Case No: S_____

IN THE SUPREME COURT OF CALIFORNIA

MICHAEL DENNY
Petitioner,
vs.

JOHN ARNTZ, Director of Elections;
DENNIS HERRERA, City Attorney,
Respondents.

PETITION FOR REVIEW

Following Affirmance of Demurrer
By the Court of Appeal
First Appellate District, Division Two, Case No. A152089

San Francisco County Superior Court No. CPF-19-516970
Ethan P. Schulman, Judge

MICHAEL DENNY, in Pro Per
3329 Cabrillo Street
San Francisco, CA 94121
Telephone: (415) 608-0268
E-Mail: Mike@Dennz.com

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	4
PETITION FOR REVIEW	7
ISSUES PRESENTED FOR REVIEW	7
STATEMENT OF THE CASE	9
STATEMENT OF FACTS	15
ARGUMENT	15
Question 1 Can trial and appellate courts ignore 170 years of statutory law and appellate opinions that treat an election contest special proceeding as expressly limited to the legislatively created procedural scheme set out in Division 16 of the Elections Code, to the exclusion of all Code of Civil Procedure or judge-made procedure, and instead treat it as a civil action? Corollary: Is failure to or neglect in following these rules a violation of due process?	19
Question 2 Does the statutory scheme created by the Legislature in pursuance of its constitutional duty to "prohibit improper practices that affect elections" place a duty upon elections officials and the courts to enforce those provisions with respect to special elections on measures (direct legislation)?	23
Question 3 Are Elections Code 13119 ballot statement provisions mandatory after an election? Corollary: Do violation of its provisions so intimately influence the voter's decision that violation vitiates the election, as held by this court for more than 150 years?	26
Question 4 Does the definition of "defendant" as a "candidate" in Elections Code 16002 bar all election contest special proceedings against measures and	32

against all persons, except candidates, who may have committed an offense against the elective franchise as provided by Division 18 of the Elections Code?

Question 5 38
Can a trial or appellate court impose a requirement on an election contest special proceeding that a contestant must avail himself of a permissive preelection challenge, and if not, convert that failure into a bar?

Question 6 41
Do legislative rules for elections, especially those in Division 9 and Division 13 of the Elections Code, preempt charter cities from devising their own schemes for measure elections that override those rules, like ballot statement word count limit, digest, controller's statement, and paid arguments?

CONCLUSION 43

CERTIFICATE OF COMPLIANCE 44

APPENDIX A: Certificate Denying Reconsideration 45

APPENDIX B: Certificate of Publication 47

APPENDIX C: Opinion 49

PROOF OF SERVICE 67

TABLE OF AUTHORITIES

CASES

	Page
Anderson v. County of Santa Barbara (1976) 56 Cal.App.3d 780	20, 21
Briggs v. Brown (2017) 3 Cal.5th 808	28
Canales v. City of Alviso (1970) 3 Cal.3d 118	29, 37
Cummings v. Stanley (2009) 177 Cal.App.4th 493	38, 39
Dorsey v. Barry (1864) 24 Cal. 449	20
Friends of Sierra Madre v. City of Sierra Madre (2001) 25 Cal.4th 165	26
Garrison v. Rourke (1948) 2 Cal. 2d 430	28
Hernandez v. County of Los Angeles (2008) 167 Cal.App.4th 12	24
Huntington Beach v. Superior Court (2002) 94 Cal.App.4th 1417	39
Lockyer v. City and County of San Francisco (2004) 33 Cal.4th 1055	14, 25
Lungren v. Deukmejian (1988) 45 Cal.3d 727	36
McDonough v. Superior Court (2012) 204 Cal.App.4th 1169	39
Rideout v. City of Los Angeles (1921) 185 Cal. 426	26, 27, 28, 35, 40
Rodriguez v. Solis (1991) 1 Cal.App.4th 495	25
Stanson v. Mott (1976) 17 Cal.3d 206	42

STATUTES

	Page
California Constitution	

Article II, Sec. 4

California Statutes

Code of Civil Procedure 403.10	22
Code of Civil Procedure 1111	21
Code of Civil Procedure 1127	21
Elections Code 2	32, 35
Elections Code 9	
Elections Code 305	10
Elections Code 320	23
Elections Code 328	10
Elections Code 329	10
Elections Code 356	10
Elections Code 9051	12, 18, 19, 39, 42
Elections Code 9280	17, 42
Elections Code 9282	17
Elections Code 9295	
Elections Code 9400	18
Elections Code 9402	18
Elections Code 10403	12, 19

Elections Code 13100	16
Elections Code 13109	17
Elections Code 13109.8	17
Elections Code 13119	11, 12, 13, 18, 19, 26, 27, 28, 30, 31, 39, 43
Elections Code 13200	16, 29
Elections Code 13247	12, 18, 29, 30
Elections Code 16001	35
Elections Code 16002	33, 35, 37
Elections Code 16100	36, 37
Elections Code 16101	37
Elections Code 16400	22, 33
Elections Code 18002	13
Elections Code 18401	13, 18, 27

PETITION FOR REVIEW

TO THE HONORABLE TANI CANTIL-SAKAUYE, CHIEF JUSTICE, AND

TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Pursuant to Rule 8.500, California Rules of Court, Michael Denny Contestant and Appellant, hereby petitions this Court to grant review of the decision of the Court of Appeal for the First Appellate District, Division Two, filed on September 17, 2020, which affirmed an order granting a demurrer. A copy of the opinion of the Court of appeal is attached as Appendix A.

ISSUES PRESENTED FOR REVIEW

Contestant has grouped the issues into three categories.

The procedural issues relate to the rules for election contest special proceedings under Division 16 of the Elections Code ("Contest Rules"). The procedural issues affect all lower courts. The courts are ignoring this court's precedent and falling back into their comfort zone, civil actions.

The election contest law ("Contest Law") issues are all areas of first impression that have never been addressed by this or any other court. The issue of honest ballots affects hundreds of local measures every year. The intentional subversion of honest ballots as prescribed by law undermines the entire election system when the courts cast a blind eye on those seeking to take advantage of a de facto lawless system.

The issues evading review are unique to San Francisco. Nevertheless, they

destroy the uniformity that the Elections Code was designed to ensure.

Contest Rules

1. Can trial and appellate courts ignore 170 years of statutory law and appellate opinions that treat an election contest special proceeding as expressly limited to the legislatively created procedural scheme set out in Division 16 of the Elections Code, to the exclusion of all Code of Civil Procedure or judge-made procedure, and instead treat it as a civil action? Corollary: Is failure to or neglect in following these rules a violation of due process?

Contest Law

2. Does the statutory scheme created by the Legislature in pursuance of its constitutional duty to "prohibit improper practices that affect elections" place a duty upon elections officials and the courts to enforce those provisions with respect to special elections on measures (direct legislation)?

3. Are Elections Code 13119 ballot statement provisions mandatory after an election? Corollary: Do violation of its provisions so intimately influence the voter's decision that violation vitiates the election, as held by this court for more than 150 years?

4. Does the definition of "defendant" as a "candidate" in Elections Code 16002 bar all election contest special proceedings against measures and against all persons, except candidates, who may have committed an offense against the

elective franchise as provided by Division 18 of the Elections Code?

5. Can a trial or appellate court impose a requirement on an election contest special proceeding that a contestant must avail himself of a permissive preelection challenge, and if not, convert that failure into a bar?

Issues Evading Review But Guaranteed to Reoccur (SFMEC)

6. Do legislative rules for elections, especially those in Division 9 and Division 13 of the Elections Code, preempt charter cities from devising their own schemes for measure elections that override those rules, like ballot statement word count limit, digest, controller's statement, and paid arguments?

(Contestant notes with some amusement that this court exerts such strict scrutiny on word count yet word count on ballots imposing billions of dollars in taxes gets no scrutiny at all.)

STATEMENT OF CASE

This election contest special proceeding ("Contest") is representative, in its major aspects, of several contests that are working their way through the county Superior Courts and the Courts of Appeal.

For consistency, Elections Code sections in this petition will precede section numbers of the Elections with ELEC, e.g. ELEC 13119, sections of the Code of Civil Procedure with CCP, and sections of the San Francisco Municipal Elections Code with SFMEC.

When using the term "local measure," Contestant is combining the definitions of "local election" (ELEC 328), "measure" (ELEC 329), and "special election" (ELEC 356), referring to all questions that are neither advisory questions nor recall questions.

Contestant uses the term "ballot statement" because of a perceived confusion brought about by the Elections Code's inconsistent usage of terms, further confused by court opinions. Most closely, the term "ballot label" (ELEC 305) applies. Language like ballot title or ballot title and summary or ballot abbreviation provide confusion. Ballot materials, though used by some, is sloppy. There are no ballot materials. There is the ballot, whereupon a ballot statement is printed along with voting targets, and there are official materials that are printed in the voter information guide ("Guide").

Local Measure Elections Are of Statewide Importance

The California Election Data Archive ("CEDA") is a project of the Secretary of State to archive local election data for counties, cities, school and college districts, and community services districts. From 1996 through 2019 (latest CEDA data available), CEDA has recorded 9,357 measures, excluding advisory and recall questions. Since it does not include measures of special districts, this number does not represent the full extent of local measures for that period.

Local Measure Elections (Source: CEDA)

Year	Total	SF	Year	Total	SF	Year	Total	SF
1991	--	--	2001	212	9	2011	150	8
1992	--	--	2002	650	26	2012	507	9
1993	--	--	2003	169	14	2013	129	4
1994	--	--	2004	701	25	2014	570	14
1995	--	--	2005	284	9	2015	103	11
1996	541	12	2006	539	15	2016	863	30
1997	313	14	2007	166	11	2017	111	0
1998	552	22	2008	581	33	2018	697	15
1999	269	11	2009	180	5	2019	67	6
2000	548	24	2010	455	20	2020	741	18
						Total	**10,098**	**365**

Note: 2020 data compiled from public record requests and county registrar web sites includes all local measures.

The most objective part of ELEC 13119 is subparagraph (a). It's not new either. It first became law in 1911 as Political Code 4058. On a statewide basis (including the City), of the 10,098 local measures, 343 conformed to the form specified by ELEC 13119(a). Of the 10,098 local measures, 2,724 were GO bonds. Of those GO bonds, 6 conformed to ELEC 13119(a).

The City makes liberal use of initiatives, both by petition and without a petition. Multiple local measures have appeared on ballots at all but one primary, general, and district (odd year) election, a total of 365 since 1996. Of those 365 local measures, not a single one has conformed to the form specified by ELEC 13119(a). Of those 365 local measures, 31 were GO bonds.

While the disclosure requirements of ELEC 13119(b) did not exist before

2018, the ELEC 13119(c) prohibition against using the ballot statement for partisan advantage for local measures has existed from at least as early as 1976 through ELEC 9051 via either ELEC 13247[10327] or ELEC 10403. Compliance is inversely correlated to the increase in taxation proposed in the local measure. Relatively inconsequential measures like those making certain local offices appointive rather than elective are almost always straightforward. When taxes are at stake, the gloves come off. The ballot statements for even minor tax increases are full-blown arguments for their passage. Dishonest, but effective. Giving voters reasons to vote yes on the ballot itself is much more effective than all the costly advertising and publicity for or against any particular local measure.

If any local measures, over the last 25 years (and likely longer), have complied with the statutes in force at the time, it would be the unicorn among them. The importance of this issue to this court is, then, the fundamentals of democracy -- elections. How can this court, in good conscience, wax eloquently about elections being the fundamental power of the people to control its government, when not a single governmental agency is following the laws enacted to prohibit those agencies from taking unfair advantage at the ballot box?

That's the lay of the land.

It is incumbent upon this court to put a stop to ballot fraud of the highest order. This is the vehicle by which it can be done. Setting aside an election for ballot

fraud, ELEC 18401 or ELEC 18002, would do much more to ensure honest ballots than any pronouncement of what the law says or doesn't say. Lawyers are never shy about trying to find ways around laws to satisfy greedy clients. Self-enforcement, like self-government, works when unlawful conduct has meaningful sanctions. Right now there are none. The City, along with the hordes of public-private parasites, who feed at the ballot trough, don't believe they can thrive with honest ballots.

Conformance to ELEC 13119 and Predecessors

From 1911 (Political Code 4058) through 2017 (ELEC 13119), the form of the ballot statement for direct legislation in all its forms has been "Shall the ordinance (stating the nature thereof) be adopted?" In 2017 AB-195 (Stats. 2017, Ch. 105), substituted the word "measure" for "ordinance."

This case provides a good vehicle for review. The language appearing on the ballot for the Measure ("Ballot Statement") is the only factual document necessary for consideration. Since it speaks for itself, all other issues are matters of law within the purview of the courts.

The people of California are being hoodwinked on a massive scale by a public-private partnership that has an expressed intent to persuade the voters, on the ballot, to vote in favor of a measure, to enable policy and exaction of taxes favorable to the local governing body's wishes, and to enrich the public employees

and private parties who directly benefit from the enhanced power and exaction of taxes.

The City and County of San Francisco ("City") could be the poster child for this scheme.

It's so out in the open, that after having two bond measures challenged (this Contest and Proposition A from the November 5, 2019 ballot), the City continues to defy the statutes governing the ballot statement at both elections in 2020.

As this court presciently observed in *Lockyer v. City and County of San Francisco* (2004) 33 Cal.4th 1055: "There is no justification for forcing private parties to go to Court in order to require agencies of government to perform the duties they have sworn to perform."

In the case before the court, the City has had no less than three opportunities to put the Measure on the ballot again with a ballot statement that conforms to the law. Doing so, of course, would be an admission against the City's interest in fighting this Contest. It would also have the deserved and expected fallout that would come from the well-funded special interests backing the Measure who spent $1,807,661.33 on the campaign to pass it.

STATEMENT OF FACTS

The opinion below misrepresents material facts. It makes conclusions of law with respect to the statement of contest ("Contest") and with respect to the provisions of the SFMEC.

The Contest challenges Proposition A ("Measure"). The Ballot Statement at issue is in the opinion.

The City consolidated the Measure with other elections being held on November 6, 2018 into a single ballot. The Ballot Statement contained 141 words. Division 9 of the Elections Code ("Division 9") requires that the voter information guide contain an impartial analysis and a tax rate statement. The Guide contained neither. In addition to arguments and rebuttals allowable under Division 9, the Guide contained express advocacy under the designation "paid arguments." The Ballot Statement and the Guide are printed materials and each speaks for itself.

All voters in the City were eligible to vote on the Measure. Defendant Arntz printed and circulated ballots containing the Ballot Statement.

The opinion below was handed down on September 17, 2020 (unpublished). The opinion was published on October 14, 2020. Request for reconsider was denied on November 4, 2020.

ARGUMENT

The Elections Code is a uniform, if unwieldy, body of legislative rules

designed to impose uniformity of election procedures and rules on all. In other words, elections are subject to due process. Nowhere in the Elections Code does the legislature grant local governing bodies the authority to preempt its provisions.

Division 13 of the Elections Code ("Division 13") is about "Ballots, Sample Ballots, And Voter Pamphlets." Division 9 is about "Measures Submitted to the Voters." Division 16 of the Elections Code is about "Elections Contests." Division 18 of the Elections Code is about "Penal Provisions." Those are the areas of the Elections Code that cover the issues before this court for review.

Division 13 consists of 6 chapters, two of which are relevant to the discussion. Chapter 2 is about "Forms of Ballots: Ballot Order." Chapter 3 is about "Ballot Printing Specifications."

Because Division 13 preempts authority for its provisions, it can make superinclusive statements.

For example, the first section of Chapter 2, ELEC 13100, states "All ballots used in all elections shall be governed by this chapter unless otherwise specifically provided." Can that not be any more clear?

Similarly, the first section of Chapter 3, ELEC 13200, for example, states "Ballots not printed in accordance with this chapter shall not be cast nor counted at any election." Note that the mandate is toward an entire ballot, like those produced when elections are consolidated. Also note, that the mandate addresses

postelection activity and is unarguably mandatory after an election.

Preemption is presumed unless explicitly allowed. ELEC 13109 specifies the ballot order (order of elections appearing on the ballot). Election officials cannot change the ballot order. When the legislature determined to allow the Los Angeles county elections official to reverse the ballot order, it did so by providing specific authority to do so in ELEC 13109.8.

All aspects of the ballot statement are prescribed -- form, length, and prohibited language. To the extent that the SFMEC purports to exceed these prescriptions, it is preempted.

Division 9 addresses all measures. Two chapters are relevant with respect to the voter information guide ("Guide"). Chapter 3 is about "Municipal Elections." Chapter 5 is about "Bond Issues." Chapter 3 provides that the full text of the measure may be printed in the Guide. It provides that an impartial analysis be printed in the Guide. It also provides that the arguments selected by the election official shall be printed in the Guide.

ELEC 9280 provides that an impartial analysis precede arguments in the Guide. It also provides a statement, should the City choose not to print the "entire text of the measure." ELEC 9282 specifies the form and title for arguments printed in the Guide. Combined, the full text, the impartial analysis, and the arguments are the official materials.

The Measure authorizes bonds and the imposition of an ad valorem tax to pay off the bonds. Chapter 5 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."

ELEC 13119[10235], since at least 2018, by its terms, applies to the Measure. ELEC 13119(a) specifies the form. ELEC 13119(b), applicable to the Measure, specifies certain disclosures. ELEC 13119(c) specifies prohibits advocacy. ELEC 13247[10327], added in 1976, makes the provisions of ELEC 9051 (word limit and advocacy prohibition) apply as well.

Defendants do not argue that the Ballot Statement conforms to the various prescriptions.

The Ballot Statement did not conform to Chapter 2 of Division 13, ostensibly committing offenses against the elective franchise under ELEC 18401, via underlying violations of ELEC 13119. This was the primary ground for the Contest.

The ballot statement is primarily governed by ELEC 13119, ELEC 13247, and

ELEC 10403, the latter two both incorporate the word count and advocacy prohibition of ELEC 9051.

Question 1

1. Can trial and appellate courts ignore 170 years of statutory law and appellate opinions that treat an election contest special proceeding as expressly limited to the legislatively created procedural scheme set out in Division 16 of the Elections Code, to the exclusion of all Code of Civil Procedure or judge-made procedure, and instead treat it as a civil action? Corollary: Is failure to or neglect in following these rules a violation of due process?

This court has, early in the history of election contest special proceedings, held that the only jurisdiction of the courts over an election contest special proceeding is that provided by the legislature in Contest Rules.

In all the ongoing election contest special proceedings based on the grounds of offenses against the elective franchise precipitated by printing and circulating ballots that do not conform to ELEC 13119, the contestants have faced a universal lack of knowledge by the trial court systems and the defendants who all proceeded as if the statement of contest is a civil action under the CCP.

This lack of respect for Contest Rules appears to go beyond those contests. As recently as September 9, 2020, the court of appeal in the case of *Vosburg v. County*

of Fresno (Case No. F078081, partially published) recites a litany of CCP procedures that the contestants, apparently, didn't object to. *Vosburg* involved a local sales tax measure for the City of Coalinga that failed. The grounds were that illegal votes were counted. The opinion describes the trial court's allowance of an intervener, nowhere to be found in Contest Rules. The opinion revolved around the issue of whether the successful intervener was allowed attorneys fees, in direct conflict with Contest Rules' express limitation that only costs are allowed to the successful party.

These kinds of extra-jurisdictional application of the CCP to election contest special proceedings appears to be prevalent throughout the trial court system. This court should use this opportunity to instruct the lower courts on proper procedure.

Contestant asserts that neither the trial courts nor the appeals courts have jurisdiction (authority) to impose or allow CCP rules in an election contest special proceeding based on an early line of opinions from this court that hold to the contrary. *Dorsey v. Barry* (1864) 24 Cal. 449. As recently as 1976, *Anderson v. County of Santa Barbara* (1976) 56 Cal.App.3d 780 upheld and continued this line of authority. *Dorsey* predates the period the Contest Rules were moved into the 1872 CCP. In 1939, the Contest Rules were moved into the first Elections Code as a separate division, where they remain to this day.

Dorsey held the following:

> The Act itself provides a complete mode of procedure, leaving but little, if anything, dependent upon implication or the common law powers of the Court.
>
> In special proceedings, the Court vested with jurisdiction by the statute possesses only such powers as the Act [Contest Rules] creating the special case has conferred, and in the exercise of those powers it is limited by the terms of the Act.

The "Act" refers to the Contest Rules enacted by Stats. 1850, Ch. 36, Art. VI that are now in Division 16.

Anderson put that hundred-year-old ruling into modern terms:

> Thus the statutory scheme governing election contests requires that trial commence no later than 45 days from the time that notice of the contest is filed with the county clerk. Nowhere in the time limit is there leeway for the pretrial skirmishing and motion practice that has become commonplace in today's traditional lawsuit.

Part 2 of the CCP is entitled "OF CIVIL ACTIONS." Contestant recognizes the well-known rule of statutory construction that titles in codes are not law. However, a dichotomy is demonstrated by the title of Part 3, "OF SPECIAL PROCEEDINGS OF A CIVIL NATURE." This was the erstwhile, albeit temporary, location of Contest Rules, CCP 1111 through CCP 1127, which sections were repealed in 1939, renumbered and reorganized, and moved to where they had been in 1850, before the code commissioners messed up, in election law.

This further, strongly suggests that Part 2 of the CCP is not applicable to an election contest special proceeding, just as this court has held. Thus a demurrer

under CCP 430.10 is beyond the jurisdiction of the trial and appellate courts. Without jurisdiction, an order granting a demurrer is nugatory and void. The same is true for an opinion affirming such a void order, as the opinion below did.

For the sake of argument, let's say that Article 1 of Chapter 3 of Title 6 of Part 2 of the CCP has some relevance. The first sentence of CCP 430.10 should quickly disabuse the reader of that idea.

> The party against whom a complaint or cross-complaint has been filed may object, by demurrer or answer as provided in Section 430.30, to the pleading on any one or more of the following grounds:

Notice "a complaint or cross-complaint?" Contestant filed a statement of contest under ELEC 16400, which is neither of those. The fact that the filing clerks of the trial court, from the chief clerk down, are ignorant of Contest Rules and refused to file the statement of contest without the term complaint or petition in the caption does not counteract the substance of the statement of contest that Contestant filed.

Furthermore, the purported demurrer is not based on any of the nine grounds allowed under CCP 430.10.

By affirming a demurrer that the trial court had no jurisdiction to grant, the court below has effectively overturned 170 years of Contest Rules and precedent.

This court should affirm its prior holding that all courts must stick to Contest Rules and have no authority to expand them.

Affirming its own precedent would mean that this court should overturn the lower court's affirmation of the demurrer and order it to void the trial court's order granting the demurrer as lacking jurisdiction.

Question 2

2. Does the statutory scheme created by the Legislature in pursuance of its constitutional duty to "prohibit improper practices that affect elections" place a duty upon elections officials and the courts to enforce those provisions with respect to special elections on measures (direct legislation)?

ELEC 320 contains two definitions for "elections official." Subparagraph (b) refers to the role of the person having "jurisdiction" over elections. Contestant will use the term as defined in subparagraph (a), the person who "is charged with the duty of conducting an election."

The elections official in this Contest is Defendant Arntz. Arntz runs all the local measure elections in the City. Arntz has that duty.

Based on public statements, either through counsel or directly, county election officials ostensibly have taken a hands off approach to local measure elections. Although Defendant Arntz has made no public statements, Contestant surmises that Arntz subscribes to the idea that it is not his duty to enforce the Elections Code prohibitions for local measures.

As reported by Marsha Sutton (http://www.delmartimes.net/our-columns/sd-cm-nc-education-matters-20190124-story.html), "Michael Vu [San Diego Registrar of Voters] disagreed, saying the role of his office is to act as facilitators contracted to conduct elections and is not responsible for reviewing ballot language submitted to them by other governing bodies." Sutton then quotes Vu as saying, "We administratively handle the elections for other political entities. We facilitate that election for them." The reporter added, "He said the complainants should work with school districts at their public meetings before ballot language is submitted." Vu is the elections official who "conducted" two school measure elections, against which election contest special proceedings were filed, on the same election day as this Measure. Basically, Vu shuns all responsibility for conducting honest elections. Vu collects a lot of revenue for conducting those elections. With that view, "other governing bodies" could put anything that wish on the ballot. They do.

Anecdotes abound, however, in *Hernandez v. County of Los Angeles* (2008) 167 Cal.App.4th 12, the footnote exposes Vu's attitude as, perhaps, endemic rather than an anomaly. //

"A ministerial act is an act that a public officer is required to perform in a prescribed manner in obedience to the mandate of legal authority and without regard to his own judgment or opinion concerning such act's propriety or

impropriety, when a given state of facts exists." *Rodriguez v. Solis* (1991) 1 Cal.App.4th 495

Lockyer was a case of a City official overstepping his bounds with regard to marriage licenses. His ministerial duty was to follow the law as it was written, not to decide that the law was wrong.

Please note well that Contestant is not arguing that the elections official should conform a ballot statement or official materials in the Guide. The elections official simply has a ministerial duty to reject a ballot statement or other official materials that do not conform to the plain language of the law. There are a host of other tasks where elections officials do this now. Why is the ballot statement any different?

There are some county election officials that take the position, related to the "facilitator" position expressed by Vu, that the elections official is always the person described in subparagraph (b) of the definition. The concept is that the (b) elections official is actually conducting the election even though it has been consolidated with the other elections on the ballot. This is a pretense to shift both duty and authority. The consolidation process delegates all duties with respect to the consolidated elections to the county elections official. While San Francisco does not have this distinction, every other county does. Therefore, this court should hold that, with respect to a particular election, there can only be one elections official conducting an election and that elections official has the duty to

enforce all the provisions of the laws relating to that election.

This court should hold that it is the duty of the elections official conducting the election to reject ballot statements and other materials in the Guide that do not conform to the rules set out in the Elections Code, or other governing law, like the Constitution or other codes that specify rules that involve elections.

Question 3

3. Are Elections Code 13119 ballot statement provisions mandatory after an election? Corollary: Do violation of its provisions so intimately influence the voter's decision that violation vitiates the election, as held by this court for more than 150 years?

The leading case on election contest special proceedings is *Rideout v. City of Los Angeles* (1921) 185 Cal. 426.

The opinion below omits discussion of *Rideout*. It mentions *Friends of Sierra Madre*, which quotes, as do many other election-related cases, from *Rideout* without direct citation.

The issue for this court is one of first impression that the court below avoided. ELEC 13119 is unarguably mandatory before an election. The question, as explained in *Rideout*, is then: Is ELEC 13119 mandatory after an election or merely directory?

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

> It is a primary principle of law as applied to election contests that it is the duty of the court to validate the election if possible. That is to say, the election must be held valid unless plainly illegal. [Citation.] Accordingly, a distinction has been developed between mandatory and directory provisions in election laws; a violation of a mandatory provision vitiates the election, whereas a departure from a directory provision does not render the election void if there is a substantial observance of the law and no showing that the result of the election has been changed or the rights of the voters injuriously affected by the deviation. [Citations.] Whether or not a provision, the observance of which is not expressly declared by law to be essential to the validity of the election, is mandatory or merely directory, depends upon the character of the act prescribed. If the act enjoined goes to the substance or necessarily affects the merits or results of the election, it is mandatory; otherwise directory. [Citations.] Provisions prescribing minor details in regard to the form of ballots are held to be in a large measure directory, in so far as the voter is concerned, upon the theory that, where there are errors on the part of those intrusted with the preparation of ballots, the disenfranchisement of voters for these violations of the law over which they have no control would result in defeating the will of the people by technicalities, unless it appears that the mistakes in fact operated to prevent a free, fair and honest election. [Citations.]

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, this 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.

Two tests militate in favor of Contestant's position that ELEC 13119 is mandatory, and not directory, after an election. That position is supported by opinions of this court.

Rideout suggests that there may be some provisions that could be classified as directory after an election even if expressly made mandatory or sanctioned. Chapter 2 contains many provisions, some of which, like ballot order or local measure letter assignment, might be considered technical in nature. *Rideout* gives examples in its explanation. The distinction that *Rideout* suggests is that ballot order and letter assignment are the type of errors that a voter would not recognize as an error. So even though they appear in Chapter 2, they would not automatically result in being made mandatory after an election because they would not have necessarily influenced the voter's choices, at least without evidence that they did, in fact, influence the choices.

Rideout also explains that for violations that are mandatory after an election, there is no need to prove that the results would have changed. For the kinds of violations that are mandatory after the election, the courts will presume that the results would have changed, because factual proof is impossible. In other words, this court recognizes that something that "goes to the substance or necessarily

affects the merits or results of the election," is worthy of consequences despite the impossibility of proof. Contestant contends that advocacy on the ballot itself affects both the merits and the results. That's the "improper practice" that the legislature has sanctioned.

In *Canales v. City of Alviso* (1970) 3 Cal.3d 118, this court has noted regarding the "policy and the rule" to uphold popular elections, "neither has been invoked to uphold an election in the face of illegalities which affected the result--a situation in which the will of the people may be thwarted by upholding an election. Hence, respondents' invocation of the policy in favor of upholding elections begs the question whether irregularities were merely incidental to the result or in fact prevented 'the fair expression of popular will.'" Advocacy on the ballot is intentional. It's electioneering on the ballot. It's designed to influence the vote for partisan gain. That it did influence votes is presumed. How many votes it influenced can never be known. The "improper practice" is sanctioned.

Aside: But 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 November 6, 2018 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 1872 Political Code from which the section has been carried forward, without change, through three reorganizations of the Elections Code -- 1939, 1961, and 1994.

Is putting the ballot statement in the form required by ELEC 13119(a) mandatory or directory? The vast evidence is that the thousands upon thousands of ballot statements that have violated this provision do so intentionally to gain advantage. The bookends of "Shall the measure ... be adopted?" gives no advantage. The bookends are neutral. Furthermore, they put the "measure," not the artfully written question, in the mind of the voter. The fact is that the voter is voting on an underlying measure, unless the entire measure is in the ballot statement. The suggestion of a "measure" would, at least, put a voter on inquiry notice that there is something more behind it.

Finally, it's such an easy thing to correct before an election. The people who write the ballot statement will know there are potentially serious consequences, of course. But so will the election official know, who can reject any ballot statement that does not conform, as that election official could do today. Holding that it is not mandatory after an election can only lead to more shenanigans by those who

wish to game the system for their own advantage. What more could the legislature do? It's already in quotation marks.

If the form of a question or the words used have no effect on someone's choice, then all the people on Madison Avenue and all the opinion researchers would be out of jobs. "Words matter," as some famous politician once said. Any opinion to the contrary denies human psychology.

For the Contest, the issue does not hinge on ELEC 13119(a). So holding that it is mandatory after an election will only affect future elections.

Not even the conniving officials who game the system want to face the wrath of donors and supporters who invested money, influence, time, and effort to pass a measure and then learn that their efforts were canceled due to preventable cheating on the ballot. Human nature will take over.

This court should hold that ELEC 13119, in all its aspects, is mandatory after an election.

This court should further hold that a violation of any aspect of ELEC 13119 vitiates an election.

Then it is for the trial and appellate courts to apply those holdings to the facts of a particular ballot statement.

Let honest ballots rule the day!

Question 4

4. Does the definition of "defendant" as a "candidate" in Elections Code 16002 bar all election contest special proceedings against measures and against all persons, except candidates, who may have committed an offense against the elective franchise as provided by Division 18 of the Elections Code?

> 16002. When used in this division, "contestant" means any person initiating an election contest. "Defendant" means 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.

When this definition was added to the Elections Code in 1939, the legislature was addressing a specific situation as part of the incorporation of Stats. 1913, Ch. 690, Sec. 28 ("Sec. 28") dealing with contests in primary elections as Chapter 3 in the division on election contest special proceedings. ELEC 2 of the 1939 Elections Code and every subsequent reorganization declares the reorganization does not change any substantive law.

There are actually two separate definitions in two separate sentences in ELEC 16002.

Let's look at the first definition in the first sentence.

"When used in this division, "contestant" means any person initiating an

election contest."

This sentence has a conditional clause "When used in this division." This is a common practice in legislative acts when the legislature wants to apply a definition to more than the section in which the definition appears.

It's clear that the straightforward definition applies to any person who initiates an election contest. But even this clarity is subject to other provisions of Division 16. For example, ELEC 16400 refers to an "elector," not a contestant.

Notably, the second definition does not lead with the "When used in this division" language.

On its face, then the definition of "defendant" does NOT apply to "this division."

The second definition even refers to "primary elections" explicitly as well as "nomination" and "contested office." Contested offices only occur in candidate elections. Nominations only occur at primary elections. Measure elections are never primary elections.

Division 10 (1939) was comprised of four chapters, Chapter 1 (GENERAL PROVISIONS), Chapter 2 (CONTESTS AT GENERAL ELECTIONS), Chapter 3 (CONTESTING PRIMARY ELECTIONS), and Chapter 4 (TIE VOTES).

Chapter 1 was comprised entirely of two new sections (ELEC 16001[8500] [repealed] and ELEC 16002[8501]). Chapter 2 was derived entirely from CCP

(1872) sections 1111 through 1127. Chapter 3 was derived entirely, except for two new sections (16440[8620], and 16460[8640]), from the 1309-word Sec. 28 addressing contests of nominations in a primary election. Stats. 1913, Ch. 690 was "An act to provide for and regulate primary elections ..."

Chapter 1 consists of four words or terms: "county clerk," "registrar of voters," "contestant," and "defendant." It will become clear, below, that all of these words or terms were added as a result of the incorporation of Sec. 28, i.e., Chapter 3.

Sec. 28 used "county clerk" 5 times, "registrar of voters" 1 time, "contestant" 2 times, and "defendant" 0 times. It used the word or term "contestee" 14 times for the other party.

Chapter 2 used "county clerk" 3 times, "registrar of voters" 0 times, "contestant" 5 times, and "defendant" 10 times. "Elector" was used 4 times.

Throughout sections 1111 through 1127 of the 1872 CCP, as amended at the time of the enacted of the 1939 Elections Code, used "county clerk" 4 times, "registrar of voters" 0 times, "contestant" 1 time, and "defendant" 1 time. Primarily the parties were described as persons with different characteristics. Specifically, the contestant was also referred to, more specifically as an "elector," 5 times.

In the entirety of Chapter 3, the word or term "contestee" is not used a single time, while the word or term "defendant" is used 27 times.

It's clear to anyone willing to examine these changes that all four of the new sections added to the 1939 Elections Code were added due to the incorporation of Sec. 28.

After direct legislation by initiative powers were given to the counties, cities, and the people in 1911, the courts, including this court, heard many appeals of measure contests, including the leading case, *Rideout*.

Except for the newly written statutes for the 1939 Code in Chapter 1 (sections ELEC 16001[8500][repealed] and ELEC 16002[8501]) and Chapter 3 (sections 16440[8620], and 16460[8640]), all of Division 10 came from two sources. Sections 8511 through 8576 were the current versions of the 1872 CCP. Sections 8600 through 8656 (Chapter 3 of Division 10 (1939)) were derived from the 1309-word Sec. 28 addressing contests of nominations in a primary election.

Note that the 1850 statutes only used the word or term "defendant" once and didn't use the word or term "candidate" at all.

While CCP 1872 language was changed when it was reorganized in Chapter 2, ELEC 2 (1939) clearly states that these changes were just continuations of existing law.

The earliest opinion on an election contest special proceeding involving a measure that Contestant has found was *McConoughey v. City of San Diego* (1900) 128 Cal. 366 in which McConoughey challenged a local bond measure. While it

wasn't successful, neither the trial court nor the supreme court, which was the only appellate court authorized to hear election contest appeals at that time, found any problem with a non-candidate being a defendant.

While not as frequent as candidate contests, measure contests have been heard by the courts from time immemorial. This is in the face of Contest Rules being written with the idea of candidate contests in mind. Yet it wasn't until the 1939 Elections Code that "any elector ... may contest any election" appeared in Contest Rules. ELEC 16100[20021][8511][CCP1111]. It was not an amendment, but simply a "continuation" of existing law.

The long-standing rules of statutory construction require that words be given their plain meaning. To determine that a word defined in one context applies in another context, without examination of the effect of that construction on the statutory scheme defined by Contest Rules and more than 150 years of Contest Law that have permitted non-candidates to be defendants in election contest special proceedings fails to follow the rules.

In *Lungren v. Deukmejian* (1988) 45 Cal.3d 727, this court explained statutory construction. Internal citations are omitted for clarity of reading.

> But the "plain meaning" rule does not prohibit a court from determining whether the literal meaning of a statute comports with its purpose or whether such a construction of one provision is consistent with other provisions of the statute. The meaning of a statute may not be determined from a single word or sentence; the words must be construed in context, and provisions relating to the

> same subject matter must be harmonized to the extent possible. ([citation]) (5) Literal construction should not prevail if it is contrary to the legislative intent apparent in the statute. The intent prevails over the letter, and the letter will, if possible, be so read as to conform to the spirit of the act. ([citations]) An interpretation that renders related provisions nugatory must be avoided ([citation]); each sentence must be read not in isolation but in the light of the statutory scheme ([citation); and if a statute is amenable to two alternative interpretations, the one that leads to the more reasonable result will be followed ([citation]). These rules apply as well to the interpretation of constitutional provisions. ([citation].)

The court below disregarded this advice. Using its narrow examination of the definition, many purposes of Contest Rules would be defeated, not only with respect to measure contests, but also with respect to candidate contests. See ELEC 16101(b). It effectively overturns this court's rationale with respect to ELEC 16100[20021](c) in *Canales* which found that "no reason appears why subdivision (c) should not also apply to [measure] elections." It's just bad law. Using strict construction, the definition of defendant would only apply to the section in which it is found. However, it can be reconciled with its history as originating from the incorporation of the contest rules for candidates in a primary election in 1939.

This court should hold that ELEC 16002 applies only to primary elections among candidates and reaffirm that ELEC 16100(c) applies to measure elections and any persons who have committed offenses against the elective franchise.

Question 5

5. Can a trial or appellate court impose a requirement on an election contest special proceeding that a contestant must avail himself of a permissive preelection challenge, and if not, convert that failure into a bar?

There is nothing in Contest Rules that requires a contestant to file a civil action prior to filing an election contest special proceeding.

An election contest special proceeding and a petition for writ of mandate (civil action) are separate, independent, unrelated proceedings. An election contest special proceeding can only be filed after an election to set aside an election or change the result. A petition for writ of mandate can be brought at any time to have a court order someone over whom it has jurisdiction to perform a specific ministerial act.

That should be the end of it, but Defendants persist that dicta in, exclusively, civil actions bars an election contest special proceeding on something akin to an exhaustion of remedies theory. Defendants have settled on the term preelection challenge.

This theory was addressed and dismissed (under the specific fact pattern presented) in *Cummings v. Stanley* (2009) 177 Cal.App.4th 493. *Cummings* was an election contest special proceeding for a candidate contest. It cast the defendant's objection as "Plaintiff's Failure to Exhaust Preelection Remedies." In considering

the theory, *Cummings* cited a series of opinions that all dealt with exhaustion of administrative remedies. Administrative remedies have no relation to an election contest special proceeding.

What the theory of exhaustion of remedies, in the vein of a preelection challenge, attempts to do is place an impossible burden on a contestant. The concept is that the defendants can violate the law to their hearts' content, explicit bad faith, and force a contestant to challenge their bad faith behavior in a tiny 10-day window with an outside deadline for the challenge, including engaging counsel and appeal, to be finally determined by the day the materials are printed, in general, approximately 30 days later.

Opinions of the only cases that have successfully reached a court of appeal with a preelection challenge to a ballot statement are *Huntington Beach v. Superior Court* (2002) 94 Cal.App.4th 1417 and *McDonough v. Superior Court* (2012) 204 Cal.App.4th 1169. Had those petitioners not had the money and the lawyers to force those cases through in record time, no one would be any the wiser, because after an election the petitions for writ of mandate would have been moot.

The petitioners in both those cases were successful in convincing two courts that the ballot statement was defective under ELEC 9051. The language of ELEC 9051 is virtually identical to that of ELEC 13119(c) with respect to advocacy on

the ballot. That gives Contestant confidence that courts may recognize advocacy when they see it in an election contest special proceeding, if they ever get to it. That possibility terrifies Defendants, so they have thrown up every odd-ball theory they can fabricate to prevent that possibility.

Defendants find its only support for its theory by conflating dicta in cases that are not election contest special proceedings with holdings in a long line of opinions in election contest special proceedings regarding technical defects or election official procedural defects that do not result in contestants successfully setting aside elections. What those opinions hold is that many election contest special proceedings fail. The likelihood of failure is not a bar. In fact, as explained in *Rideout*, even technical defects have the potential to succeed in setting aside an election under the proper circumstances.

This court should hold that a preelection challenge to the ballot statement does not exist under any chapter of Division 9.

This court should further hold, notwithstanding that the legislature has not allowed for a preelection challenge to a ballot statement, no court may consider any theory of exhaustion of remedies in an election contest special proceeding due to lack of jurisdiction.

Question 6

6. Do legislative rules for elections, especially those in Division 9 and Division 13 of the Elections Code, preempt charter cities from devising their own schemes for measure elections that override those rules, like ballot statement word count limit, digest, controller's statement, and paid arguments?

San Francisco is the only jurisdiction in California that does not, at least putatively, abide by the all the provisions relating to local measures that all other 57 counties purport to use. It appears to have its own take on things no other county finds objectionable as they are.

The only justification for increasing the ballot statement word count beyond the 75 word limit is to explain the purpose of a local measure authorizing the issuance of bonds. That's just plain bogus. The purpose of a local measure authorizing the issuance of bonds is to authorize the City to issue up to a certain amount of bonds and to impose the tax necessary to pay off the principal and interest due on the borrowed money. Everything else are just reasons along with benefits to vote in favor of the local measure. The ballot is not the place to sell the local measure.

To determine the pros AND the cons, a voter is provided with the full text, in most cases, of the local measure, an impartial analysis, except in San Francisco,

arguments for and against, and a tax rate statement, except in San Francisco.

A digest as described in the SFMEC is a condensed statement about the local measure. It's more than the 75 words on the ballot, but less than 300 words, unless more are needed. It's not an impartial analysis as provided for in ELEC 9280, "an impartial analysis of the measure showing the effect of the measure on the existing law and the operation of the measure."

Similarly, the controller's statement is not a tax rate statement as required by Chapter 5 of Division 9.

Finally, the paid argument provisions of the SFMEC are nothing more than the City using public moneys for express advocacy under the imprimatur of official materials in the Guide. When money or power is involved, the paid argument provision favors the moneyed interests. It's cheap, virtually free, advertising paid for with public moneys.

The subsidy provided by the City for the paid arguments is a nonmonetary contribution or independent expenditure or both under the Political Reform Act. It flies in the face of this court's landmark decision in *Stanson v. Mott* (1976) 17 Cal.3d 206.

This court should hold that the 75 word limit in ELEC 9051 for measures preempts local governing bodies from raising the limit.

This court should hold that paid arguments in the Guide are, per se, unlawful.

It should further hold that a digest is not a substitute for an impartial analysis and a controller's statement is not a substitute for a tax rate statement and that San Francisco is preempted from substituting its own concoctions in their place.

CONCLUSION

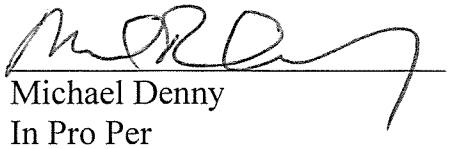
As stated earlier, this case involves a new legislative act, AB-195 (2017), that revised ELEC 13119. The court of appeal referred to it twice, in passing, and once in a footnote. To date, the application of that statute has never been reviewed by any appellate court.

It affects every one of the 394 local measures on the November 3, 2020 ballot and beyond.

For the foregoing reasons, appellant respectfully urges this Honorable Court to grant review in this matter.

DATED: November 6, 2020

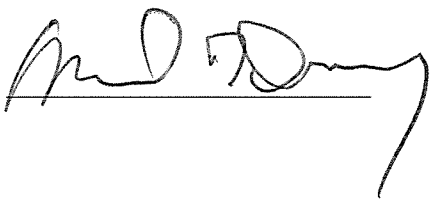
Respectfully submitted,



Michael Denny
In Pro Per

CERTIFICATE OF COMPLIANCE

Pursuant to rule 8.204(c) of the California Rules of Court, I hereby certify that this petition contains 8,397 words, including footnotes. In making this certification, I have relied on the word count of the computer program used to prepare the brief.

By 

APPENDIX A

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

MICHAEL DENNY, Plaintiff and Appellant, v. JOHN ARNTZ et al., Defendants and Respondents.	A158029 (San Francisco County Super. Ct. No. CGC19575070)

BY THE COURT:

Plaintiff, Michael Denny's "Request to Depublish and Reconsider," filed on October 20, 2020, is denied.

Date: 11/04/2020 KLINE, P.J.
PRESIDING JUDGE

APPENDIX B

Filed 10/14/20 after nonpublished opinion filed 9/17/20

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

MICHAEL DENNY, Plaintiff and Appellant, v. JOHN ARNTZ, as Director, etc., et al. Defendants and Respondents.	A158029 (City & County of San Francisco Super. Ct. No. CGC-19-575070)

BY THE COURT:

The opinion in the above-entitled matter filed on September 17, 2020, was not certified for publication in the Official Reports. For good cause and pursuant to California Rules of Court, rule 8.1105, it now appears that the opinion should be published in the Official Reports, and it is so ordered.

Dated: 10/14/2020

Kline, P. J.

Kline, P.J. PRESIDING JUSTICE

APPENDIX C

Filed 9/17/20 Denny v. Arntz CA1/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

MICHAEL DENNY, Plaintiff and Appellant, v. JOHN ARNTZ, as Director, etc., et al. Defendants and Respondents.	A158029 (City & County of San Francisco Super. Ct. No. CGC-19-575070)

In November 2018, the voters in San Francisco passed Proposition A, the Embarcadero Seawall Earthquake Safety Bond, by 82.7 percent of the popular vote. The following spring, plaintiff Michael Denny filed a lawsuit against defendant John Arntz, the San Francisco Director of Elections, and defendant Dennis Herrera, the City Attorney, to set aside Proposition A. Denny alleged that, in various ways, the ballot materials were not fair and impartial, thus constituting grounds to contest the election outcome under Elections Code section 16100.[1] Defendants demurred to the complaint, arguing that it failed to state a claim based on any of the permissible grounds for a postelection contest under section 16100. The trial court sustained

[1] Undesignated statutory references are to the Elections Code.

defendants' demurrer without leave to amend and entered a judgment of dismissal. Denny appeals from the judgment. We shall affirm.

FACTUAL AND PROCEDURAL BACKGROUND

We draw our statement of facts from the complaint and the documents that were judicially noticed by the trial court.[2]

A. *Proposition A*

At the November 6, 2018 election, the City and County of San Francisco (City) general election ballot[3] contained Proposition A, which put to the voters whether the City should issue bonds to fund repairs and improvements to the Embarcadero Seawall.

The official language for Proposition A that appeared on the ballot was as follows:

"SAN FRANCISCO SEAWALL EARTHQUAKE SAFETY BOND, 2018: To protect the waterfront, [Bay Area Rapid Transit] 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

---

[2] In his appellate briefs, Denny requests that this court take judicial notice of sample ballots and local measure materials for various elections in California and other states. There is no indication that these materials were presented to the trial court, and appellate courts are not required to take judicial notice of documents in those circumstances. (*McMahan v. City and County of San Francisco* (2005) 127 Cal.App.4th 1368, 1373, fn. 2.) In any event, we do not find them relevant and the request is denied.

[3] A ballot contains, among other things, the "[t]itles and summaries of measures submitted to vote of the voters." (§ 13103, subd. (c).)

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."

Consistent with the City's Municipal Elections Code, a Voter Information Pamphlet, which included a digest of Proposition A, was prepared for the November 2018 election and distributed to every registered voter in the City. (S.F. Mun. Elec. Code, §§ 500, 502.) The digest of Proposition A was written by the City's Ballot Simplification Committee (BSC)—a group responsible under the City's Municipal Elections Code for digests of local ballot measures. (S.F. Mun. Elec. Code, §§ 500, subd. (c)(3), 515; 610, subd. (a)(1).) Generally, these digests consist of four sections: (1) "The Way It Is Now"; (2) "The Proposal"; (3) "A 'Yes' Vote Means"; and (4) "A 'No' Vote Means." (S.F. Mun. Elec. Code, § 515, subd. (a).) The digests must meet certain characteristics; for example, generally they do not exceed 300 words and they must be written for eighth-grade level readability. (S.F. Mun. Elec. Code, § 515, subds. (b)-(c).)

The BSC holds meetings where the public can provide comments regarding the proposed digests. (S.F. Mun. Elec. Code, § 590; see also § 9295 [providing a 10-day public examination period during which members of the public may review the voter information pamphlet before it is printed].) The BSC held public meetings on July 30 and August 3, 2018, to discuss the digest language for Proposition A in advance of the November 6 election.

The Voter Information Pamphlet contained additional information about Proposition A: the City controller's financial analysis, the City Attorney's general statement about the measure, and arguments in favor and against the measure. (S.F. Mun. Elec. Code, §§ 510, subd. (a), 520, 540, 550, subd. (a).) There were also paid arguments in favor of the proposition; paid arguments in opposition are permitted, but none were submitted. (*Id.*, § 555.) The Voter Information Pamphlet also included the full text of Proposition A, which ran to some three single spaced pages.

Proposition A passed in November 2018 with 82.7 percent of votes cast in favor.

B. *Denny Files Suit to Set Aside Proposition A*

In April 2019, Denny, representing himself, filed a lawsuit to set aside Proposition A pursuant to section 16100, subdivision (c) based on five grounds: (1) the digest prepared by the BSC was not impartial; (2) the City should not have included paid ballot arguments in the Voter Information Pamphlet; (3) the ballot question for Proposition A violated the Elections Code because it did not include the phrase "shall the measure . . . be adopted"; (4) the ballot question was not impartial and the title should not have been printed in upper case letters; (5) the ballot question for Proposition A was too long. The complaint alleged that these purported deficiencies constituted a failure to comply with section 13119 et seq., which sets forth the content requirements for ballots.[4] Denny alleged that each deficiency

---

[4] Section 13119 provides, in relevant part, "[t]he ballots used when voting upon a measure . . . authorizing the issuance of bonds or the incurrence of debt, shall have printed on them the words 'Shall the measure (stating the nature thereof) be adopted?' To the right or below the statement of the measure to be voted on, the words 'Yes' and 'No' shall be printed on separate lines, with voting targets." (§ 13119, subd. (a).) It also requires the

constituted an actionable "offense [by defendants] against the elective franchise" within the meaning of section 16100, subdivision (c), which authorizes election contests in certain circumstances. (§ 16100, subd. (c).)

Defendants demurred to the complaint on multiple grounds, including that Denny had failed to avail himself of *preelection* remedies for challenging the Voter Information Pamphlet and Ballot language, and that the complaint in any event could not state a claim as a postelection challenge under section 16100. After a hearing, the trial court issued a detailed order sustaining the demurrer without leave to amend. The trial court determined that "none of the grounds giving rise to a post-election challenge under Elections Code section 16100 applies." The court explained that Denny's reliance on section 16100, subdivision (c) was 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, subdivision (c); and (3) Denny failed to show that any alleged violations of the law effected the outcome of the election, as required by section 16100, subdivision (c). Denny timely appealed.

DISCUSSION

This dispute centers on whether Denny's allegations—that Proposition A's ballot materials were not impartial due to its alleged deficiencies—state a claim that defendants committed an offense against the election franchise under section 16100 subdivision (c). Denny contends his claims are cognizable under the Elections Code, and the demurrer was procedurally improper. We address each contention in turn.

---

statement of the measure to be true, impartial, and should not be argumentative or "likely to create prejudice for or against the measure." (§ 13119, subd. (c).)

A. *Standard of Review*

Our standard of review is well established. "When reviewing a judgment dismissing a complaint after the granting of a demurrer without leave to amend, courts must assume the truth of the complaint's properly pleaded or implied factual allegations. [Citation.] Courts must also consider judicially noticed matters. [Citation.] In addition, we give the complaint a reasonable interpretation, and read it in context. [Citation.]" (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081 (*Schifando*).) "We do not, however, assume the truth of contentions, deductions, or conclusions of fact or law." (*Moore v. Regents of University of California* (1990) 51 Cal.3d 120, 125.)

"[W]e determine whether the complaint states facts sufficient to state a cause of action." (*Schifando, supra*, 31 Cal.4th at p. 1081.) "If the complaint states a cause of action under any theory, regardless of the title under which the factual basis for relief is stated, that aspect of the complaint is good against a demurrer." (*Quelimane Company v. Stewart Title Guaranty Company* (1998) 19 Cal.4th 26, 38.) Issues of statutory construction are questions of law subject to independent review. (*MacIsaac v. Waste Management Collection & Recycling, Inc.* (2005) 134 Cal.App.4th 1076, 1082.)

Our review is de novo, but appellant bears the burden of demonstrating error. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) We treat a party who represents himself on appeal as we would any other party or attorney. (*Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1247.)

B. *Denny Cannot Proceed With A Post-Election Contest*

It is " ' "the duty of the court to validate the election if possible," ' " meaning the election " ' "must be held valid unless plainly illegal." ' " (*Friends of Sierra Madre v. City of Sierra Madre* (2001) 25 Cal.4th 165, 192

(*Friends of Sierra Madre*).) Thus, a "court's authority to invalidate an election is limited to the bases for contest specified in Elections Code section 16100." (*Ibid.*) Those bases include misconduct of a precinct board member, the elected person being ineligible for office at the time of election, bribery or offense against the elective franchise, the casting of illegal votes, denial of eligible voters' right to vote, precinct board errors in canvassing or conducting the election returns, and an error in vote counting programs or summation. (§ 16100, subds. (a)-(g).)

Denny's complaint is based on section 16100, subdivision (c), which authorizes an election contest on the ground that "[*t*]*he 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." (Italics added.)

The trial court concluded that although Denny labeled his claim statutory misconduct by defendants under section 16100, subdivision (c), his complaint is actually a challenge to the sufficiency and impartiality of Proposition A's digest and ballot materials, and that is a claim that can only be raised preelection. (*Friends of Sierra Madre*, *supra*, 25 Cal.4th at pp. 192-194.) As we explain below, we agree with the trial court that Denny failed to state a claim under section 16100.

The first issue with Denny's complaint is the definition of "defendant" under section 16100, subdivision (c). The Elections Code defines "defendant" as, essentially, a candidate in the election. (§ 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"].) By its terms, section 16100 subdivision (c) applies where a defendant (i.e., candidate) has offered a bribe or otherwise "has committed any other offense against the elective franchise defined in Division 18 (commencing with Section 18000)." (§ 16100, subd. (c).) Neither of the defendants here were candidates in the November 2018 election.

Although Denny relies on *Canales v. City of Alviso* (1970) 3 Cal.3d 118, to support his argument that section 16100, subdivision (c) allows election contests to ballot measures as well as candidate conduct, that reliance is misplaced. In *Canales*, our Supreme Court construed a prior version of section 16100, subdivision (c) to allow an election contest where proponents of a ballot measure offered bribes to secure the passage of a measure, and the challenger sought a recount. (*Id.* at pp. 129-130.) The court noted the bribes "should not void an election unless it is shown that the result would have been different without their influence"—that it affected the outcome of the election. (*Id.* at p. 130.) Here, Denny does not seek a recount of the ballots. Nor, as we will discuss, does he satisfy the requirement of alleging facts that any improper conduct affected the outcome of the election. (See *ibid.*; see also *Horwath v. City of East Palo Alto* (1989) 212 Cal.App.3d 766, 774 ["When a contestant seeking to overturn a ballot measure election, as opposed to a candidate election, relies on subdivision (c), he or she must demonstrate that the forbidden act affected the outcome"].)

Second, section 16100, subdivision (c) does not provide a statutory basis "to attack the outcome of an election based on deficiencies in the impartial analysis" of a ballot measure after the election, such as the attack Denny wages on Proposition A here. (*People ex rel. Kerr v. County of Orange* (2003) 106 Cal.App.4th 914, 932 (*Kerr*).) Enforcing the requirements for an impartial analysis of a ballot is a preelection activity. (*Friends of Sierra*

Madre, *supra*, 25 Cal.4th at pp. 178-179, 193 [postelection challenge to a local ordinance based on city improperly changing the ordinance's language on scope and intent not permitted by section 16100].)

Both the California Elections Code and the City's Municipal Elections Code authorize preelection challenges to alleged flaws in the Voter Information Pamphlet or ballot and set out the procedure for doing so. During the 10-day public examination period when the public may review the Voter Information Pamphlet prior to printing, "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." (§ 9295, subd. (b)(1); see also S.F. Mun. Elec. Code, § 590.) The writ of mandate or injunction must be filed "no later than the end of the 10-calendar-day public examination period." (§ 9295, subd. (b)(1).)

Section 13314 similarly permits a voter to seek a preelection 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." (§ 13314, subd. (a)(1).) In *Kerr*, for example, a group of citizens made a postelection challenge to the passage of a local measure adopting a county charter by claiming, among other things, the measure was misleadingly described in the ballot materials, which also omitted a fiscal impact statement. (*Kerr*, *supra,* 106 Cal.App.4th at p. 918.) The court noted that "anyone who thought that the impartial analysis provided with the ballot materials was somehow deficient might have made a preelection effort to cure any deficiency and thereby

prevent any alleged misleading of the voters before it happened." (*Id.* at pp. 931-932.)

Nothing in Denny's complaint or the proceedings in the trial court reflect that he availed himself of preelection procedures for challenging the Proposition A ballot materials or digest. The BSC held public meetings on July 30 and August 3, 2018, at which members of the public had the opportunity to comment on the digest of Proposition A. (See § 9295, subd. (a)-(b).) If Denny believed the impartial analysis or other ballot materials or digest were deficient, he could have made a preelection effort to cure them at public meetings or by a writ of mandate. (See § 13314, subd. (a)(1).) Denny does not dispute that a preelection writ of mandate was an available remedy and that he did not use it. His postelection challenges to the ballot and information pamphlet after Proposition A has already passed cannot proceed.[5]

Denny nonetheless argues that the failure of a local ballot measure to strictly comply with Elections Code requirements for language and form gives rise to a proper postelection challenge. But the two cases he relies on do not support his point; both cases address challenges to ballot materials and voter guides that were made before the election, not after. (See *Huntington Beach City Council v. Superior Court* (2002) 94 Cal.App.4th 1417, 1426 [preelection petitions for writs of mandate to address false or misleading statements];

---

[5] We note that courts have recognized "the 'possibility' that an impartial analysis of a county measure or other ballot materials can be so misleading and inaccurate 'that constitutional due process requires invalidation of the election,' " but Denny does not raise any such claim here. (*Owens v. County of Los Angeles* (2013) 220 Cal.App.4th 107, 123.)

McDonough v. Superior Court (2012) 204 Cal.App.4th 1169, 1173 [preelection writ of mandate challenging ballot title and question].)

Finally, even if Denny could rely on section 16100, subdivision (c) as a basis to challenge the ballot measure, Denny does not allege the defendants' actions affected the election results for Proposition A as required for ballot measure election contests under section 16100, subdivision (c). (*Horwath v. City of East Palo Alto, supra,* 212 Cal.App.3d at p. 774 ["When a contestant seeking to overturn a ballot measure election, as opposed to a candidate election, relies on subdivision (c), he or she must demonstrate that the forbidden act affected the outcome"].) In *Horwath*, plaintiffs alleged that the city attorney failed to provide complete and impartial analysis of a ballot measure, rendering the election process as "hopelessly riddled with the effects of misleading official ballot materials." (*Id.* at pp. 771-772.) By failing to demonstrate how these deficiencies affected the ability of the voters to make an informed choice, the court determined the plaintiffs were not entitled to relief because they could not "maintain a statutory election contest." (*Id.* at pp. 774-775; see also *Nguyen v. Nguyen* (2008) 158 Cal.App.4th 1636, 1662-1663 [noting "[w]here technical deviations from Elections Code provisions have not posed the possibility of an actual change of result, the courts have uniformly upheld the results of the election as against any challenges based on those technical deviations"].)

Here, rather than alleging that deficient language and analysis in the ballot materials affected the outcome of Proposition A, Denny admits in his complaint, "[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." But where "voters are

provided the whole text of a proposed law or ordinance, we ordinarily assume the voters voted intelligently on the matter." (*Owens v. County of Los Angeles, supra,* 220 Cal.App.4th at p. 126.) Here, as we have described, the voters were provided with the full text of Proposition A, and we assume that any alleged discrepancies in the ballot materials did not affect the voters' ability to vote intelligently.

Arguing that he is not required to make this showing, Denny relies entirely on *Bradley v. Perrodin* (2003) 106 Cal.App.4th 1153, a case annulling the election of a candidate who fraudulently registered voters, despite the lack of evidence that the misconduct affected the election outcome. *Bradley* is inapposite. It expressly distinguished invalidating the election results for a candidate (as compared to a ballot measure) in the absence of any evidence that unlawful behavior changed the outcome of the election. (*Id.* at p. 1168.) Indeed, the court reiterated that a ballot measure election "should not be annulled for the misdeeds of the measure's proponents, 'unless the misdeeds affected the outcome.' " (*Ibid.*)

"[M]ost of the time [a court's] analysis ends with determination of whether plaintiff is attacking election on one of the grounds specified in section 16100." (*McKinney v. Superior Court* (2004) 124 Cal.App.4th 951, 955, 958 [holding that a postelection challenge brought on the theory that a write-in candidate who lost in an election was ineligible for office and it affected the outcome of the election should have been brought before the election].) Because Denny has not stated any grounds for relief under section 16100 for a postelection contest, our analysis ends here, and we do not assess the particulars of his claim that the Proposition A ballot materials were

technically deficient under section 13119. (See *id.* at p. 958.) Nor do we address defendants' remaining arguments in support of the demurrer.[6]

Based on the foregoing, we conclude the trial court properly sustained the demurrer.

C. *The Demurrer Was Procedurally Proper*

Denny argues defendants were not authorized to file a demurrer because his claim is governed by the election contest procedures set forth in Division 16, Chapter 5, Article 3 of the Elections Code (§ 16440 et seq.), not the Code of Civil Procedure. He contends that defendants were required under section 16400, subdivision (c) to file an affidavit to respond to his complaint.

Denny's argument is premised on his assumption that his complaint states a claim under section 16100 subdivision (c), which, as we have addressed above, is incorrect. Because Denny does not properly allege a section 16100 subdivision (c) claim, limiting the trial court's procedures to those in Article 3 and precluding a demurrer is unwarranted here.[7]

---

[6] Defendants argue Denny's claims were untimely within the limits set under section 16401, requiring election contests based on grounds aside from section 16100, subdivision (c) to be brought within 30 days after the Director of Elections has declared the results of the election; and Government Code section 53511 for actions to determine the validity of bonds. Nor do we address defendants' argument that Denny's claims fail under the Third Validating Act of 2018. (Sen. Bill No. 1499 (2017-2018 Reg. Sess.) §§ 1, 6.)

[7] The procedures in Division 16, Chapter 5, Article 3 govern election contests based on limited, specific grounds, including section 16100, subdivision (c), offenses against an elective franchise (§ 16440 [identifying the election contest grounds to which Article 3 applies].) They require a contestant to file an affidavit alleging the contest grounds with the clerk of the superior court, which must then be served on the defendant—which, as noted above, is a candidate. (§ 16442; see also § 16002.) The statute further provides that "[n]o special appearance, demurrer or objection may be taken

Nor do we credit Denny's additional claim that the Code of Civil Procedure is generally inapplicable to election contests. The Elections Code expressly incorporates the Code of Civil Procedure into procedures for election contests as long as they are compatible. Section 16602, which sets forth the procedures for election contests, states that trial courts shall "be governed by the rules of law and evidence governing the determination of questions of law and fact, so far as the same may be applicable." (§ 16602; cf. *Anderson v. County of Santa Barbara* (1976) 56 Cal.App.3d 780, 786-788 [finding Code of Civil Procedure section 437c timelines for filing a summary judgment motion 60 days after a general appearance in court incompatible with election contest requirements to commence a trial within 45 days of filing the contest].)

There is no such incompatibility between a demurrer and Denny's election contest. Section 16602 authorizes a trial court to "dismiss the proceedings if the statement of the cause of the contest is insufficient," which is no different from the standards in a demurrer under the Code of Civil Procedure. (§ 16602; Code Civ. Proc. § 430.10, subd. (e) [authorizing a demurrer if the "pleading does not state facts sufficient to constitute a cause of action"].) Indeed, other courts have resolved election contests through demurrers. (See, e.g., *Salazar v. City of Montebello* (1987) 190 Cal.App.3d 953, 955 [affirming trial court order sustaining a demurrer in an election contest]; *Hale v. Farrell* (1981) 115 Cal.App.3d 164, 168 [affirming trial court order sustaining election contest on one cause of action].)

---

other than by the affidavits which shall be considered a general appearance in the contest." (§ 16444.)

This case is no different. Defendants' demurrer was properly before the trial court.

D. *Leave to Amend Is Not Warranted*

The trial court sustained the demurrer without leave to amend. In his brief on appeal, Denny has not argued that he could cure any defects in the causes of action in the complaint, but he states without more that he seeks leave to amend his complaint to add a new ground for relief "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.' " This is the sum total of the argument.

Although an amendment to a complaint may be requested for the first time on appeal, we reject this request because Denny has not demonstrated to us how this amendment would allow him to state a cause of action. (*Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1386) [leave to amend may be made for the first time in the reviewing court, but requires demonstrating a reasonable possibility an amendment will cure the complaint's defects]; *Rakestraw v. California Physicians' Service* (2000) 81 Cal.App.4th 39, 43 [requiring party to "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," and all specific factual allegations for the claim].) Denny's complaint was properly dismissed without leave to amend.[8]

---

[8] We do not address Denny's additional claims, asking us to rewrite the Elections Code timing requirements for filing election contests, and to invalidate the City's Municipal Code sections 515 and 600, governing the BSC and the procedures and requirements for preparing ballot materials for voter pamphlets. Those claims were not raised in his complaint. (*Jones v. Kvistad* (1971) 19 Cal.App.3d 836, 842 ["Ordinarily a party is prohibited from

DISPOSITION

The judgment of dismissal is affirmed.

---

asserting on appeal claims to relief not asserted or requested in the court below"].)

Miller, J.

WE CONCUR:

Kline, P.J.

Richman, J.

A158029, *Denny v. Arntz*

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 6, 2020, I served the following document.

REFERRAL FOR CONSIDERATION BY CA SUPREME COURT
Denny v. Arntz, et al., Case No. A158029, 1st District, Division 2

On the following persons at the locations specified:

Ms. Tara Steeley
City Attorney's Office of San Francisco
1 Dr. Carlton B Goodlett Place
San Francisco, CA 94102
Telephone: (415) 554-4661
Email: tara.steeley@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)

1st District Court of Appeal
350 McAllister Street
San Francisco, CA 94102
[VIA PERSONAL SERVICE]
(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 and 1st District Court of Appeal.

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