election. (App. Br. at 21-31.) In any event, Appellant is simply incorrect when he argues that the alleged defects in the ballot question and voter pamphlet should cause the election to be overturned. As the Supreme Court explained, elections "must be held valid unless plainly illegal." *Friends of Sierra Madre, supra*, 25 Cal.4th at p. 192. Therefore, courts will not overturn the results of an election based on deficiencies that do not "necessarily affect[ ] the merits or results of the election." (*Rideout v. City of Los Angeles* (1921) 185 Cal. 426, 431.) Here, none of the alleged deficiencies "necessarily affected" the voters' approval of Proposition A. Appellant raises technicalities, such as a claim based on the fact that the ballot question stated "shall the City issue $425 million in bonds?" rather than the words "[s]hall the measure (stating the nature thereof) be adopted?" Elec. Code, § 13119(a). Similarly, Appellant complains that the ballot question was too long, and used what Appellant views as "promotional" language. But Appellant offers no reason to assume that those alleged deficiencies "necessarily affect[ed] the merits or results of the election." As the trial court explained, Appellant failed to show that there was anything confusing, misleading, or improper about the ballot question or voter pamphlet for Proposition A. (CT 714-716.) Appellant claims that all alleged deficiencies in the ballot (including the inclusion of "typographical enhancements") should be deemed to have affected the election, but Appellant offers no support for that claim. The *Rideout* case on which Appellant relies stands for the opposite proposition. (*Rideout*, at p. 431.)

220 Cal.App.4th at p. 126.) Appellant offers no reason to depart from that presumption here.

Accordingly, the trial court correctly held that Appellant's post-election challenge to Proposition A fails as a matter of law because it was not based on any of the grounds set forth in Section 16100. Because Appellant did not allege claims that fall within any of Section 16100's statutory grounds, the trial court properly sustained the demurrer. (*Bradley v. Perrodin* (2003) 106 Cal.App.4th 1153, 1173 ["Election results may only be challenged on one of the grounds specified in section 16100."])

## II. APELLANT'S CAUSES OF ACTION ALL FAIL BECAUSE THEY ARE UNTIMELY.

Appellant's causes of action also fail because they are untimely under California Elections Code Section 16401 and Code of Civil Procedure Section 860 *et seq.*

### A. Appellant's Claims Are Untimely Under California Elections Code Section 16401.

California Elections Code Section 16401 provides that any election contest must be brought "within the following times after . . . the declaration of the result of the election":

> a) In cases other than cases of a tie, where the contest is brought on any of the grounds mentioned in subdivision (c) of Section 16100, six months.
>
> (b) In all cases of tie, 20 days.
>
> (c) In cases involving presidential electors, 10 days.
>
> (d) In all other cases, 30 days.

Because Appellant has not stated a claim pursuant to Section 16100(c) for the reasons set forth above (see *infra*, Section I), and this case does not involve a tie in the election or presidential electors, Appellant's post-election challenge to Proposition A is subject to the 30-day limitations period. Appellant did not file this action within 30 days after Director of Elections declared the results of the

election on November 27, 2018, but instead waited to file until April 5, 2019. (CT 23, 349, 369.) Therefore, this action is untimely by over four months.

### B. Appellant's Causes Of Action Are Untimely Under The Limitations Period Applicable To Validating Actions.

Appellant's claims are also untimely under Code of Civil Procedure Section 860 *et seq*. Challenges to bond measures, such as Appellant's challenge to Proposition A, can be adjudicated in validation actions pursuant to Government Code Section 53511, which authorizes actions to determine the validity of bonds, warrants, contracts, obligations or evidences of indebtedness pursuant to Section 860 *et seq*. (Cal. Gov. Code § 53511.) Therefore, Appellant was required to bring his challenge to Proposition A's bond authorization within 60 days pursuant to C.C.P. Section 863. Under the statutory scheme applicable to validation actions, "unless an 'interested person' brings an action of his own under section 863 within the 60–day period, the agency's action will become immune from attack whether it is legally valid or not." (*California Commerce Casino, Inc. v. Schwarzenegger* (2007) 146 Cal.App.4th 1406, 1420, as modified on denial of reh'g (Feb. 22, 2007) [internal punctuation removed].) "As to matters 'which have been or which could have been adjudicated in a validation action, such matters—including constitutional challenges—must be raised within the statutory limitations period in section 860 *et seq*. or they are waived.'" (*Ibid.*)

Before the trial court, Appellant offered two arguments to escape the effect of the 60-day limitations period, but neither is persuasive. Appellant noted that the City has not yet issued bonds pursuant to Proposition A, but that does not matter. Validation procedures apply before bonds are issued.[6] Indeed,

[6] Under C.C.P. Section 860, a validation action may be brought "upon the existence of any matter" permitted to be determined under the validation proceedings. Section 864 provides that bonds are "deemed to be in existence upon their authorization." And Government Code section 53511 specifically

"validation actions are most commonly used to secure a judicial determination that a government entity's *proposed issuance* of bonds is valid." (*Kaatz v. City of Seaside* (2006) 143 Cal.App.4th 13, 39 [emphasis added].)

Second, Appellant claimed that Section 860 *et seq.* does not apply because this action is subject to the Elections Code, and the Elections Code should be read to "override the general provisions that may be found in other codes." (CT 573.) Not surprisingly, Appellant cited no authority for the proposition that Elections Code overrides C.C.P. Section 860 *et seq*. To the contrary, the Elections Code expressly incorporates the California Code of Civil Procedure "so far as the same may be applicable." (Cal. Elec. Code, § 16602; *Anderson v. County of Santa Barbara* (1976) 56 Cal.App.3d 780, 786.) Appellant cites no authority for the proposition that Section 860 *et seq.* is inapplicable to voter-approved bond measures.

To hold otherwise would defeat the critical purpose served by Section 860's strict limitation period, which is designed to achieve the "speedy determination of the validity of the public agency's action." (*Golden Gate Hill Dev. Co. v. County of Alameda* (2015) 242 Cal. App. 4th 760, 767.) "A key objective of a validation action is to limit the extent to which delay due to litigation may impair a public agency's ability to operate financially," and, in particular, to "facilitate a public agency's financial transactions with third parties by quickly affirming their legality." (*Friedland v. City of Long Beach* (1998) 62 Cal. App. 4th 835, 843.)

Accordingly, Appellant's challenge to the City's authority to issue bonds is subject to the 60-day statute of limitations set forth in Section 860 *et seq*. Because Appellant filed this action *over four months* after bonds were authorized

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provides for actions pursuant to C.C.P. Section 860 to determine the validity of public agency bonds.

by the voters during the November 2018 election, Appellant did not comply with the 60-day limitations period. (CT 347-420.)

## III. APPELLANT'S CLAIMS FAIL UNDER THE THIRD VALIDATING ACT.

Appellant's claims also fail under the Third Validating Act of 2018, which was approved as Senate Bill 1499 and became effective January 1, 2019. (CT 559-565.) The Third Validating Act provides:

> All acts and proceedings heretofore taken by or on behalf of any public body under any law, or under color of any law, for, or in connection with, the authorization, issuance, sale, execution, delivery, or exchange of bonds of any public body for any public purpose are hereby authorized, confirmed, validated, and declared legally effective. This shall include all acts and proceedings of the governing board of public bodies and of any person, public officer, board, or agency heretofore done or taken upon the question of the authorization, issuance, sale, execution, delivery or exchange of bonds. . . . All bonds of, or relating to, any public body heretofore authorized to be issued by ordinance, resolution, order, or other action adopted or taken by or on behalf of the public body and hereafter issued and delivered in accordance with that authorization shall be the legal, valid, and binding obligations of the public body. (CT 559 [emphasis added.)

California case law has long held that validating acts akin to the Third Validating Act serve as "curative acts" that "wipe[] away whatever mistakes there may have been in the procedure . . . ." (*Los Angeles County Flood Control Dist. v. Hamilton* (1917) 177 Cal. 119, 131.) Indeed, "[i]t is settled law in this state that defects in procedural steps leading to the incurring of bonded indebtedness by municipal corporations and other political subdivisions may be cured by subsequent validating statutes enacted by the Legislature." (*City of Pac. Grove v. Irwin* (1946) 76 Cal. App. 2d 46, 50 [citations omitted]). Therefore, unless "the constitution made it mandatory upon the legislature to require the things to be done which it is claimed were omitted," "the curative statute was therefore effective to validate the election." (*Ibid.*)

Here, the Third Validating Act cures any statutory defects (if there were any) in the approval of Proposition A. Appellant alleges that the City violated certain California statutory provisions that Appellant alleges caused the voter pamphlet and ballot to not be impartial. (CT 9-21.) But none of the statutory provisions on which Appellant relies were required by the Constitution. Instead, they were created by the Legislature by statute; and therefore, they also can be waived by a statute such as the Third Validating Act. (*City of Pac. Grove, supra,* 76 Cal.App. 2d at p. 50.) Because the Third Validating Act validated any statutory defects in the approval of Proposition A (if there were any), Appellant cannot state a claim.

Appellant argued to the trial court that the Third Validating Act should not apply because the City has not yet issued bonds under Proposition A, but that argument fails. By its plain terms, the Third Validating Act authorizes and confirms all "acts and proceedings" in connection with the "*authorization*" of bonds. (CT 559 [emphasis added].) And this is consistent with "settled" case law, recognizing that validating statutes apply to all possible defects in "procedural steps *leading to* the incurring of bonded indebtedness . . . ." (*City of Pac. Grove, supra*, 76 Cal. App. 2d at p. 50 [citations omitted].) Therefore, validating acts apply *before bonds are issued* to cure any defects in the authorization of the bonds. (*Ibid.* [holding that city clerk could not refuse to sign bond authorization based on alleged inadequacies in the authorization for the bonds because the validating act cured the alleged defects].) Like here, the court in *Pacific Grove* considered a claim that an election approving the issuance of bonds was invalid because municipal officials had allegedly failed to comply with the law when submitting the proposition to the voters. The court's holding in *Pacific Grove* that the "curative statute" was "effective to validate the election" is

equally applicable here. (*Ibid*; see also *Clark v. Los Angeles* (1911) 160 Cal. 30 [validating act cured claimed irregularities in bond ballot questions and content].)

Accordingly, the Third Validating Act of 2018 bars Appellant's claims.

## IV. THE TRIAL COURT PROPERLY DID NOT GRANT LEAVE TO AMEND.

As explained above, Appellant's challenge to Proposition A fails because: (1) it is not based on any of the exclusive grounds for a post-election contest set forth in Section 16100; (2) it is time-barred; and, (3) it is barred by the Third Validating Act. Those defects cannot be cured through any amendment. Therefore, the trial court correctly sustained the demurrer without leave to amend. (CT 677-681; *Gutkin, supra,* 101 Cal.App.4th at 975–976.) Appellant offers no argument to the contrary, and therefore has failed to satisfy his burden to show that he can cure any of the defects in his Complaint. (*Ibid*. ["The burden is on the plaintiff ... to demonstrate the manner in which the complaint might be amended."].)

Although Appellant does not even attempt to show that he can cure the defects in his causes of action, Appellant's brief mentions – with no further explanation – that he now wishes to plead a new cause of action "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.'" (App. Br. at p. 38.)

That single sentence in Appellant's brief is insufficient to show that he should be given leave to amend. First of all, Appellant's complaint does not even hint at the possibility that Proposition A could be inconsistent with Proposition 46, and Appellant did not present that argument to the trial court. Appellant should not be allowed to change the theory of his case on appeal. (*Robinson v. Grossman* (1997) 57 Cal.App.4th 634, 648–649 [holding "[i]ssues not presented

to the trial court are waived on appeal," and "a party may not ordinarily change the theory of his or her case for the first time on appeal"].)

In addition, to satisfy his burden on appeal, Appellant "must show in what manner he can amend his complaint and how that amendment will change the legal effect of his pleading." (*Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349.) Appellant "must clearly and specifically set forth the 'applicable substantive law, and the legal basis for amendment, i.e., the elements of the cause of action and authority for it." (*Rakestraw v. California Physicians' Service* (2000) 81 Cal.App.4th 39, 43 [internal citations omitted].) "Further, plaintiff must set forth factual allegations that sufficiently state all required elements of that cause of action." (*Ibid.*) "Allegations must be factual and specific, not vague or conclusionary." (*Ibid.*) "Where the appellant offers no allegations to support the possibility of amendment and no legal authority showing the viability of new causes of action, there is no basis for finding the trial court abused its discretion when it sustained the demurrer without leave to amend." (*Ibid*; *New Plumbing Contractors, Inc. v. Nationwide Mutual Ins. Co*. (1992) 7 Cal.App.4th 1088, 1098; *HFH, Ltd. v. Superior Court* (1975) 15 Cal.3d 508, 513, fn. 3.)

Here, Appellant failed to satisfy his burden to show that he should be given leave to amend. Appellant does not set forth any factual allegations or legal authority to show that Proposition A violates any restrictions on the imposition of ad valorem taxes. Appellant appears to rely on Article 13A, Section 1 of the California Constitution, but he points to nothing suggesting that Proposition A will cause property taxes to increase. (Cal. Const., art. 13A, § 1; CT 531 [explaining that the City's debt management policy is to keep "the property tax rate from the City general obligation bonds below the 2006 rate by issuing new bonds as older ones are retired and the tax base grows," thus preventing an increase in property taxes].) Nor does Appellant offer any facts or

legal argument to show why the City is not entitled to rely on Article 13A, Section 1(b)(2), which provides that the limit on property tax increases does not apply to "[b]onded indebtedness for the acquisition or improvement of real property approved on or after July 1, 1978, by two-thirds of the votes cast by the voters voting on the proposition." (*Ibid.*) As explained above, San Francisco voters approved Proposition A with well-over two-thirds of the votes cast. (CT 369.) Appellant appears to contend that Proposition A's funds will not be spent on the "improvement of real property," (App. Br. at p. 38), but he identifies no facts or authority to show that is true. Indeed, by the measure's clear terms, the funds will be used for the improvement of real property, including the City's seawall and infrastructure near the Embarcadero. (CT 530-532.) And, if there are any improper expenditures of bond funds at some point in the future, those issues can be addressed by a court when and if they arise. Accordingly, because Appellant offers no factual allegations to support the possibility of amendment and provides no legal authority showing the viability of his proposed new cause of action, Appellant has failed to show that he should be allowed leave to amend. (*Rakestraw, supra,* 81 Cal.App.4th at p. 43–44.)

## V. THE DEMURRER WAS PROCEDURALLY PROPER.

Unable to show any errors in the trial court's legal analysis, Appellant spends most of his brief arguing that the trial court lacked jurisdiction to consider the demurrer. According to Appellant, the trial court lacked jurisdiction to consider the demurrer because Respondents did not file an "affidavit" supporting the demurrer and did not file the demurrer within five days after receiving service of the Complaint. (App. Br. at 16.) Appellant also contends that the trial court was not allowed to consider whether the complaint stated a permissible post-election challenge under Section 16100 when resolving the demurrer. Finally, Appellant contends that Division 16, Chapter 5 Article 3 of the California

Elections Code (California Elections Code Section 16400 *et seq*.) exclusively governs his challenge to Proposition A, and therefore the trial court erred by applying the California Code of Civil Procedure.

These arguments all lack merit. Appellant's arguments fail because: (1) Appellant has not pled an election contest subject to Division 16, Chapter 5 Article 3 of the California Elections Code; (2) nothing in the Elections Code prevents a trial court from dismissing a complaint that fails to state a claim under Elections Code Section 16100; and, (3) the trial court properly applied the C.C.P. in this case.

### A. Division 16, Chapter 5, Article 3 of the California Elections Code Does Not Apply.

Appellant's procedural arguments all fail at the outset because they are premised on the mistaken contention that this case is an election contest. As explained above, this case is not an election contest governed by Division 16 of the California Elections Code because Appellant has not alleged any claims under Section 16100 that call into question the integrity of the election. (See *infra*, Section I; *Friends of Sierra Madre, supra*, 25 Cal.4th at p. 194 [holding case was not a "permissible election challenge" where it was not brought on the grounds set forth in Elections Code Section 16100]; *Alden v. Superior Court In and For San Luis Obispo County* (1963) 212 Cal.App.2d 764, 768 [holding action in superior court was not an "election contest within the meaning of the Elections Code," because a "proceeding to contest an election may be brought only when and as authorized by statute," and complaint did not state a claim authorized by statute].) Instead of an election contest, this case is an untimely challenge to voter and ballot materials – a challenge Appellant was required to bring before the election pursuant to California Elections Code Sections 9295(b)(1) and

13314(a)(1). (See *infra*, Section I.) The procedures of Division 16 simply have no application to this case.

Further, even if this were an election contest, Appellant is mistaken when he argues that Respondents were required to submit affidavits within 5 days of service of the Complaint, pursuant to Division 16, Chapter 5 Article 3 of the California Elections Code. By its plain terms, the procedures in Article 3 apply only to cases brought on one of the following grounds: "(a) The defendant is not eligible to the office in dispute. (b) The defendant has committed any offense against the elective franchise as defined in Division 18 (commencing with Section 18000). (c) A sufficient number of votes were illegal, fraudulent, forged, or otherwise improper, and that had those votes not been counted the defendant would not have received as many votes as the contestant." (Cal. Elec. Code, § 16440.) As noted above, a "defendant" is defined to mean a *candidate in the election.* (Cal. Elec. Code, § 16002 [defining "defendant" as "that person whose election or nomination is contested or those persons receiving an equal and highest number of votes, other than the contestant, where, in other than primary elections, the body canvassing the returns declares that no one person has received the highest number of votes for the contested office."].) Thus, the special procedures set forth in Article 3 apply only where a *candidate's* election is disputed on the grounds set forth in Section 16440.[7]

Here, Appellant has not challenged the actions or the election of any candidate. Therefore, while Appellant correctly states that Article 3 allows a *candidate* in a disputed election to respond to the challenge against him or her by filing an affidavit within 5 days (*see* Cal. Elec. Code, § 16443), and provides that

[7] Appellant relies on *Dorsey v. Barry* (1864) 24 Cal. 449, 451, but that case concerned a challenge to a candidate's election. Again, no such challenge has been made in this case.

"[n]o special appearance, demurrer or objection may be taken other than by the affidavits" (*see* Cal. Elec. Code, § 16444), those requirements have no application to this case. Indeed, because Appellant has not challenged the actions of any "defendant" as defined in Elections Code Section 16002, there is no "defendant" that even can provide the affidavit contemplated by Elections Code Section 16443.

### B. The Trial Court Properly Dismissed The Demurrer Because The Complaint Did Not State Any Of The Grounds For An Election Contest Under Section 16100.

Appellant argues that a court can only sustain a demurrer to an election contest where: (1) the complaint omits factual allegations required under Section 16400 (such as the name of the defendant and the "particular grounds of contest and the section of this code under which the statement is filed"); (2) the complaint fails to satisfy the statute of limitations for an election contest under Section 16401; or, (3) the complaint fails to "advise the defendant of the particular proceeding or cause for which the election is contested" as required by Section 16403. (App. Br. at 19.) Not surprisingly, Appellant cites no authority for the proposition that the trial court could only dismiss his Complaint based on those grounds. Indeed, Appellant ignores that the Elections Code expressly authorizes courts to "dismiss" an elections challenges whenever "the cause of the contest is insufficient," (Cal. Elec. Code, § 16602), and expressly grants the trial court "all the powers necessary" to "determine the contested election," (Cal. Elec. Code, § 16600). Here, the trial court correctly held that the "cause of the contest is insufficient" in Appellant's Complaint because Appellant did not plead a post-election challenge based on any of the exclusive grounds stated in Section 16100 of the Elections Code. Appellant offers nothing to show that the trial court erred in reaching that conclusion.

### C. The Elections Code Expressly Incorporates Applicable Procedures From The C.C.P., Including Procedures Applicable To Demurrers.

Appellant is also mistaken when he claims that the procedures set forth in the California Code of Civil Procedure do not apply to this case, and instead the trial court should have only applied Division 16 of the Elections Code. As explained above, Division 16 has no application here because this is not an election contest. (See *supra,* Section I & Section V (A).) But, even if this were an election contest, the Elections Code expressly incorporates the California Code of Civil Procedure "so far as the same may be applicable." (Cal. Elec. Code, § 16602; *Anderson v. County of Santa Barbara* (1976) 56 Cal.App.3d 780, 786 [explaining that Elections Code Section 16602 (formally Section 20085) makes the California Code of Civil Procedure's procedures applicable to election contests as long as those procedures are "compatible" with the Elections Code].)

Here, the C.C.P.'s rules governing demurrers are applicable and compatible with the Elections Code. The Elections Code expressly authorizes courts to "dismiss" an elections challenge where "the cause of the contest is insufficient." (Cal. Elec. Code, § 16602.) The C.C.P.'s sections governing demurrers provide the procedural framework allowing courts to make that determination. For that reason, it is not surprising that California courts have commonly resolved election contests through demurrers. (See, e.g., *Salazar v. City of Montebello* (1987) 190 Cal.App.3d 953, 954 [affirming trial court order sustaining demurrer to election contest]; *Hale v. Farrell* (1981) 115 Cal.App.3d 164, 168 [affirming trial court's order sustaining demurrer to one cause of action in election contest]; *Warden v. Brown* (1960) 185 Cal.App.2d 626, 626 [affirming trial court order sustaining demurrer to election contest]; *Williams v. McClellan* (1953) 119 Cal.App.2d 138, 144 [same]; *Wessling v. Nye* (1909) 156 Cal. 472, 475 [same].)

Appellant claims that the C.C.P.'s procedures are not compatible with the Elections Code because the C.C.P's procedures might cause delays. According to Appellant, the trial court cannot reclassify improperly filed cases, require filing fees to be paid, rely on the default briefing schedule for motions under C.C.P. 1005, or require parties to meet and confer because those requirements might slow down resolution of an election contest.[8] (App. Br. at pp.12-16.) But Appellant cites no authority to support his claim that the Elections Code prevents the superior court from enforcing those requirements.

Nor can Appellant show that there is any inherent conflict between the time requirements of the Elections Code and the C.C.P.[9] Indeed, in this case, the trial court applied the C.C.P.'s procedures, *and* resolved this case within the time period set forth by the Elections Code. As Appellant notes, the Elections Code requires the clerk of the court to notify the superior court of all filed election contests "within five days after the end of the time allowed for filing statements of contest." (Cal. Elec. Code, § 16500.) Here, Appellant claims that he can rely on the six-month limitations period under Section 16401(a), and therefore the "end of the time allowed for filing" election contests was May 27, 2019 – six months after the City certified the results of the election. (CT 347-420; Cal. Elec. Code, § 16500.) Thereafter, in an election contest, a trial court has 45 days in

[8] Appellant also argues that the C.C.P.'s ex parte hearing procedure cannot be used in election contests. That question is not properly before this Court. The trial court did not hold any ex parte hearings in this case, and therefore Appellant improperly seeks an advisory opinion on that issue. (*Wilson & Wilson v. City Council of Redwood City* (2011) 191 Cal.App.4th 1559, 1573.)

[9] Appellant's argument about C.C.P. 1005 is premised on a misunderstanding of that rule. Under C.C.P. 1005, demurrers and other motions must be filed and noticed at least 16 court days before the date of the hearing. Thus, hearings can occur 16 court days after the moving papers are filed. Appellant provides no support for his claim that C.C.P. 1005 requires hearings to occur at least 28 days after the moving papers are filed. (App. Br. at p. 15.)

which to hold a trial, and an additional 10 days to reach a decision.[10] (Cal. Elec. Code, §§ 16500, 16600, 16603; *Anderson, supra,* 56 Cal.App.3d at p. 787 [holding "statutory scheme governing election contests requires that trial commence" within "45 days"].) Therefore, even if the time periods provided for election contests applied, the trial court had until July 22, 2019 to reach a decision. (*Ibid.*) The trial court entered judgment for Respondents *over a month earlier*, on June 19, 2019. (CT 594-613.) Accordingly, the trial court resolved the demurrer within the time periods that would apply if this were an election contest.[11]

To avoid that apparent flaw in his argument, Appellant asks the Court to rewrite the timing requirements of the Elections Code. Specifically, Appellant asks this Court to adopt a rule that would require the clerk of the superior court to notify the superior court of election contests on a rolling basis "within five days of the filing of an election contest during the lengthy five months (beyond the initial 30 days) available for filing," rather than "[w]ithin five days after the end of the time allowed for filing statements of contest" as Section 16500 requires. (App. Br. at 12.) Appellant claims that his proposed revision to Section 16500 would "satisfy the overall legislative scheme and yet not be administratively burdensome." (*Ibid.*)

But, whatever the benefits might be of Appellant's proposed staggered-notification approach, the Court may not re-write Section 16500 to achieve

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[10] See *Dennis v. Superior Court in and for San Mateo County* (1948) 87 Cal.App.2d 279, 280 [holding the Elections Code does not provide a deadline for the trial court to schedule a trial after receiving notice from the clerk of the court but, "at most," requires the trial to be set within a "reasonable time"].)

[11] Appellant repeatedly states that the Elections Code imposes a requirement that a hearing on an election contest occur within a "maximum of 25 days" from the time the complaint is filed, (see, e.g., App. Br. at pp. 15-16,) but the Elections Code does not impose any such requirement. Indeed, *Anderson* explains that the Elections Code provides a 45-day time period for the superior court to hold a trial. (*Anderson, supra*, 56 Cal.App.3d at p. 787.)

Appellant's policy goals. (*Doe v. City of Los Angeles* (2007) 42 Cal.4th 531, 545 [holding the Court of Appeal may "not broaden or narrow the scope of the provision by reading into it language that does not appear in it or reading out of it language that does," or "rewrite" a statute]; *Stop Youth Addiction, Inc. v. Lucky Stores, Inc*. (1998) 17 Cal.4th 553, 573 [superseded by statute on other grounds] ["Our office, of course, 'is simply to ascertain and declare' what is in the relevant statutes, 'not to insert what has been omitted, or to omit what has been inserted.' . . .We are not authorized to insert qualifying provisions not included, and may not rewrite the statute to conform to an assumed intention which does not appear from its language."]; *Presbyterian Camp and Conference Centers, Inc. v. Superior Court of Santa Barbara County* (2019) 42 Cal.App.5th 148, as modified on denial of reh'g (Dec. 9, 2019) ["Our job is not to rewrite statutes to conform to an assumed intent that does not appear from their language."].) The Elections Code should be applied based on its plain language as the Legislature intended. (*Warden v. Brown* (1960) 185 Cal.App.2d 626, 628 [explaining that the Elections Code "is highly selective and ought to be read literally, that whatever appears to have been omitted should be considered as having been intentionally omitted and that no specific requirement ought now to be read into the law by construction."].)

In any event, even if this were an election contest and even if the trial court failed to follow any applicable time limits set forth in the Elections Code, Appellant is incorrect when he claims that the trial court would lack jurisdiction to decide the demurrer. (App. Br. at 16-17.) A trial court's failure to comply with the time limits set forth in the Elections Code does not divest the trial court of jurisdiction to decide an election contest. (*Garrison v. Rourke* (1948) 32 Cal.2d 430, 435 [overruled in other part not relevant here by *Keane v. Smith* (1971) 4 Cal.3d 932] [holding failing to comply with time requirements for election

contests does not divest the court of jurisdiction].) The time limitations provided in the Elections Code are not mandatory, but rather are directory. (*Id*. at pp. 435-436; see also *Briggs v. Brown* (2017) 3 Cal.5th 808, 851, as modified on denial of reh'g (Oct. 25, 2017) [explaining that, in *Garrison*, the Supreme Court held that the time limits set forth in the Election Code for the court's resolution of an election contest were "directory," not "mandatory"].) Therefore, there is no merit to Appellant's claim that the trial court would lack jurisdiction to dismiss an election contest outside the time periods set forth in the California Elections Code.

## VI. APPELLANT'S ARGUMENTS ABOUT THE BALLOT SIMPLIFICATION COMMITTEE AND PAID ARGUMENTS ARE NOT PROPERLY BEFORE THIS COURT.

In the final section of his brief, Appellant asks this Court to hold that the City's use of a Ballot Simplification Committee to prepare digests for measures, pursuant to San Francisco Municipal Elections Code Sections 515 and 600, is improper because it could lead to a "digest containing partisan materials that naturally reflects the BSC members' political leanings." (App. Br. at 33-34.) Appellant also asks the Court to "strike down the City's entire process of soliciting and placing paid arguments alongside official materials in the voter information guide" because he believes it "violate[s] public policy" for the City to allow proponents and opponents of a measure the opportunity to include paid arguments in the voter pamphlet, as authorized by San Francisco Municipal Elections Code Section 560. (App. Br. at 35-36.) Finally, Appellant contends that it is improper for the Board of Supervisors to approve a ballot question by ordinance that exceeds the word limits that otherwise would apply to ballot questions. According to Appellant, the Board's actions in that circumstance could cause measures placed on the ballot by the Board to have an advantage over

initiatives placed on the ballot by the voters, and thus could violate the "right to equal protection of the laws." (App. Br. at 36-37.)

Those arguments are not properly before this Court. Appellant's Complaint did not plead any challenge to San Francisco Municipal Elections Code, or raise any equal protection claims. Likewise, Appellant did not present any such arguments to the trial court. Therefore, Appellant cannot raise those claims for the first time on appeal. *Robinson, supra*, 57 Cal.App.4th at p. 648 ("Issues not presented to the trial court are waived on appeal.")

Appellant's new claims are also not justiciable. Appellant offers nothing to show that the City laws and practices he challenges are unlawful. Appellant contends that the City's elections laws and practices are unwise as a matter of policy, but those judgments are best left to the political branches, not the courts. (*County of San Diego v. State of California* (2008) 164 Cal.App.4th 580, 597 ["[A] court cannot substitute its judgment for that of the Legislature"].)

Likewise, Appellant offers nothing to show that he has standing to challenge San Francisco's Municipal Elections Code or to raise an equal protection claim. He does not show that he has any "special interest to be served or some particular right to be preserved and protected over and above the interest held in common with the public at large," or that he has any interests that are "concrete and actual, and not conjectural or hypothetical." (*People ex rel. Becerra v. Superior Court* (2018) 29 Cal.App.5th 486, 495–496, as modified (Nov. 28, 2018), review denied (Feb. 27, 2019) [quoting *Teal v. Superior Court* (2014) 60 Cal.4th 595, 599].) Instead, Appellant contends that the public as a whole will be harmed *if* the BSC digest reflects the biases of the BSC's members, *if* the inclusion of paid arguments harms public policy in some way, and *if* initiatives and referendums placed on the ballot by the voters at some point in the future are at a disadvantage when compared to a measure placed by the ballot by

the Board of Supervisors. Those hypothetical claims brought by someone without any interest in the matter beyond those "held in common with the public at large" cannot be adjudicated by the Court. (*Ibid.*)

Appellant claims that the Court should decide these matters now because the BSC digest, the ballot language and the inclusion of paid arguments can only be challenged "during the short 10-day mandatory public examination periods" before the City prints the ballots and voter pamphlets for the upcoming election and therefore the issues will "evade review." (App. Br. at 32.) Appellant's argument does not support his assertion that these issues will "evade review," and instead demonstrates the opposite. Any claims that arise about the impartiality of the digest, the ballot language and the inclusion of paid arguments with respect to any particular measure can be brought – and, in fact, must be brought – during the 10-day review period under California Elections Code Section 9295. During that time period, a court can resolve any challenges to the BSC digest, the voter pamphlet and the actions by the Board of Supervisors in the context of an actual dispute where the facts are known, rather than based on the hypotheticals and conjecture Appellant offers in his brief. (See *Huntington Beach City Council v. Superior Court* (2002) 94 Cal.App.4th 1417, 1423 [resolving claims to ballot and voter guide brought before the election]; *McDonough v. Superior Court* (2012) 204 Cal.App.4th 1169, 1171 [resolving challenge to ballot title and ballot question brought before the election]; *Horneff v. City and County of San Francisco* (2003) 110 Cal.App.4th 814, 824 [resolving challenge to BSC digest, explaining that the "purpose of section 9295 is to establish a preelection procedure for the timely correction of election materials"].)

Accordingly, the issues that Appellant claims are "evading review" are not properly before this Court and should not be considered.

## CONCLUSION

Respondents respectfully request that the Court affirm the trial court's judgment in its entirety. As explained herein, Appellant's challenge to Proposition A fails because it is not based on any of the exclusive grounds for a post-election contest set forth in Section 16100, it is time-barred, and it is barred by the Third Validating Act. Those defects cannot be cured through any amendment. Therefore, the trial court properly sustained the demurrer to the Complaint without leave to amend.

Dated: December 23, 2019

DENNIS J. HERRERA
City Attorney
WAYNE SNODGRASS
TARA M. STEELEY
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By: /s/Tara M. Steeley
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## CERTIFICATE OF COMPLIANCE

I hereby certify that this brief has been prepared using proportionately double-spaced 13 point Times New Roman typeface. According to the "Word Count" feature in my Microsoft Word for Windows software, this brief contains 11,458 words.

I declare under penalty of perjury that this Certificate of Compliance is true and correct and that this declaration was executed on December 23, 2019.

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## PROOF OF SERVICE

I, Pamela Cheeseborough, declare as follows:

I am a citizen of the United States, over the age of eighteen years and not a party to the above-entitled action. I am employed at the City Attorney's Office of San Francisco, City Hall, and 1 Dr. Carlton B. Goodlett Place, San Francisco, CA 94102.

On December 23, 2019, I served the following document(s):

**BRIEF OF RESPONDENTS JOHN ARNTZ AND DENNIS HERRERA**

on the following persons at the locations specified:

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[VIA PERSONAL SERVICE]

California Supreme Court
[Submitted Electronically Through the Court of Appeal E-Submission]

in the manner indicated below:

☒ **BY UNITED STATES MAIL**: Following ordinary business practices, I sealed true and correct copies of the above documents in addressed envelope(s) and placed them at my workplace for collection and mailing with the United States Postal Service. I am readily familiar with the practices of the San Francisco City Attorney's Office for collecting and processing mail. In the ordinary course of business, the sealed envelope(s) that I placed for collection would be

☒ **BY ELECTRONIC MAIL:** Based on a court order or an agreement of the parties to accept electronic service, I caused the documents to be sent to the person(s) at the electronic service address(es) listed above. Such document(s) were transmitted *via* electronic mail from the electronic address: pamela.cheeseborough@sfcityatty.org ☐ in portable document format ("PDF") Adobe Acrobat or ☐ in Word document format. OR

☐ **BY ELECTRONIC-SERVICE:** Based on a court order or an agreement of the parties to accept electronic service, I caused the documents to be served electronically through **File & ServeXpress or TrueFiling** in portable document format ("PDF") Adobe Acrobat.

I declare under penalty of perjury pursuant to the laws of the State of California that the foregoing is true and correct.

Executed December 23, 2019, at San Francisco, California.

Pamela Cheeseborough