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5 *Exempt From Filing Fees (Gov't Code § 6103)*

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8 **IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA**
9 **IN AND FOR THE COUNTY OF SAN DIEGO, CENTRAL DIVISION**
10

11 CITIZENS OVERSIGHT, INC., a Delaware
non-profit corporation; RAYMOND LUTZ,
12 an individual,

13 Plaintiffs,

14 v.

15 MICHAEL VU, San Diego Registrar of
Voters; SAN DIEGO COUNTY, a public
16 entity; DOES 1-10,

17 Defendants.

) No. 37-2017-00027595-CU-MC-CTL
Action Filed: July 25, 2017

) **MEMORANDUM OF POINTS AND**
) **AUTHORITIES IN SUPPORT OF**
) **DEFENDANTS' MICHAEL VU AND**
) **COUNTY OF SAN DIEGO DEMURRER**
) **TO COMPLAINT FOR DECLARATORY**
) **RELIEF AND MANDAMUS FOR**
) **VIOLATION OF THE CALIFORNIA**
) **PUBLIC RECORDS ACT**

) **IMAGED FILE**

) Date: October 13, 2017

) Time: 10:30 a.m.

) Dept.: 66

) ICJ: Hon. Kenneth J. Medel
20

21 Defendants/Respondents Michael Vu, sued in his capacity as the Registrar of Voters for
22 the County of San Diego and the County of San Diego (collectively referred to as the "County
23 of San Diego") hereby submit the following memorandum of points and authorities in support of
24 their demurrer to the plaintiffs/petitioners' Complaint for Declaratory Relief and Mandamus for
25 Violation of the California Public Records Act ("Complaint"):

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1 **STATEMENT OF FACTS**

2 On February 2, 2017, plaintiff Lutz sent an email to Michael Vu, the Registrar of Voters
3 for the County of San Diego, requesting that he and his supporters be allowed to “conduct
4 recount [sic] of the presidential race in the June 2016 primary in certain batches or precincts of
5 ballots.” (See, Complaint, Paragraph 12 and Exhibit 1, page 1.)

6 On February 7, 2017, Mr. Vu responded indicating that “[t]he time period to request a
7 recount has passed and the ballots for the 2016 June Primary Election have been sealed per State
8 law”. (See Complaint, Paragraph 12 and Exhibit 1, page 2.)

9 On February 17, 2017, Lutz emailed Mr. Vu as follows: “. . . per California Public
10 Records Act, please provide the legal basis for withholding ballots from our inspection. Please
11 specifically state which exemption you are claiming and how the exemption applies” (See
12 Complaint Paragraph 12 Exhibit 1, page 3.)

13 Mr. Vu. Responded to Lutz via email on February 23, 2017, informing him that the
14 ballots had been sealed pursuant to Elections Code 15370 and 17301 and that production of the
15 requested ballots was exempt from the requirements of the Public Records Act citing
16 Government Code § 6245(k).

17 On April 4, 2017, counsel for plaintiffs’ wrote counsel for the County requesting that his
18 clients be allowed to “inspect the ballots from the June 6, 2016, Presidential Primary.” (See,
19 Complaint Paragraph 13 and Exhibit 2.)

20 On April 11, 2017, counsel for the County wrote counsel for plaintiffs’ in relevant part
21 stating:

22 The ballots from the June election have been sealed pursuant to California
23 Elections Code 15370 and 17301(b). Once sealed pursuant to these sections ‘the
24 elections official may not open any ballots or permit any ballots to be opened....’
25 (Elections Code §15307) Elections Code §17301(b) also requires that voted
ballots in Presidential Elections be kept sealed and ‘shall be kept by the elections
official unopened and unaltered....’ Although there are exceptions to the sealing
requirement, none apply to your client’s Public Records Act request.”

26 Documents whose disclosure is exempted or prohibited by state law are not
27 subject to disclosure under the Public Records Act. (Government Code §6254(k).
28 See also Evidence Code §1040(b)(1).)”

1 (See Complaint Paragraph 14 and Exhibit 3.)

2 This lawsuit followed.

3 **LAW APPLICABLE TO GENERAL DEMURRER**

4 When any ground for objection to a complaint appears on the face thereof, the objection
5 on that ground may be taken by a demurrer to the pleading. Code Civ. Proc., § 430.30(a). The
6 party against whom a complaint has been filed may object by demurrer to the pleading, on the
7 ground that the pleading does not state facts sufficient to constitute a cause of action. Code Civ.
8 Proc., § 430.10(e).

9 A general demurrer tests the legal sufficiency of the pleadings. *Smeltzley v. Nicholson*
10 *Mfg. Co.*, 18 Cal.3d 932, 939 (1977). It assumes as true all properly pleaded material facts, but
11 not the truth of contentions, deductions, or conclusions of fact or law. *Moore v. Regents of*
12 *Univ. of California*, 51 Cal.3d 120, 125 (1990). But facts not alleged are presumed not to exist.
13 *Melikian v. Truck Ins. Exchange*, 133 Cal.App. 2d 113, 115 (1955) (“*Melikian*”). Moreover,
14 where the facts appearing in exhibits attached to a petition contradict the facts alleged, the facts
15 in the exhibits take precedence. *Holland v. Morse Diesel Int’l, Inc.*, 86 Cal.App.4th 1443, 1447
16 (2001).

17 The allegations in the complaint, petition, and the exhibits attached thereto, fail to set
18 forth facts sufficient to constitute a cause of action against defendants. Defendants’ general
19 demurrer is therefore proper and for the reasons set forth below, should be granted without leave
20 to amend.

21 **DEMURRER TO FIRST CAUSE OF ACTION FOR DECLARATORY RELIEF**

22 **1. Ballots from the June 2016 Presidential Primary are Exempt from**
23 **Production Pursuant to the Public Records Act.**

24 Government Code, §6254(k) provides that the Public Records Act (Gov’t Code §§ 6250 -
25 6286.48) does not require the disclosure of “[r]ecords, the disclosure of which is exempted or
26 prohibited pursuant to federal or state law, including, but not limited to, provisions of the
27 Evidence Code relating to privilege.” (Gov’t Code §6254(k).) In addition, Evidence Code

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1 §1040(b)(1) provides that the County has a privilege to refuse to disclose official information if
2 the disclosure is forbidden by ... a statute of this state.”

3 **2. The California Elections Code Prohibits the Registrar from Producing**
4 **the Requested Ballots**

5 For elections involving federal offices, the Elections Code¹ provides that the packages
6 containing ballots and identification envelopes “shall be kept by the elections official, unopened
7 and unaltered for 22 months from the date of the election. (Section 17301(b).) In addition,
8 Section 15370 provides that “[a]fter ballots are counted and sealed, the elections official may not
9 open any ballots nor permit any ballots to be opened except as permitted in Sections 15303² and
10 15304³, or in the event of a recount.”⁴

11 **DEMURRER TO PETITION FOR WRIT OF MANDATE**

12 In order to obtain a writ of mandate, petitioners must prove ““(1) a clear, present and
13 usually ministerial duty on the part of the respondent . . . ; and (2) a clear, present and beneficial
14 right in the petitioner to the performance of that duty....” (*San Diego City Firefighters, Local*
15 *145, AFL-CIO v. Bd. of Admin of San Diego City Employees’ Ret. Sys.*, 206 Cal.App.4th 594,
16 622 (2012), citing *Santa Clara County Counsel Attys. Assn. v. Woodside*, 7 Cal.4th 525, 539-540
17 (1994); See also, *California Assn. for Health Services at Home v. State Dept. of Health Services*,
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19 _____
20 ¹ Unless otherwise noted all references are to the Elections Code.

21 ² Section 15303 provides that if during the official canvass of an election, it appears that the
22 returns from any precinct “are incomplete, ambiguous, not properly authenticated, or otherwise
23 defective, the elections official may issue and serve subpoenas requiring members of the precinct board
to appear and be examined under oath concerning the manner in which votes were counted and the result
of the count in their precinct. Section 15303 only applies when ballots are tabulated at the polls. San
Diego does not tabulated ballots at the polls.

24 ³ Section 15304 relates to jurisdictions using a central counting place and provides that during
25 the official canvass an “elections official may appoint not less than three deputies to open the envelopes
26 or containers with the materials returned from the precincts. If, after examination, any of the materials
27 are incomplete, ambiguous, not properly authenticated, or otherwise defective, the precinct officers may
be summoned before the elections official and examined under oath to describe polling place procedures
and to correct errors and omissions.

28 ⁴ A request for a recount must be made within 5 days of the completion of the official canvass.
(Sections 15620 and 15621.)

1 148 Cal.App.4th 696- 709 (2007) – “[A]n applicant for a writ of mandate must show a present
2 duty for the performance of the act sought to be compelled.”)

3 In this case, petitioners have not, and cannot demonstrate that the Registrar has a clear,
4 present and ministerial duty to unseal the ballots from the June 7, 2016 primary election or that
5 petitioners have a clear, present and beneficial right to review these ballots. In fact, state law
6 prohibits the Registrar from unsealing the ballots and making them available to petitioners for
7 their review.

8 Plaintiffs/petitioners’ petition for writ of mandate simply asks for a different form of
9 relief based on the same set of facts that are the basis for their complaint for declaratory relief.
10 As demonstrated above, that cause of action fails to set forth facts sufficient to constitute a cause
11 of action against the County defendants. Absent a legal basis for relief, plaintiffs/petitioners are
12 not entitled to writ relief and the petition should be dismissed on the grounds that, as a matter of
13 law, it fails to set forth facts sufficient to constitute a basis for writ relief.

14 **CONCLUSION**

15 For the foregoing reasons, defendants and respondents respectfully request the court to
16 grant their general demurrer to the complaint and petition without leave to amend.

17 DATED: September 11, 2017

THOMAS E. MONTGOMERY, County Counsel

19 By: s/Stephanie A. Karnavas
20 STEPHANIE A. KARNAVAS, Senior Deputy
Attorneys for Defendants