THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION TWO

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. A160234 (Super. Ct. No. CPF-19-516970)

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

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STATEMENT OF THE CASE

This appeal is about JURISDICTION, specifically, the lack thereof by both the trial court and the court of appeal. Without JURISDICTION, ALL previous orders, decisions, and opinions are void for lack of authority.

The underlying contest is about HONEST BALLOTS, which through November 3, 2020 do not exist in any county in California.

When used in this brief, ELEC refers to sections of the Elections Code of 1994, as amended and effective through December 31, 2019. The Elections Code has undergone four codifications in 1872 (Political Code and Code of Civil Procedure 1111 to 1127), 1939, 1961, and 1994. In each code, the legislature renumbered sections while declaring that each code contains "continuations" of existing law. Prior to 1872, statutes were not codified. References for sections prior to 1872, may be referred to by the Act of 1850 itself or by the names of one of the statutory compilations that lawyers and courts used to more easily refer to the loose statutes and their amendments. When referring to language of previous section assignments in previous codes, to the extent needed, each previous number appears in brackets after the current section number, in the pattern ELEC 1994[1961][1939][1872][1850]. For example, ELEC 16100[20021][8511] [CCP1111][ACT59]. Similarly, CCP designates sections of the Code of Civil Procedure and GC designates sections of the Government Code.

"Ballot Statement" means the language that was printed and circulated by

Defendant Arntz on the consolidated ballot for the Measure for the Election Day.

"City" means the City and County of San Francisco.

"Contest" means the statement of contest filed on December 23, 2019 against Defendant Arntz and Defendant Herrara to set aside the Measure.

"Contest Law" means the opinions and holdings of the supreme court and the courts of appeal that have created the law of election contests. Specifically, Contest Law is the description of the law of election contest special proceedings that is summarized in the leading case, often cited and never overturned, commonly known to lawyers and judges as precedent, of *Rideout v. City of Los Angeles* (1921) 185 Cal. 426.

"Contest Rules" means the rules set by the legislature, in 1850, and now in Division 16 of the Elections Code that grant the county court jurisdiction and authority to hear an election contest special proceeding.

"Counsel" means counsel for the Defendants from the city attorney's office.

"Election Day" means November 5, 2019.

"Guide" means the separately printed voter information guide that was printed and circulated by Defendant Arntz that includes, among other materials, a sample ballot, the Ballot Statement, the digest for the Measure, the controller's statement for the Measure, the official arguments for the Measure, and the paid arguments for the Measure.

"Judge" means Ethan P. Schulman; "Presiding Judge" means Garrett L. Wong;

"Clerk" means Michael Yuen, "Trial Court" means the San Francisco County Superior Court.

"Measure" means the full text of the initiative (yes, initiative) without a petition submitted to the voters by the City at a special election for a local measure known as Proposition A that was consolidated with all other elections onto a single ballot in the City on the Election Day.

"Proposition 46" means the amendment to Article XIII-A of the constitution adopted on November XXX, 1986.

"SFMEC" means the San Francisco Municipal Elections Code.

Neither Counsel nor any of the courts thus far appear to have had any interest in the extensive historical research that Contestant has done. Explicitly, precedential opinions have been completely ignored.

Even though this court summarily dismissed all issues of a continuing nature in A152089 that are likely to evade review, Contestant will include all those issues in this brief, to preserve them for further review.

Nevertheless, those issues that continue to evade review are not the primary basis for this appeal. As previously stated, and to drive it home, this appeal is based on JURISDICTION and DUE PROCESS violations.

Besides the specific grounds under ELEC 16100, there is a contitutional ground under Proposition 46. The supreme court has recognized that constitutional grounds do not fall under ELEC 16100. They are independent grounds that can be

raised at any time and without time limit.

This proceeding is not a "continuation" of any prior proceeding. It is an election contest special proceeding based upon Contest Rules that set the grounds and jurisdictional requirements. Any prior proceeding, by law, could not have been an election contest special proceeding.

STATEMENT OF APPEALABILITY

This appeal is from the judgment of the Trial Court dismissing the Contest. 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

Prior to Election Day, Defendant Arntz printed and circulated ballots containing the Ballot Statement. (1 CT XXX.)

Prior to Election Day, Defendant Arntz printed and circulated the Guide. (1 CT XXX.)

On November 5, 2019, the City released the results of an earlier public records request which are available at the City's web site: http://sanfrancisco.nextrequest.com/requests/19-4048. Contestant requests that the court take judicial notice of the released public records under Evidence Code sections 451(f), 452(g), 452(h), and 453.

On November 26, 2019, the Board of Supervisors declared the results of the election for the Measure which established the primary jurisdictional requirement

for the Contest. (1 CT XXX)

On December 26, 2019, Contestant filed the verified statement of contest under ELEC 16400. The Clerk required the words "Petition Re" be added to the caption before the statement of contest, without which the Clerk would not accept the filing. (1 CT 8) The Clerk further required the term "contestant" be changed to "petitioner" and the term "defendants" be changed to "respondents."

On December 29, 2019, the Presiding Judge issued an order assigning the Judge to the matter. (1 CT 61)

On January 1, 2020, Contestant received a letter delivered via first class mail to his home address containing the notice of assignment to the Judge. (1 CT 61)

On January 3, 2020, Contestant filed a peremptory challenge against the Judge. (1 CT 66)

Missing from the record, but relevant, on January 3, 2020, Contestant filed and served on Counsel an Affidavit to Continue Trial Before Commencement Not Exceeding 20 Days under Contest Rules. (1 CT 66)

On January 6, 2020, Counsel notified Contestant of an ex parte hearing on January 7, 2020 to "confirm ... the briefing schedule."

On January 7, 2020 at 9:22 a.m., while Contestant was on his way by bus to appear at the purported ex parte hearing, he received an e-mail from Counsel Maldonado with attachments for Ex Parte App and MPA regarding Hearing Schedule and Peremptory Challenge. (1 CT 195) At the outset of the ex parte

hearing, the Judge overruled all of Contestant's objections. Regarding Counsel's surprise inclusion of the peremptory challenge at the ex parte hearing, the Judge said "the presiding judge appointed me."

On January 8, 2020, Contestant received the Briefing Schedule Order. (1 CT 202)

On January 11, 2020, Contestant received the order, delivered via first class mail postmarked January 9th from the Judge, striking the peremptory challenge. (1 CT 208)

On January 15, 2020, Contestant filed objections to the order striking the peremptory challenge and an unrebutted affidavit containing additional facts, surrounding the proceedings prior to January 13, 2020. (1 CT 213)

On February 5, 2020, the Judge issued an order granting Counsel's demurrer. (1 CT 1193)

For the purpose of establishing a pattern of behavior, Contestant requests that this court take judicial notice of the ballots and guides that Defendant Arntz printed and circulated for local measure elections held on November 6, 2018, on November 5, 2019, on March 3, 2020, and on November 3, 2020 under Evidence Code sections 451(f), 452(g), 452(h), and 453.

ARGUMENT

Just so it's crystal clear to this court, this appeal is primarily about JURISDICTION, specifically, the LACK thereof. The next THREE arguments are

about JURISDICTION. JURISDICTION was raised in the Trial Court, but that doesn't matter because JURISDICTION can be raised at any time. This court completely ignored JURISDICTION in its previous opinion (A152089) where Contestant was before this court.

The Trial Court, the Clerk, and the Presiding Judge all ignored Contestant's best efforts in trying to correct and educate them regarding Contest Rules.

Contestant gets it. Setting aside an election is tough medicine. The solution, however, is not to weasel around and avoid the issue, trying to find some attenuated distinction in order to avoid following the law in collaboration with Counsel and the City. The solution is for the City to conform to the law that the legislature has mandated. Upholding cheating on the ballot, by whatever means necessary, as it appears this court is wont to do, undermines the integrity of the entire elective franchise as well of the integrity of a judiciary that appears hell bent on favoring government over the people in the face of explicit law to the contrary.

Contestant is fully aware that courts at all levels are capable of prejudging any case by deciding the outcome first and then backfilling the reasoning no matter how dishonest and unsound.

It's the City, not the Contestant, that has put this court in the position it is in. The law on initiative measures, whether by petition or by resolution of a governing body, has not fundamentally changed in over 100 years. Counsel is dead set on protecting the City's lawlessness. Neither the Trial Court nor this court should act

in furtherance of the City's scheme. That, by definition, would be a conspiracy among all three departments of government.

Contestant is entitled to a trial of the Contest (ELEC 16403). A trial consists of opening statements, presentation of evidence, closing arguments, and supporting trial briefs, as deemed necessary by the parties or the judge conducting the trial. Under Contest Law, that should have happened in January 2020.

I. The Judge Lacked Jurisdiction To Make Any Decisions On The Contest

A. A Timely Peremptory Challenge Against Judge Under CCP 170.6 Is Automatic And Not Contestable

As this court most certainly understands, Contestant had a statutory right to file a peremptory challenge and exercised that right (1 CT 64). Counsel objected to neither the timeliness of the challenge, nor any other defect. The affidavit of prejudice is not contestable and the disqualification of the judge is automatic. The Presiding Judge had a duty to assign another judge, but did nothing.

CCP 170.6 is in the general provisions, Part 1 ("Of Justice Courts") of the Code of Civil Procedure. It specifically applies to and distinguishes "civil or criminal action or special proceeding of any kind." When timely made, it effects no delay in an election contest special proceeding. Counsel knew this. The Judge is presumed to have known this. The Presiding Judge is presumed to have known this. Yet here we are.

The Trial Court appears to be engaged in a pattern of flagrant disregard for

rules that can only be explained by bias, perhaps because Contestant is not paying a lawyer, perhaps because it believes it can get away with it, perhaps because the powerful special interests backing the Measure would be displeased (may we say outraged?) that their payday is tied up in this Contest because the City cheated on the ballot, perhaps because it is working in concert with Counsel to make this proceeding go away by any means necessary, or perhaps because the City is stuffing money into the Judge's pocket without public disclosure. See Political Reform Act discussion below.

CCP 170.6(a)(4) makes the duty of the Presiding Judge mandatory: "If the motion is duly presented, and the affidavit or declaration under penalty of perjury is duly filed ..., thereupon and without any further act or proof, the judge supervising the master calendar, if any, shall assign some other judge."

Yet, in a bald-faced act of defiance, the Presiding Judge allowed the Judge to hold an illegal and surprise ex parte hearing four days after Contestant filed the timely peremptory challenge. The Judge overruled Contestant's objection at the hearing in an act of express bias. The Judge allowed Counsel to make the surprise, unnoticed peremptory challenge argument at the hearing. The Judge peremptorily shut down Contestant's due process right to respond on the surprise issue. The Judge then, days later, ordered his own peremptory challenge stricken without any basis in fact or law.

This court is bound by the opinions of the supreme court. (Contestant feels

compelled to remind this court that its duty is to deal with the Contest within the confines of the law, not to make law or to avoid law in order to reach its preferred decision.) In *McCartney v. Commission on Judicial Qualifications* (1974) 12 Cal.3d 512, the opinion, in effect, read the riot act to the judge who was griping about the repeated use of peremptory challenges against him. *McCartney* went so far as to censure that judge.

> It is well recognized that in enacting Code of Civil Procedure section 170.6 the Legislature guaranteed to litigants an extraordinary right to disqualify a judge. The right is "automatic" in the sense that a good faith belief in prejudice is alone sufficient, proof of facts showing actual prejudice not being required. (E.g., *Pappa v. Superior Court* (1960) 54 Cal.2d 350, 353; *Mayr v. Superior Court* (1964) 228 Cal.App.2d 60, 63.) Accordingly, the rule has developed that, <u>once an affidavit of prejudice has been filed under section 170.6, the court has no jurisdiction to hold further proceedings in the matter</u> except to inquire into the timeliness of the affidavit or its technical sufficiency under the statute. (See, e.g., *Andrews v. Joint Clerks etc. Committee* (1966) 239 Cal.App.2d 285, 293-299, upholding court's power to inquire as to timeliness; *Lewis v. Linn* (1962) 209 Cal.App.2d 394, 399-400, upholding court's power to inquire into sufficiency.) <u>When the affidavit is timely and properly made, immediate disqualification is mandatory.</u> (*Jacobs v. Superior Court* (1959) 53 Cal.2d 187, 190.) Hence, [the Judge] was bound to accept proper affidavits without further inquiry. (<u>Emphasis</u> supplied.)

Can it not be more clear? Or will this court entertain the same inane, concocted arguments (that a special proceeding is a continuation of a civil action) that the Judge swallowed (wink, wink) hook, line, and sinker? Counsel, besides lying in the notice for its ex parte application (discussed below), abrogated its duty under Rule 3.3 of the California Rules of Professional Conduct as well. Counsel had a duty to "disclose to the tribunal* legal authority in the controlling jurisdiction

known* to the lawyer to be directly adverse to the position of the [Defendants]." Just another day in the life of Counsel, lying and cheating, to win by any means necessary. Or will Counsel just hide behind a stupidity defense?

This court must hold that the peremptory challenge was effective upon filing on January 3, 2020. This court must further hold that all actions of the Judge in connection with the Contest after January 3, 2020 are void as a matter of law because the Judge lost any jurisdiction he might have previously had personally.

The only real question remaining for this court is whether it will further subject Contestant to a clearly lawless and biased Trial Court.

The only reason for this court to allow this entire charade to continue is to wear Contestant down by permitting knowing and willful violation of Contest Rules, statutory rules, and rules of court by the Trial Court to go unsanctioned.

This court should sanction all involved in this scheme, *i.e.*, the Presiding Judge for standing idly by, the Judge for knowingly violating Contestant's right to due process, the Clerk for forcing Contestant into his "civil action" box, and Counsel for knowing, willful, and mendacious contact in its effort to enlist the Trial Court in its scheme to gain advantage, all using public moneys, in deep-sixing the Contest. And why is Counsel and personnel of the Trial Court acting in such a way? To protect the City's unlawful use of the ballot to ostensibly fix (as in "the fix is in") local measure elections.

Thus far this court's conciliatory[WORDXXX] and obeisant conduct toward

Counsel, at every step of the way, brings discredit upon this court and is much more than the "mere appearance of impropriety."

This court's actions thus far, even in the matters preliminary to this brief, let alone its previous conduct in A152089, begs the question whether the entire system that the People created under the California Constitution is corrupt to its core.

B. The Judge Received "Gifts" Of Many Thousands of Dollars In Violation of CCP 170.9

Contestant will not belabor this point, but the legislature has purportedly legitimized unlawful payments by the City to all the judges of the Trial Court.

The Judge is receiving regular payments from the City in the thousands of dollars annually. CCP 170.9(l) defines gift.

> "Gift" means a payment to the extent that consideration of equal or greater value is not received ... A person ... who claims that a payment is not a gift by reason of receipt of consideration has the burden of proving that the consideration received is of equal or greater value.

What consideration of equal or greater value is the City receiving for its payments? (Rulings favorable to its positions?) Is the City claiming that it is receiving consideration? Is the Judge, or any of the judges of the Trial Court, providing anything of equal or greater value in return?

Trial court judges are elective positions. Every county elects its judges. Elections are not referendums on the quality of candidates. Almost all trial court judges are, initially, appointed. For the less ambitious, they are as good as lifetime

jobs as long as they keep their profile low. The number of elections that are actually contests is so puny as to surprise voters when they actually have an opportunity to vote in a judicial election.

Some counties provide no payments. Some counties provide lesser payments. Some counties provide more payments. Each judge has the same, equivalent duties, as assigned by another judge. The disparity in payments from zero to upwards of $60,000 annually does not pencil out as based on consideration, which is the key component in the definition of gift.

In *Sturgeon [I] v. County of Los Angeles* (2008) 167 Cal.App.4th 630, compensation paid by counties to judges was determined to be unconstitutional and illegal. The court held: "Because the benefits provided by the county are compensation within the meaning of section 19, article VI of our Constitution, and because this record does not establish those benefits have been prescribed by the Legislature, the trial court erred in granting the county's motion for summary judgment."

Almost immediately after the decision in *Sturgeon I* was published, in 2009, the justices of the supreme court saw the writing on the wall. They wrote a bill known as SBX2-11 that added GC 68220, GC 68221, and GC 68222. They got the President Pro-Tempore of the state Senate at the time, Darrell Steinberg, to sponsor it. Obviously, this was a "big f...ing deal."

Section 5 of SBX2-11, which did not make it into the Government Code where

all could see the ugly truth, recognized that the payments were illegal civilly and criminally, and immunized all parties for their clearly illegal conduct. "Notwithstanding any other law, no governmental entity, or officer or employee of a governmental entity, shall incur any liability or be subject to prosecution or disciplinary action because of benefits provided to a judge under the official action of a governmental entity prior to the effective date of this act on the ground that those benefits were not authorized under law." The legislature is describing the felony in Penal Code 424(a)(2). Nearly every judge in the state was an unindicted felon. Wouldn't it be nice if regular folk were represented like that in the legislature? Just make all wrong-doing disappear with the stroke of a pen. No disgorgement either. Take that you sucker taxpayers!

In *Sturgeon [II] v. County of Los Angeles* (2010) 191 Cal.App.4th 344, the same court "reaffirmed the principle that judicial compensation is a state, not a county, responsibility. We found that by providing substantial employment benefits to its superior court judges, defendant County of Los Angeles (the county) violated article VI, section 19 of our Constitution, which requires that compensation for judges be prescribed by the Legislature." Then it went on to address the new, emergency legislation that was rushed through the Legislature and signed by lame-duck Governator Arnold Schwarzenegger.

Neither the whoops-we-were-wrong holding in *Sturgeon [III] v. County of Los Angeles* (2015) 242 Cal.App.4th 1437 nor SBX2-11 deal with gifts under CCP

170.9, which was amended subsequently to SBX2-11. That court even noted the wide disparity in "benefits" ("something that produces good or helpful results or effects or that promotes well-being" per Merriam-Webster Dictionary).

According to the records released by Contestant's public records request, every judge of the Trial Court is receiving payments under GC 68220. In fact, GC 68220 requires that they all receive it, unless they decide that none of them can receive it. Just like the Three Musketeers, it's one for all, and all for one.

The Judge did not report these gifts on his Form 700 filing. Contestant will address that issue below.

C. The Political Reform Act Prohibits ALL Judges In San Francisco From Hearing The Contest

The voters of this state passed Proposition 9, the Political Reform Act ("PRA"), as an initiative statute in 1974. Chapter 1 concerns General provisions, including purposes and provision for amendment. Chapter 2 concerns Definitions. Chapter 7 concerns Conflicts of Interest.

As enacted, GC 82048 read: "Public official" means every member, officer, employee or consultant of a state or local government agency.

Chapter 7, GC 87100, provides a broad statement of the prohibition on conflicts of interest:

> No public official at any level of state or local government shall make, participate in making or in any way attempt to use his official position to influence a governmental decision in which he knows or has reason to know he has a financial interest.

GC 87103(c) further clarifies what a "financial interest" means.

The original language,

> Any source of income, other than loans by a commercial lending institution in the regular course of business, aggregating two hundred fifty dollars ($250) or more in value received by or promised to the public official within twelve months prior to the time when the decision is made; or ...

has been slightly amended for clarification, but has closely tracked the original purposes and intent of the PRA.

> Any source of income, except gifts or loans by a commercial lending institution made in the regular course of business on terms available to the public without regard to official status, aggregating five hundred dollars ($500) or more in value provided or promised to, received by, the public official within 12 months prior to the time when the decision is made.

The Judge and all other judges in the Trial Court have received "income" of more than $500 from the City in the prior 12 months. (See public records request, *supra*.) The Judge, therefore, has an unreported "financial interest" in the City. It follows that the Judge "shall make" no "governmental decision" in the Contest against the City.

However, in 1984, the legislature amended GC 82048 to exempt the entire judicial department. Stats. 1984, Ch. 727, Sec. 5.

In *Sturgeon I*, the court observed: "Although the record is not entirely clear, it appears that at some point in the late 1980's the county began providing its superior and municipal court judges with employment benefits in addition to the salary prescribed by the Legislature." Isn't it curious how that works out? The

legislature exempts judges from conflict of interest and disclosure rules and all of a sudden counties start giving judges a little (27% in the case of Los Angeles County) something extra.

GC 81012, however, provides that "This title may be amended to further its purposes by statute ..."

Contestant contends that the legislature had no authority to exempt judges from the definition of "public official" because exempting judges does not further the purposes of the PRA.

In *Amwest Surety Ins. Co. v. Wilson* (1995) 11 Cal.4th 1243, the court considered, for the first time, the issue of the legislature amending an initiative statute containing the condition "to further its purposes." *Amwest* involved Proposition 103, an insurance reform initiative statute. The legislature amended Proposition 103 to "clarify" that "surety" insurance was not covered by the initiative statute. The court in *Amwest* held:

> The question before us is not whether exempting surety insurance from some of the provisions of Proposition 103 furthers the public good, but rather whether doing so furthers the purposes of Proposition 103. We hold that it does not. Because Proposition 103 expressly permits its provisions to be amended without voter approval, but only when to do so would further the purposes of the initiative, section 1861.135 is invalid.

This is precisely analogous to the amendment of GC 82048. It follows that the legislative amendment to exempt judges is invalid. As a result, the Judge has a conflict of interest under the PRA and all his decisions regarding the Contest are

void.

The purposes of the PRA with respect to conflicts of interest are set out in GC 81001(b).

> The people find and declare as follows:
> ...
> (b) Public officials, whether elected or appointed, should perform their duties in an impartial manner, free from bias caused by their own financial interests or the financial interests of persons who have supported them;

As the backdrop for the only two amendments to GC 82048, the legislature enacted the judicial exclusion before the counties began paying judges in the late 1980s or early 1990s (See *Sturgeon I*). The amendment in 2004, according to the legislative history, was strictly to add another exclusion and not change or ratify the 1984 change.

Thus the opinion in *Fair Political Practices Com. v. Suitt* (1979) 90 Cal.App.3d 125 fits very directly into a rather strong argument that, whether or not the legislature had the authority to make the change, the circumstance of 90% of the superior court judges in California receiving payments from their counties could not have been foreseen by the legislature.

The prophylactic SBX2-11 in 2009 pretty clearly shows that the legislature was not even aware of the situation until *Sturgeon I* was decided.

Below Contestant substitutes the judges being paid (bribed) by the counties into the *Suitt* opinion. It's a perfect fit.

> But a very obvious reason for the absence of discussion of [judges

> being excluded from the definition of public officials for conflict reporting purposes] is not that the act intended such to remain secret and undisclosed, but that [unconstitutional payments to judges] are per se illegal. Gifts of public money to [judges] are prohibited by [article VI, section 19] of the California Constitution. It was thus inconceivable in 1974 to the draftsmen of the initiative measure [or the legislature in 1984], and to the electorate, that public funds would be expended by or for the benefit of [judges]. Hence the need to specify such a proscription in the act would have been deemed unnecessary, and even demeaning to [judges] generally. It does not follow however that such expenditures were meant to be unreportable, for the electorate would then be saying in effect: "We recognize that such a use of public money is illegal and unconstitutional, but where it nonetheless occurs, it may be kept secret." This is absurd. The act's silence bespeaks incredulity that such practices would occur rather than an intent to exempt them from disclosure.
>
> The act undeniably was intended to deal comprehensively with the influence of money, all money, on electoral and governmental processes. Its paramount purpose, as expressed in section [87100], is that ["No public official at any level of state or local government shall make, participate in making or in any way attempt to use his official position to influence a governmental decision in which he knows or has reason to know he has a financial interest."] [87103(c)] It would be anomalous in the extreme to hold that such a blatantly improper practice as a gift of public money to a [judge] was nevertheless intended to remain undisclosed under the act.

By analogy, Contestant contends that in 1974, judges were not exempt. In 1984 when the legislature purportedly made them exempt, it was inconceivable that they would be paid in an unconstitutional manner, *i.e.*, other than by the legislature.

The cover provided by the unauthorized amendment in 1984 opened the floodgates to hidden conflicts of interest. It was only when a lawyer in private practice in Los Angeles discovered the hidden, illegal payments, that it became public knowledge. The corrupt system exacted a heavy revenge on that lawyer.

This court should hold that Stats. 1984, Ch. 727, Sec. 5 is an invalid amendment to an initiative statute, making subparagraph (b) of the current version of GC 82048 invalid. This court should further hold that the Judge's orders are void due to an actual conflict of interest.

II. Trial Court Lacked Jurisdiction To Consider An Ex Parte Application

Three days before the ex parte application, Contestant filed a peremptory challenge against the Judge. The Judge lacked jurisdiction to consider anything with respect to the Contest.

An election contest special proceeding is, by law (*Dorsey v. Barry* (1864) 24 Cal. 449; *Anderson v. County of Santa Barbara* (1976) 56 Cal.App.3d 780), already an expedited proceeding requiring a trial with 45 days.

Nowhere in Contest Rules is there provision made for an ex parte application. Nowhere in Contest Rules is there provision made for a briefing schedule.

A. The Trial Court Lacked Jurisdiction To Hold An Ex Parte Hearing

"In special proceedings, the Court vested with jurisdiction by the statute possesses only such powers as the Act creating the special case has conferred, and in the exercise of those powers it is limited by the terms of the Act." *Dorsey v. Barry* (1864) 24 Cal. 449.

The Trial Court is bound by precedent. The Trial Court lacked jurisdiction.

The orders of the Trial Court setting a briefing schedule and striking the peremptory challenge are both void.

B. Ex Parte Hearing Is Limited To Emergencies

Even under the California Rules of Court, an ex parte hearing is only permitted in situations of irreparable harm or immediate danger (Cal. Rules of Court, rule 3.1202(c)) and with specific notice of the relief sought (Cal. Rules of Court, rule 3.1204(a)(1)).

Under Contest Rules, the hearing date (ELEC 16500) set by the Presiding Judge is the trial date. It's the date to hear the Contest.

Under Contest Rules, the trial date could be continued by affidavit (ELEC 16600). Contestant filed an affidavit for continuance to January 30, 2020 under Contest Rules on January 3, 2020. Counsel had the same procedure available to it.

In the first instance, this court should not condone abuse of court rules. A briefing schedule before trial is not permitted by Contest Rules. Neither the Trial Court nor the Presiding Judge had jurisdiction to set a briefing schedule.

"An applicant must make an affirmative factual showing" of "irreparable harm, immediate danger, or any other statutory basis." Cal. Rules of Court, rule 3.1202(c). No statutory basis is provided in Contest Rules.

The application "must be accompanied by a declaration regarding notice" stating "the relief sought." Cal. Rules of Court, rule 3.1204(a)(1). The notice Counsel sent to Contestant at 9:26 a.m. on January 6, 2020 stated that it was for a "briefing schedule."

"Briefing schedule" is code for a demurrer (prohibited under Contest Rules),

which is exactly what Counsel ultimately filed.

C. Professional Misconduct By Lying and Surprise Violates Due Process

Counsel lied in the notice for the ex parte application that the purpose of the hearing was to set a "briefing schedule."

The Judge had already demonstrated actual bias in A152089 by refusing to follow Contest Rules. Counsel's noticed basis for the ex parte hearing was the "briefing schedule." Less than two hours before the hearing, while Contestant was en route, Counsel surprised Contestant by adding argument to overcome the "peremptory challenge." The Judge demonstrated further actual bias and violated Contestant's right to due process by permitting Counsel to proceed over Contestant's objection, and further, by not providing Contestant a meaningful opportunity to respond.

Fraud vitiates all.

This court should hold that the ex parte application violated the court's own rules and that any acts issuing therefrom are void. This court should further hold that Counsel and the Judge violated Contestant's right to due process by considering a surprise argument based on a lie in the notice as to the true purpose of the ex parte application.

III. Trial Court Had No Jurisdiction to Consider Demurrer under Contest Rules

The Judge and Counsel are clever. Anticipating Contestant's contention (based

on A152089) that the Trial Court lacks jurisdiction to consider a demurrer under Contest Rules, the device for the demurrer became the "briefing schedule." Counsel's "brief" was couched in terms of "Opposition." It wasn't a brief related to Contest Rules, Contest Law, or the merits of the Contest. It was a series of objections, otherwise known as a demurrer. The Judge entertained Counsel's demurrer prior to the trial required by ELEC 16500.

Substance rules form. Just like the ex parte application, the Trial Court lacked jurisdiction to hold any pre-trial hearings.

Dorsey, *supra*, is binding on this court. Contestant has a statutory right to a trial of the Contest. (ELEC 16403).

This court should hold that the Judge's order dismissing the Contest is void for lack of jurisdiction.

IV. Measure Violates Proposition 46's Restrictions on Use of Bond Proceeds

Challenges based on the Constitution are outside the scope of Contest Rules.

Friends of Sierra Madre v. City of Sierra Madre (2001) 25 Cal.4th 165 held that the courts recognize that elections may be set aside on grounds other than those specified in Contest Rules.

There is no statute of limitation for a constitutional challenge, just as there was no statute for a CEQA challenge in *Friends of Sierra Madre*.

If this court wheedles its way around addressing the statutory grounds for the Contest under ELEC 16100, then it must address the constitutional grounds.

City Controller Rosenfield is provided several pages in each Guide to explain City debt. Under the heading "What Is Bond Financing?", Rosenfield describes the general purposes for which bond proceeds can be used, followed by the two kinds of bonds that must be voted on in the City, general obligation bonds and revenue bonds.

Revenue bonds are repaid by revenue generated by the facilities or by general city taxes. General obligation bonds, of which Proposition 46 bonds are one example, are repaid by *ad valorem* taxes on property.

"Affordable housing programs" (Rosenfield's words) are not public facilities, as those in the nature of "police stations or parks." Affordable housing, whatever that means, does not mean free housing nor is it something that the general public benefits from in the same way it benefits from every other one the examples he uses. Rosenfield's distinction goes to the heart of this issue. The proceeds from Proposition 46 bonds may only be used for "the acquisition or improvement of real property."

While housing sounds like it relates to real property, the Measure goes well beyond the limited purposes permitted. By its own terms it provides programs, even programs especially for City and school district employees. The Measure itself is self-servingly vague as to all the programs, but reading the official arguments and the paid arguments which describe the promises being made, the proceeds will be used for "down payment assistance," "housing subsidies,"

"oversight," and all manner of other vague purposes. The Measure describes not a single specific project to acquire or improve real property. It's a pretext for a blank check. The public will only discover what the proceeds will actually be used for after bonds are issues and property taxes accrue, when it will be to late to doing anything about it.

The Measure, based on the arguments of proponents who have the inside scoop, will under some of the programs be used to underwrite subsidies to individual tenants or owners in facilities that are not "acquired" at all.

Section 2 of the ordinance explicitly describes the Measure is "for the programs described in the amount and for the purposes stated."

After calling it a "project" in Section 2, Section 3 calls the six items (A through F) the "Proposed Program." Five allocations are made for "Public," "Low Income," "Middle Income,", "Senior,", and "Educator" Housing programs and one for the City's "Citizens' Oversight Committee."

While some of the "programs" use some of the proceeds for acquisition or improvement of real property, all of the "housing programs" will generate revenue. None of the favored classes of needy people will be getting something for free. The City will be their landlord, collecting rents. This is precisely the kind of program that Rosenfield says revenue bonds are to be used for.

Note that two of the "programs" are "Public Housing" and "Low Income Housing." Nothing is mentioned in the Measure about whether any of those

programs comply with Article XXXIV (Public Housing Project Law.) By its terms, Article XXXIV preempts the field with respect to "low rent housing project" and "persons of low income" which it defines.

Article XXXIV expresses prohibits any "low rent housing project" unless the voters "approve such project." The Measure allocates money for speculative, undefined "projects," that have not been approved by the voters.

> No low rent housing project shall hereafter be developed, constructed, or acquired in any manner by any state public body until, a majority of the qualified electors of the city, town or county, as the case may be, in which it is proposed to develop, construct, or acquire the same, voting upon such issue, approve such project by voting in favor thereof at an election to be held for that purpose, or at any general or special election.

The fact that rents will be collected is never even disclosed in the Measure. Rents are certainly mentioned. Even in the Ballot Statement it says "rental or home ownership opportunities." How much rent and other revenue does the City expect to generate from all these "housing programs?" Silence.

All these programs, while certainly magnanimous and philanthropic, are needed to keep a steady supply of human chattel available to serve the wealthy, the elite, and the connected, who don't want to perform the menial, low-paying work. It's a subsidized cheap labor program. Should the City borrow money to do it? That's for the voters to decide. Can it impose *ad valorem* property taxes to do it? No. The programs generate revenue. Unlike police stations and parks, these projects do not benefit all property owners collectively.

And all these programs require administration. The Measure doesn't say where the money for all the bureaucracy to administer these programs will come from. Will the rents fund the City's bureaucracy and all the do-gooder NGOs that will line up with their collective hands out to feed at the government trough? The devil is in the details. The Measure is very short on details.

Facially, the Measure fails to explicitly restrict the use of bond proceeds to "the acquisition or improvement of real property." By its own terms, proceeds will be used for what appears to be a bank-like or landlord-like system that will return a continuing and never-ending revenue stream to the City. None of the proceeds will be used for public facilities.

This court should hold that general obligation bonds repaid with *ad valorem* property taxes are not permitted for any other purpose than the constitution provides.

Acquisition or Improvement

The ordinary meaning of acquisition is "the act of acquiring something." (http://www.merriam-webster.com/dictionary/acquisition) The ordinary meaning of "acquire" is "to get as one's own." (http://www.merriam-webster.com/dictionary/acquire) When you acquire something, it becomes yours, as in ownership.

The ordinary meaning of "improvement" is "something that enhances value or excellence." (http://www.merriam-webster.com/dictionary/improvement). The

California Constitution is replete with the usage of improvement in connection with real property. No legislative body can expand or alter the meaning of words in the constitution. A survey finds the following instances.

Article I, Sec. 19, concerning eminent domain: "Public work or improvement" means facilities or infrastructure for the delivery of public services ..."

Article XI, Sec. 11, concerning separation of authority between the legislature and local governments.

Article XIII, Sec. 11, concerning taxability of certain local government improvements.

Article XIII, Sec. 13: "Land and improvements shall be separately assessed."

Article XIII A, Sec,. 1, concerning limitation on use of proceeds for Proposition 46 bonded indebtedness.

Article XIII D, Sec. 2 and Sec. 4, concerning proportional assessment of capital cost versus maintenance for permanent public improvements.

Article XV, Sec. 1, concerning exclusion of "improvement of real property" from personal purposes in usury.

Article XVI, Sec. 16, concerning assessment and repayment of Proposition 46 bonded indebtedness.

Article XVI, Sec. 19, concerning debt limitation and majority protest proceedings in allocation of assessments for "any public improvement, or the acquisition of any property for public use."

Article XIX, Sec. 2, concerning use of motor vehicle revenues for improvement of public streets and public mass transit.

Article XIX A, Sec. 1, concerning loans for "public transit capital improvement projects."

Article XIX B, Sec. 2, concerning use of motor vehicle fuel sales tax revenues for "public transit capital improvement projects."

Article XXII, Sec. 1, concerning contracting with private entities for service related to "public works of improvement."

All of the above usages of "improvement" concern something added to real property as distinguished from maintenance, repair, and many of the other words used in the Measure.

The purpose of the uses of Proposition 46 bond proceeds is to fund "land and buildings." That's what the Legislative Analyst's Office opinion printed in the state voter information guide. "[T]he money raised through the sale of the bonds must be used exclusively to purchase or improve real property (that is, land and buildings)." "Exclusively" comports with the narrow construction afforded exceptions to the rule. It authorizes debt secured by real property for land and buildings. That is congruent with the term "real property."

Every assessor knows what an "improvement" is. Just ask. Cutting grass, cleaning windows, painting, repairing damage, and on and on, are not improvements in any sense of the word as it is used repeatedly throughout the

constitution.

Even exclusive use is not acquisition. Certainly liens, agreements, memoranda of understanding, leases, financing, and other such acts connected with real property are not acquisition as well. The authors of the very next subparagraph in the constitution understood this. When they proposed Proposition 39 in 2000, they not only reduced the threshold for voter approval for general obligation bonds for school districts, but also expanded the uses from "improvement" to "construction, reconstruction, rehabilitation, and replacement" and from "acquisition" to "lease and acquisition." They further understood that "furnishing and equipping" are not capital improvements and added those uses as well. When any of the vague programs in the Measure are implemented, will the City be adding amenities to its rental units? The Measure doesn't say, but whatever it adds after a building is acquired or an improvement is made, cannot be funded by proceeds from Proposition 46 bonds. Where is that money going to come from?

The Measure never discusses a single project. It fraudulently hides the fact that the use of borrowed money will generate an entirely new, shall we say permanent, revenue stream that will not be used to pay the principal and interest on the borrowed money, but will pour into the City's general funds to do with as it wishes. The Measure doesn't even bind itself to use any revenue, either from existing tax streams or new ones created as a result of the Measure, for upkeep. The City is under no obligation to use its general funds to maintain and otherwise

keep up the acquisitions or improvements. It can let the buildings deteriorate over the years, just as it has let its previous, grand schemes deteriorate. Buildings can't complain. That's the way the City likes it.

On its face, the Measure says it will use bond proceeds for purposes not authorized by law. That's a felony under Penal Code 424(a)(2). It avoids saying too much, but it's clear from the materials in the Guide what the City has promised, but not in writing, the Measure's supporters.

The Measure speaks for itself. The Measure violates the Constitution. This court lacks jurisdiction to second-guess the City and "fix" the Measure. It fails to qualify for the ballot on its face.

This court must hold that the Measure purports to use bond proceeds for purposes not authorized by the constitution. This court must set aside the election for the Measure on this ground alone.

V. Grounds for Election Contest

To preserve the issues raised in the Contest for further review, Contestant will briefly address each of the seven grounds.

Contest Law has been eloquently and concisely summarized in *Rideout*, *supra* at 430-431. It 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.]

Note that "a violation of a mandatory provision vitiates the election." "If the act enjoined goes to the substance or necessarily affects the merits or results of the election, it is mandatory." Unlike the entire body of court opinions that deal with counting votes, there is no requirement of proof that votes would have changed. In fact, vote counting opinions are, on the whole, solely about whether the challenged votes were lawful and to which side the vote accrues.

Language from *Rideout* is cited in almost every opinion involving contested elections, whether or nor it is attributed as the source of the language. It expresses the law. This court is bound by that law.

Every one of the grounds is a substantive issue, not a procedural matter. Every one of the grounds involves printed words presented to voters on the ballot or in the Guide. Every one of the grounds involves official printed matter with all the gravitas and influence that such official material may enjoy. Every one of the grounds necessarily affect the merits of the Measure. Every one of the grounds necessarily affects the decision of whether to vote yes or no.

The Ballot Statement the Defendant Arntz printed and circulated contains 165 words and reads as follows.

> SAN FRANCISCO AFFORDABLE HOUSING BONDS. To finance the construction, development, acquisition, and preservation of housing affordable to extremely-low, low and middle-income households through programs that will prioritize vulnerable populations such as San Francisco's working families, veterans, seniors, and persons with disabilities; to assist in the acquisition, rehabilitation, and preservation of existing affordable housing to prevent the displacement of residents; to repair and reconstruct distressed and dilapidated public housing developments and their underlying infrastructure; to assist the City's middle-income residents or workers in obtaining affordable rental or home ownership opportunities including down payment assistance and support for new construction of affordable housing for San Francisco Unified School District and City College of San Francisco employees; and to pay related costs; shall the City and County of San Francisco issue $600,000,000 in general obligation bonds with a duration of up to 30 years from the time of issuance, an estimated average tax rate of $0.019/$100 of assessed property value, and projected average annual revenues of $50,000,000, subject to independent citizen oversight and regular audits?"

For The Matters Raised In This Contest, The Legislature Has Preempted The Field

"As to matters of statewide concern, charter cities remain subject to state law." *Sonoma County Org. of Pub. Employees v. Cty. of Sonoma* (1979) 23 Cal.3d 296

San Francisco is a charter city. Elections are a matter of statewide concern.

> It has long been settled that, insofar as a charter city legislates with regard to municipal affairs, its charter prevails over general state law. (E.g., *Ex Parte Braun* (1903) 141 Cal. 204, 209; *Professional Fire Fighters, Inc. v. City of Los Angeles* (1963) 60 Cal.2d 276, 291.) However, as to matters of statewide concern, charter cities remain subject to state law. (*Bishop v. City of San Jose* (1969) 1 Cal.3d 56, 61-62.)
> *Sonoma County*, *supra*.

"What constitutes a strictly municipal affair is often a difficult question; ultimately it is an issue for the courts to determine." *Sonoma County*, *supra*.

The legislature has a constitutional duty to "prohibit improper practices that affect elections." That duty is not delegable. Does anyone have the temerity, with a straight face, to say that elections are not a matter of statewide concern?

This Contest, however, does not deal with the entire Elections Code. Contestant contends that the matter of ballots (Division 13) and the matter of measures submitted to the voters (Division 9) are matters of statewide concern. The City has no municipal interest and therefore no basis for claiming that these matters are of a strictly municipal nature. All of the issues raised related to the SFMEC involve the City's attempts to influence the outcome of the election.

Even more specifically, Article II, Sec. 4 of the Constitution imposes a mandate, exclusively upon the legislature, that it "prohibit improper practices that

affect elections." This indicates both an area where the legislature preempts the field and perhaps, by implication, grants the field exclusively to the legislature.

Of the seven grounds set out in the Contest, only the Fourth Ground (Proposition 46), is beyond the governance of Divisions 13 and Division 9.

Specifically, with respect to ELEC 9280, ELEC 9400, ELEC 9401, ELEC 9402, ELEC 13119, ELEC 13200, and ELEC 13247, the legislature has preempted the field, voiding the City's attempts to impose local rules.

This appears to be another issue of first impression. After extensive research, Contestant can find no court opinions on sections of the Elections Code preempting the field. Most opinions on the subject of elections and preemption involve initiative and referendum petitions. The lack of opinions may be a clue on the universal acceptance that elections are a matter of statewide interest.

A. First Ground of Contest: Failure to conform to ELEC 13119(a)

The Ballot Statement speaks for itself.

The Ballot Statement fails to conform to ELEC 13119(a).

This court should hold the Ballot Statement did not conform to legislative mandate of ELEC 13119(a) as to its form, "Shall the measure (stating the nature thereof) be adopted?" That's been the law since 1911.

ELEC 13119 is in Chapter 2 of Division 13. ELEC 18401 makes it an offense against the elective franchise to print or circulate ballots that do not conform to Chapter 2 as a misdemeanor. Furthermore, the Ballot Statement "goes to the

substance or necessarily affects the merits" of the election.

When express "mandatory and not directory" language is not found, the supreme court has looked to see whether the failure of the mandatory conduct is sanctioned. *Garrison v. Rourke* (1948) 2 Cal. 2d 430; *Briggs v. Brown* (2017) 3 Cal.5th 808. This court is bound by those opinions.

Two tests militate in favor of Contestant's contention that ELEC 13119 is mandatory, and not directory, after an election. That contention is supported by opinions of the supreme court above and in *Rideout*.

This court should hold the Ballot Statement did not conform to the form provisions of ELEC 13119. This court should further hold that failure to conform to ELEC 13119 vitiates the election under the holding in *Rideout*.

B. Second Ground of Contest: Failure to conform to ELEC 13119(b)

The Ballot Statement speaks for itself.

The Ballot Statement fails to conform to the duration disclosure provision of ELEC 13119(b).

See discussion under First Ground, above.

This court should hold the Ballot Statement did not conform to the disclosure provisions of ELEC 13119. This court should further hold that failure to conform to ELEC 13119 vitiates the election under the holding in *Rideout*.

C. Third Ground of Contest: Failure to conform to ELEC 13119(c)

The Ballot Statement speaks for itself.

The Ballot Statement fails to conform to ELEC 13119(c).

See discussion under First Ground, above.

This court should hold the Ballot Statement did not conform to the advocacy prohibitions of ELEC 13119. This court should further hold that failure to conform to ELEC 13119 vitiates the election under the holding in *Rideout*.

D. Fourth Ground of Contest: Failure to Qualify Under Proposition 46

The Measure speaks for itself.

The Measure did not qualify for the ballot in that, on its face, it exceeds the limited authority for the use of general obligation bond proceeds provided under Proposition 46.

After extensive research, Contestant can find no court opinions on construction of the Proposition 46 language "the acquisition or improvement of real property."

See discussion, above, in section IV.

E. Fifth Ground of Contest: Failure to Print Impartial Analysis; Failure to Print Tax Rate Statement

The digest speaks for itself. The controller's statement speaks for itself.

Defendant Herrara did not submit and Defendant Arntz did not print and circulate an impartial analysis in the Guide.

A digest is "a summation or condensation of a body of information." It is not an impartial analysis "showing the effect of the measure on the existing law and the operation of the measure." ELEC 9280

After extensive research, Contestant can find no court opinions on the validity

of an election where a required impartial analysis was not printed in the Guide.

The Measure authorizes bonds and the imposition of an *ad valorem* tax to pay off the bonds. Chapter 5 of Division 9 provides additional rules for the Measure. Again, it preempts all local rules. ELEC 9400 starts off with "Notwithstanding any other provision of law, this chapter applies to all bond issues proposed ..." The statement required by Chapter 5 is commonly called a "tax rate statement" because that's how the legislature describes it ELEC 9402 -- "a statement of the tax rate data." The tax rate statement is part of the "official materials" that the Guide "shall contain."

City Controller Ben Rosenfield did not submit and Defendant Arntz did not print and circulate a tax rate statement conforming to ELEC 9401 in the Guide.

This court should hold ELEC 9280 preempts the field. This court should further hold that a digest is not an impartial analysis. This court should further hold that the failure to include an impartial analysis in the Guide, but instead providing another summary of arguments to vote yes on the Measure, vitiates the election.

This court should hold ELEC 9400, ELEC 9401, and ELEC 9402 preempts the field. This court should further hold that a controller's statement is not a tax rate statement. This court should further hold that the failure to include a tax rate statement in the Guide, but instead providing another home-made quasi-summary of the Measure, vitiates the election.

F. Sixth Ground of Contest: Paid Arguments, Using Public Moneys for Express Advocacy

The Guide speaks for itself.

Empirically, all local measures in the City are city-wide. For comparison, how much does it cost a candidate for the city-wide office of mayor to place a candidate statement in the Guide.

Contestants requests that this court take judicial notice of the Defendant Arntz's "Candidate's Guide Mayor & Board of Supervisors" under Evidence Code sections 451(f), 452(g), 452(h), and 453. http://sfelections.sfgov.org/sites/default/files/Documents/candidates/June2018_BOS-MayorCandidateGuide.pdf

The mayoral candidate statement has a basketful of further restrictions on it. It is limited to the candidate's qualification, must not exceed 200 words, must not use typographical enhancements, must not contain political affiliation or activity, must not mention opposing candidates, and others too many to list here in detail. Basically, one can boil the restrictions down to "no advocacy." Defendant Arntz is further compelled to advise candidates that they are subject to penal provisions for falsifying material facts AND subject to legal action for mentioning anything other than qualifications.

What does it cost to translate a 200-word candidate statement into Chinese, Spanish, and Filipino? It doesn't say. How much additional does it cost to print and mail half-a-million voter guides with one page devoted to the candidate statement?

It doesn't say. Even at $6,531, the cost is subsidized with public moneys because it is existentially not advocacy. It's regulated. It's part of the official materials permitted in the Guide. The legislature has made that determination.

The City's paid argument scheme, on the other hand, is pure, express, by-definition advocacy. It is printed in every Guide, just like the mayor's candidate statement. Except for a 200 word limit, it has no restrictions. It is much more deeply subsidized than the official material in the Guide. The market cost to prepare, print, and mail half-a-million pieces of advertising, minus the pitance paid to Defendant Arntz, is an unreported nonmomentary contribution to the campaign (either supporting or opposing a local measure) or an unreported independent expenditure under the Political Reform Act.

The subsidy to print and circulate paid arguments violates the prohibition on using public moneys for advocacy in the landmark opinion in *Stanson v. Mott* (1976) 17 Cal.3d 206. This court is bound by that opinion.

This court must hold that paid arguments are express advocacy. This court should further hold that paid arguments are not official materials and therefore cannot be printed in the Guide. This court should further hold that printing and circulating paid arguments using public moneys violates the law. This court should further hold that express advocacy printed and circulated along with official materials violates the fundamental integrity of an election and vitiates the election.

G. Seventh Ground of Contest: Ballots with Ballot Statements that Contain Advocacy or Exceed 75 Words Shall Not Be Counted

The Ballot Statement speaks for itself.

> The statement of all measures submitted to the voters shall be abbreviated on the ballot in a ballot label as provided for in Section 9051. The ballot label shall be followed by the words, "Yes" and "No." ELEC 13247

ELEC 9051 also prohibits advocacy in the ballot with virtually identical language as that of ELEC 13119(c), discussed above.

Here's the thing. ELEC 13247 mandates the rules for both the ballot statement language and the word count of ALL measures. It is in Chapter 3 of Division 13. ELEC 13200, the first section of Chapter 3, states: "Ballots not printed in accordance with this chapter shall not be cast nor counted at any election." Under that mandate, which is clearly a postelection mandate, no ballots (encompassing all elections on the ballot, not just the election for the contested measure) are prohibited from being counted. That means no elections on the consolidated (one ballot) San Francisco ballot on the Election Day were decided because all resulted in a zero to zero tie.

The antecedents of ELEC 13247 have existed since at least as early as the Political Code (1872) from which the section has been carried forward, without change, through three subsequent reorganizations as the Elections Code in 1939, 1961, and 1994.

This court should hold that ELEC 13247 and ELEC 9051 preempts the field.

This court should further hold that the Ballot Statement, factually and as a matter of law, exceeded the statewide word count limit of 75 words set in ELEC 9051. This court should further hold that the Ballot Statement did not conform to the advocacy prohibitions of ELEC 9051. This court further hold that no ballots containing the Ballot Statement shall be counted, resulting in the failure of the Measure to exceed the two-thirds vote requirement. In short, the Measure failed to pass.

CONCLUSION

All the actions of the Trial Court in connection with the Contest are void for lack of jurisdiction. The Presiding Judge, the Clerk, the Judge, and Counsel all ignored all the Contest Rules by which they are bound. There is no jurisdiction outside of those rules.

The Measure violates the Proposition 46 (the constitution) as to the uses of bond proceeds. The election should be set aside.

The Defendants have committed an offense against the elective franchise by printing and circulating ballots that do not conform with ELEC 13119 in all its aspects. ELEC 13119 is mandatory after an election. The non-conforming Ballot Statement "goes to the substance or necessarily affects the merits or results of the election." This court must vitiate the election as required by the holding in *Rideout*.

The legislature has preempted the field with respect to local measures on the

ballot and in the Guide. All of the City's unique local measure ordinances are void on both the preemption basis and on the basis that the ballot and Guide, with respect to impartial analysis, tax rate statement, and paid arguments, are not municipal affairs.

The ballots on which the Ballot Statement was not printed in accordance with ELEC 9051 via ELEC 13247, both as to word count and advocacy. Under ELEC 13200, such ballots "shall not be cast nor counted." As a result, the results of the election for the Measure are zero yes votes and zero no votes. The Measure did not meet the two-thirds threshold for passage and has failed.

Take your pick. It all leads to the same result.

All is not lost for the City, however. It can learn from its error. It can place a measure on the ballot at any one of the several election days available in 2021. It just has to follow the law. It can create a measure that qualifies either as a Proposition 46 bond or as a revenue bond and commit to honest ballots from here forward.

Respectfully submitted,

DATED: November 6, 2020

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 10,677 words, including footnotes. In making this certification, I have relied on the word count of the computer program used to prepare the brief.

By _____

PROOF OF SERVICE

I, MICHAEL DENNY, declare as follows:
I am a citizen of the United States, over the age of eighteen years and a party to the above-entitled action.
On November 6t[h], 2020, I served the following document.

Appellant's Opening Brief
Denny v. Arntz et al Case A160234 1[st] District Division 2

On the following persons at the locations specified:

Ms. Jenica Maldonado
City Attorney's Office of San Francisco
1 Dr. Carlton B Goodlett Place
San Francisco, CA 94102
Telephone: (415) 554-4661
Email: jenica.maldonado@sfcityatty.org
Attorney for Defendants

Hon. Ethan P. Schulman
San Francisco County Superior Court
400 McAllister Street
Dept 302
San Francisco, CA 94102
[VIA PERSONAL SERVICE ONLY]
(Delivered November 6, 2020)

In the manner indicated below:

BY ELECTRONIC MAIL: Based on an agreement of the parties, I caused the document above to be sent to the person above at the electronic service address above. Such document was transmitted via electronic mail from the electronic mail address of Mike@Dennz.com in portable document format.

BY PERSONAL SERVICE: I delivered true and sealed copies of the above document in an addressed envelope and caused said envelope to be delivered by hand at the above location. – Hon. Ethan P. Schulman Only.

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

Executed November 6, 2020, at San Francisco, CA.