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SUPERIOR COURT OF CALIFORNIA  
COUNTY OF SAN FRANCISCO

LOWELL E. GRATTAN, an individual,  
TRANSPORTATION SOLUTIONS  
DEFENSE AND EDUCATION FUND, a  
California nonprofit public benefit  
corporation,

Plaintiffs/Petitioners,

vs.

DEBRA BOWEN, Secretary of State, State  
of California, JESSE DURAZO, Registrar  
of Voters, Santa Clara County and DOES  
1 through 50, inclusive.

Defendants/Respondents.

CASE NO.:

PLAINTIFFS' EX PARTE APPLICATION  
FOR TEMPORARY RESTRAINING  
ORDER AND ORDER TO SHOW CAUSE;  
MEMORANDUM IN SUPPORT  
THEREOF

Date: December 2, 2008

Time: 11:00 a.m.

Dept.: tba

Judge: Presiding Judge

Unlimited Jurisdiction

Action filed: November 26, 2008

Trial date: Not set.

Accompanying Documents: Declaration of  
Marc G. Hynes; Request for Judicial  
Notice; Proposed Order

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Petitioners/Plaintiffs ("Plaintiffs") do hereby move ex parte for a temporary  
restraining order to restrain Defendants and each of them from preparing or distributing  
the statement of results of the November 4, 2008, election pending a post-election manual  
tally conducted for the Santa Clara County ballot proposition identified as Measure B as a  
close contest.

Plaintiffs have provided Respondents and Defendants BOWEN and DURAZO through their counsel Tyler Roozen, Deputy Attorney General and Counsel for the Secretary of State and Susan Swain, Deputy County Counsel for the County of Santa Clara, with notice of their intention to seek ex parte relief. (Declaration of Marc G. Hynes in Support of Plaintiff's Ex Parte Application for Temporary Restraining Order and Order to Show Cause.)

Plaintiffs are informed and believe that respondents are represented by:

Tyler Roozen, Deputy Attorney General and Counsel for the Secretary of State  
Department of Justice  
Office of the Attorney General  
455 Golden Gate Avenue, Suite 1100  
San Francisco, CA 94102-7004, and

Susan Swain, Deputy County Counsel, Office of the County Counsel  
Santa Clara County  
70 W. Hedding Street, East Wing, 9<sup>th</sup> Floor  
San Jose, CA 95110-1770.

Plaintiffs have previously applied ex parte for a temporary restraining order before the Superior Court of California, County of Santa Clara. That application was presented on Monday, December 1, 2008. At that time, counsel for the Secretary of State objected on the basis that Elections Code Section 13314 required that the proper venue is Sacramento County. As provided by Code of Civil Procedure Section 401, filings where the proper venue is Sacramento County authorize filings in any city and county where the Attorney General has an office. As the Attorney General has an office in the City and County of San Francisco, plaintiffs file their Writ here and seek ex parte relief from this Court.

#### MEMORANDUM

This action challenges the failure of Respondent BOWEN and Respondent DURAZO, to comply with requirements of the California Government Code, Election Code and the Post-Election Manual Tally ("PEMT") requirements in close contests. The PEMT requirements were adopted as an emergency regulation effective October 20, 2008, and appear as 2 California Code of Regulations, Sections 20120 through 20127, respectively. (See Plaintiffs' Request for Judicial Notice.) Plaintiffs seek an order from this Court requiring Defendants to comply with legal requirements to ensure the uniform application

and administration of state election laws mandated by Government Code section 12172.5 and Article IV, Section 16 of the California Constitution.

By Petition for Writ of Mandate Plaintiffs seek an Order from the Court that Defendants conduct a post-election manual tally of Measure B which seeks to impose a sales tax increase for public transit operations in Santa Clara County.

Plaintiffs further seek a declaration from this Court that PEMT regulations, and particularly section 2 California Code of Regulations Section 20121(a)(3) as presently written deny Plaintiffs their rights to equal protection under the fourteenth Amendment to the United States Constitution and Article I, Section 7 and Article IV, Section 16 of the California Constitution. A declaration of denial of equal protection of the laws as well as a denial of procedural and due process rights under the foregoing constitutions is necessary and appropriate. Pending action by the Court, Plaintiffs seek an Order from this Court enjoining certification by Defendants of election results for Santa Clara County until a PEMT has been conducted for Measure B.

#### STATEMENT OF FACTS

On October 20, 2008, the State of California Office of Administrative law approved an emergency regulation which purported to adopt the already promulgated post-election manual tally requirements (PEMT) in close contests pursuant to the case of County of San Diego v. Debra Bowen (2008) 166 Cal.App.4<sup>th</sup> 501. The regulations require that in an election contest where the margin of victory is less than half of one percent (0.5%), a manual tally of ten percent (10%) of the precincts of the contested race be conducted in addition to that already required by Elections Code section 15360.

Despite the clear mandate to uniformly enforce the election laws, and to uniformly apply and administer state election laws, as applied to ballot measures which require a two-thirds, that is, 66.667% approval, Respondents refuse to conduct a PEMT of Measure B on the basis of existing language of 2 California Code of Regulations, Section 20121(a)(3). Respondents' refusal denies Plaintiffs their rights to equal protection and procedural and substantive due process of the law under the California and United States Constitutions.

The ballot measure known as Measure B appeared on the November 4, 2008, ballot. Measure B proposes a one-eighth of one percent sales tax increase in order to fund public transit operations. As of the filing of the complaint in this action, Measure B has received 66.78% of the votes for a 0.11% margin of victory from the 66.667% required for approval of a special tax. (California Constitution, Article XIII C, Section 2(d); Article XIII A, Section 4. (Santa Clara County Local Transportation Authority v. Guardino (1995) 11 Cal.4<sup>th</sup> 220.

## ARGUMENT

### THE COURT SHOULD EXERCISE ITS AUTHORITY TO GRANT THE RELIEF REQUESTED.

#### 1. Legal Standards

This court has “inherent power” to “exercise reasonable control over litigation before it.” Venice Canals Resident Home Owners Ass’n v. Superior Court (1977) 72 Cal.App.3d 675, 679; Code of Civ. Proc. §§ 128(a)(1)(3), (4) and (8).) A court may issue a temporary restraining order when the relief consists of restraining the commission or continuance of an act; when money damage would be inadequate; or when it is extremely difficult to measure the full extent of damages suffered by the plaintiff. (Code Civ. Proc. § 526(a)(1), (4)-(5).)

The granting of such relief involves the evaluation of two interrelated facts. First, the Court must evaluate the likelihood that the plaintiff will prevail on the merits at trial. Second, the Court must evaluate the interim harm that the plaintiff is likely to suffer if the injunction is denied, as compared to the harm that the defendant is likely to suffer if the injunction is issued. (Butt v. State of California (1992) 4 Cal.4<sup>th</sup> 668, 678.) In weighing the relative hardships, the Court must also balance the respective equities of the parties. (Robbins v. Superior Court (1985) 38 Cal.3d 199, 206.)

#### 2. Plaintiff is Likely to Prevail on the Merits

2 California Code of Regulations Section 20121 is part of the comprehensive and virtually uniform scheme of manual ballot tallying throughout the state. (County of San Diego v. Debra Bowen (2008) 166 Cal.App.4<sup>th</sup> 501.) The PEMT is a stand-alone document that, as a condition of use of virtually all types of voting machines employed in

the state, requires local elections officials to comply with uniform post-election manual tally procedures. The PEMT regulations have been adopted under the authority of the Secretary of State to assure the accuracy of the voting system in close contests where the margin of victory is narrow. The Court of Appeal of California, 4<sup>th</sup> Appellate District, Division 1, held that this type of agency pronouncement comes within the definition of a regulation under California law.

Despite the foregoing characterization of the PEMT and requirements of the state constitution, particularly Article I, Section 7 and Article IV, Section 16, Defendants have refused to conduct a post-election manual tally of Measure B. The basis for this refusal is that Section 20121(a)(3) requires a manual tally if the elections official has determined a margin of victory which, for ballot measure contests, is “the difference between the percentages of votes for and against the ballot measure.” Section 20121(b) provides that for any contests in which the margin of victory is less than one half of one percent (0.5%), the elections official shall conduct a manual tally following the methods set forth in Elections Code section 15360 of ten percent of (10%) of randomly selected precincts. The ten percent manual tally applies only to votes cast in the contest with a margin of victory of less than one half of one percent (0.5%).

Plaintiffs assert that for ballot measure contests in which a two-thirds vote is required for victory, close contest tally requirements should properly be the difference between the percentage of votes for the ballot measure and the required threshold of victory for that contest, that is 66.667%. As written, Section 20121(a)(3) results in a post-election manual tally for measures requiring a simple majority only. For measures requiring a two-thirds yes vote for adoption, no manual tally would ever be required, no matter how close the contest. Plaintiffs submit that this interpretation of Section 20121(a)(3) denies them their rights to equal protection of the law in violation of the Fourteenth Amendment to the Constitution of the United States and Article I, Section 7, and Article IV, Section 16 of the California Constitution.

Article I, Section 7 provides in pertinent part as follows:

“A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws ...

Article IV, Section 16 of the California Constitution provides in pertinent part as follows:

“(a) All laws of a general nature have uniform operation.

California’s Constitutional guarantees of equal protection, requirement for the uniform operation of laws, and prohibition of special legislation, provide substantially the same protection and invoke the same standards as the United States Constitution’s Fourteenth Amendment. (Cohan v. Alvord (1984) 162 Cal.App.3d 176.

California Government Code section 12172.5 sets out the powers and duties of the Secretary of State as the Chief Elections Officer. Section 12172.5 provides that the Secretary of State may adopt regulations to assure the uniform application in administration of state election laws. Although the laws may be adapted to varying conditions, of necessity contests for ballot measures which require a 66.667% vote should receive the same treatment as ballot measures which require a simple majority for passage, i.e. 50.1% of the vote.

There is no rational basis for treating measures requiring a two-thirds vote differently from those which require a simple majority. To the extent that 2 California Code of Regulations Section 20121(a)(3) imposes this, it is unconstitutional and invalid. Defendants’/Respondents’ duties to apply the elections law in a uniform manner require that PEMT treatment be accorded to Measure B. This treatment not only accords with constitutional requirements for uniformity, but is justified on the basis of simple English.

The term “margin” is defined as “a measure or degree of difference.” Webster’s Seventh New Collegiate Dictionary (1970). The regulations requiring PEMT apply to contests with narrow margins of victory. (2 California Code of Regulations Section 20120(b).) In this case, Measure B has been adopted by a 66.78% yes vote. Because a 66.667% yes vote was required for adoption, Measure B has a margin of victory of only .011%. Section 21210(b) requires that in any contest in which the margin of victory is less than one-half of one percent (0.5%) the elections officials shall conduct a manual tally as

provided in the regulations and in compliance with its requirements. There is no reason that ballot measures requiring a two-thirds majority for adoption should be treated differently. In fact, in view of the significant increased requirement for adoption of special taxes, it is all the more important that Measure B receive PEMT treatment. It is a contest with a narrow margin of victory.

**3. The Balance of Equity Favors Granting a Restraining Order.**

A restraining order will ensure that the election is not certified until a PEMT has been conducted on Measure B, a contest with a narrow margin of victory falling within the spirit and intent of emergency regulations adopted by the State of California Office of Administrative Law. (2 California Code of Regulations 20120 through 20127.) Allowing the election results to proceed without a requiring a PEMT in advance will jeopardize the ability of Plaintiffs to obtain adequate relief after a hearing on the merits of their writ of mandate as well as the determination of their claims for violations of their constitutional rights and a judicial declaration of the same.

CONCLUSION

Based upon the above authorities and argument, Plaintiffs respectfully request that the Court grant a temporary restraining order staying further processing of the election results until a post-election manual tally has been conducted for Measure B.

ATKINSON-FARASYN, LLP

Dated: December 1, 2008.

By: \_\_\_\_\_  
MARC G. HYNES  
Attorney for Plaintiffs/Petitioners