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MEMORANDUM OF LAW

DATE: January 21, 2005

TO: The Honorable Mayor and City Council

FROM: City Attorney

SUBJECT: Applicability of California State Law Requiring Marking of Oval Next to a Write-In Candidate's Name to the City of San Diego's November 2, 2004, Mayoral Election

INTRODUCTION

On December 8, 2004, the San Diego City Council [City Council] certified the results of the November 2, 2004, election for Mayor, by declaring that Mayor Dick Murphy was the candidate who received the most votes. The San Diego County Registrar [Registrar], who performed the vote-counting for the election, counted write-in votes for Councilmember Donna Frye only if the voter marked the oval next to the space where they wrote her name, pursuant to California state law. The ballots that had Councilmember Frye=s name written in, but no marking of the oval next to her name, were recently recounted. That recount revealed that the number of those ballots, if counted, would be sufficient to make Councilmember Frye the candidate receiving the most votes for Mayor. As a result of these events, questions have arisen regarding the legality of the vote counting procedure used by the Registrar for the mayoral write-in votes.

QUESTION PRESENTED

Should write-in votes for Donna Frye for Mayor be counted, if the voter wrote her name on the ballot, but did not mark the oval next to her name?

SHORT ANSWER

No. A ballot containing the name of a write-in candidate, but no marking of the oval next to the candidate=s name, does not meet the state law requirements for voting for a write-in candidate. The state law write-in requirements are mandatory, and prevail over the City=s conflicting local ordinance in a consolidated municipal-state election, because the conduct of a consolidated election is a statewide concern.

The purpose of this memorandum is to issue an opinion regarding the applicability of the state law voting requirements to this election. However, other legal issues beyond the scope of this memorandum will need to be resolved in order for this matter to be settled. First, because the Registrar announced the write-in vote counting procedures prior to the election, post-election challenges to that decision may be barred by the doctrine of laches. Second, the failure to count write-in votes based on the application of the state law voting requirements raises an issue of whether the constitutional rights of voters were violated. These issues are more appropriately addressed by the courts hearing the pending lawsuits challenging the election.

FACTUAL BACKGROUND

On March 2, 2004, the City of San Diego conducted a municipal primary election for Mayor of San Diego. The two candidates receiving the most votes in that election were incumbent Dick Murphy and County Supervisor Ron Roberts. The names of those two candidates were printed on the ballot for the general election held on November 2, 2004. The November 2, 2004, municipal general election was consolidated with the California state general election, as a result of an ordinance passed by the City Council on July 26, 2004. A copy of that ordinance is attached as Attachment 1. Along with the ordinance, the City Council passed a resolution, requesting that the County Board of Supervisors consolidate the election, and requesting that the Registrar conduct the election. The resolution, attached as Attachment 2, states, Athe Registrar is hereby authorized to canvass the returns of the Municipal General Election and is requested to conduct the election in all respects as if there were only one election.@

On October 7, 2004, the City Clerk sent a letter to the Registrar stating that Councilmember Donna Frye had qualified as a write-in candidate for Mayor in the November 2, 2004, election.[1] The election was conducted using ballots designed to be read by optical scan technology. The optical scan ballots contain an oval next to each printed candidate's name, and next to the blank line for write-in candidates. The ballots are machine scanned to detect whether or not the oval has been darkened or filled in by the voter. Following the election, the Registrar certified the results of the election, declaring that Dick Murphy was the candidate receiving the most votes. According to the Registrar's results, Mayor Murphy had approximately 2,108 more

[1]San Diego Municipal Code section 27.0301 provides that "[w]rite-in candidates are permitted in municipal elections and special elections called by the City Council . . ." This section was enacted almost 20 years ago to comply with the California Supreme Court ruling in *Canaan v. Abdelnour,* 40 Cal. 3d 703 (1985), which required the City to permit write-in candidates in a general election. Two years ago, *Canaan* was overruled by the court in *Edelstein v. City and County of San Francisco,* 29 Cal. 4th 164 (2002). Now that *Canaan* has been overruled, there is a conflict between the municipal code provision permitting write-in candidates and San Diego City Charter section 10 that appears to preclude write-in candidates in the general election. Because the City Charter provision takes precedence over the municipal code provision, the City should no longer permit write-in candidates in the general election. The effect of the *Edelstein* decision will be explained in more detail in a separate memorandum of law.

votes than Councilmember Frye, who had the second highest number of votes.

In canvassing the results of the mayoral election, the Registrar did not count ballots with a write-in candidate=s name written on them unless the voter also marked the oval next to the write-in candidate=s name. After the certification of Dick Murphy as the winner of the election by both the Registrar and the City Council, a number of individuals and media outlets requested that the Registrar conduct a recount of those disputed ballots. The preliminary result of that recount indicates that there were approximately 5,000 ballots that contained Councilmember Frye=s name as a write-in candidate, without the oval next to her name marked. The number of these disputed ballots is sufficient to make Councilmember Frye the winner of the mayoral election if they had been counted.

The issue of whether these disputed votes should have been counted was the subject of a lawsuit in the San Diego Superior Court, brought by the League of Women Voters and several individual voters. (*League of Women Voters of San Diego, et al., v. Sally McPherson*, San Diego Superior Court Case No. GIC 838890 (2004)). In that case, the Superior Court ruled that the Registrar acted properly in refusing to count the disputed ballots pursuant to California Elections Code requirement that a write-in vote must be accompanied by the marking of the oval next to the written in candidate's name. The court also held that the lawsuit should have been brought pre-election, and was therefore barred by the doctrine of laches. The judge's decision in that case is attached as Attachment 3.[2]

ANALYSIS

I. The Registrar Acted Properly Pursuant to State Law by Rejecting Write-In Votes Without a Mark in the Space Next to the Candidate=s Name

A. The State Elections Code and San Diego Municipal Code [SDMC] Conflict Regarding Write-In Voting Requirements

The state Elections Code and SDMC differ on the subject of write-in voting procedures. Therefore, in order to determine whether the Registrar properly counted the write-in votes in the November 2, 2004, mayoral election, it must be determined which of these provisions the

[2] There have been four other post-election challenges to the City mayoral election to date, in addition to the League of Women Voters' lawsuit. Two of those challenges are also related to the Registrar's write-in vote counting procedures, and have not yet been adjudicated. *Lawrence, et al., v. Dick Murphy*, San Diego Superior Court Case No. GIC 840839 (2004); *Currie, et al., v. Dick Murphy*, San Diego Superior Court Case No. GIC 840576 (2004). The other lawsuits challenged Councilmember Frye's write-in eligibility. *McKinney v. Superior Court*, 124 Cal. App. 4th 951 (2004); *McDonald v County of San Diego*, U. S. District Court Case No. 04-CV-2265-IEG (2004). The *McKinney* lawsuit challenging Councilmember Frye's write-in eligibility was rejected by both the trial and appellate courts, which held that it should have been brought pre-election, and therefore was barred by the doctrine of laches. The issue of laches is discussed in more detail below in Section II at page 12. The *McDonald* case resulted in a court order denying Plaintiffs' motion for a preliminary injunction enjoining the Registrar from certifying the results of the mayoral election.

Registrar was required to follow.

Section 15342(a) of the Elections Code provides:

> For voting systems in which write-in spaces appear directly below the list of candidates for that office and provide a voting space, *no write-in vote shall be counted unless the voting space next to the write-in space is marked or slotted as directed in the voting instructions*. (emphasis added).

The voting instructions for both the walk-in and absentee voters stated that the voter had to mark the oval on the ballot next to the chosen candidate's name. The instructions included a photo demonstrating the method of marking the oval.

Elections Code section 15154(a) provides that any ballot that is not marked as provided by law is invalid and shall not be counted. Therefore, under the Elections Code, it is mandatory that the oval next to the write-in candidate=s name be marked in order for the write-in vote to be counted.

The legislative history of Elections Code section 15342(a) reveals that the purpose of that section was to conform the write-in voting requirements to new technology. Section 15342(a) was added to the Elections Code in 1998 by SB 627 (Karnette). This bill, which moved through the Legislature on consent, and therefore with little public discussion, reflected "over two years of work by local election officials to bring the election day and canvass procedures of the state Elections Code into conformance with modern election administration procedures and technology." Letter to Michael Poe, Governor's Office, from Deborah Seiler (former chair of the task force that drafted SB 627), June 1, 1998. As to section 15342(a) specifically, Ms. Seiler wrote that the new wording resolved "a contradiction in current law as to whether or not the voter must mark the voting space in addition to writing in the name. The revised [SB 627 version] section allows for write-in voting on state-of-the-art voting equipment." Letter to Michael Poe, *supra*.

Unlike the state Elections Code, the SDMC procedures for write-in voting do not require any marks to be made on the ballot other than the writing of the candidate=s name in the appropriate space:

> Any name written upon a municipal election or special election ballot, including a reasonable facsimile of the spelling of such name, shall be counted for the office for which it was written, if it is written in the blank space provided therefore . . . .

SDMC § 27.0636.

The legislative history of SDMC section 27.0636 demonstrates that the lack of reference to marking a space next to the write-in candidate's name was not an affirmative decision on the

part of the City Council to reject that requirement. To the contrary, this omission exists because the provision was approved at a time when punchcard ballots were used, rather than ballots read by optical scan technology. Therefore, the language was drafted at a time when ballots did not have any space next to the candidate's name that had to be marked.

Until the mid-1980s, the SDMC prohibited all write-in candidates. (See former SDMC § 27.2205, added in 1968 by Ordinance O-9839). The write-in provisions were amended on June 17, 1985, by Ordinance O-16447, to allow write-in candidates in primary elections only. On February 24, 1986, the provision was amended again to allow write-in candidates in all elections, as a result of the court decision in *Canaan v. Abdelnour*, 40 Cal. 3d 703 (1985), which held that the City could not prohibit write-in candidates in run-off elections. The 1986 version of SDMC section 27.2205 stated, in pertinent part, "Any name written upon a municipal election or special election ballot, including a reasonable facsimile of the spelling of such name, shall be counted . . . ." There has been no significant amendment to the wording of that section since that time. A minor change to the wording of section 27.2205, and a renumbering of the section to section 27.0636 occurred on July 26, 1999, pursuant to Ordinance O-18664. The provision has never been amended for the purpose of conforming it to the use of new technology or the recent use of ballots that require a space to be marked next to a candidate's name in order to be machine-read.

As will be explained further in section B below, the determination regarding which of these conflicting provisions applies to the November 2, 2004, election involves an analysis of whether the election was a purely municipal affair, over which the City has the authority to apply local rules, or a matter of statewide concern, which requires the application of state law.

B. The State Elections Code Write-In Vote Counting Requirements are Mandatory in a Consolidated Municipal/State Election Because the Conduct of a Consolidated Election is a Statewide Concern

The City of San Diego is a charter city. *Mira Development Corp. v. City of San Diego*, 205 Cal. App. 3d 1201, 1213-14 (1988). Plaintiffs challenging the vote counting procedures used in the November 2, 2004, election have argued that as a charter city, the City has unlimited authority to have its own election procedures, and that those procedures prevail over any conflicting state law. However, the City=s authority to adopt legislation as a charter city is not unlimited, but extends only to matters that are purely municipal affairs.

Article XI, section 5, subdivision (a) of the California Constitution provides that A[i]t shall be competent in any city charter to provide that the city governed thereunder may make and enforce all ordinances and regulations in respect to *municipal affairs*, subject only to restrictions and limitations provided in their several charters and in respect to other matters they shall be subject to general laws.@ (emphasis added). A charter city such as the City of San Diego operates under the Ahome rule@ doctrine, which gives the City supreme authority in the field of municipal affairs. However, as to matters of statewide concern, charter cities remain subject to

applicable general state laws, if it is the intent and purpose of such general laws to occupy the field to the exclusion of municipal regulation. *Bishop v. City of San Jose*, 1 Cal. 3d 56, 61-62 (1969). This is commonly referred to as the Apreemption@ doctrine. Under that doctrine, any reasonable doubt whether a matter is a municipal affair or broader state concern must be resolved in favor of the state's legislative authority. *Abbot v. City of Los Angeles*, 53 Cal. 2d 674, 681 (1960).

The preemption doctrine has been applied to the subject of elections in several different situations. *Johnson v. Bradley*, 4 Cal. 4th 389 (1992); *District Election of Supervisors Committee v. O'Connor*, 78 Cal. App. 3d 261 (1978). In *Johnson*, the California Supreme Court ruled that the integrity of the electoral process at both the state and local level is a matter of statewide concern, in the context of campaign finance laws. *Johnson*, 4 Cal. 4th at 405-406. In *O'Connor*, the regulation of the charter amendment process was held by the court to be a statewide concern, and therefore, San Francisco City Charter provisions conflicting with the state laws governing charter amendment were preempted by state law and invalid. The *O'Connor* court wrote:

> It becomes necessary for the Court to decide, under the facts of each case, whether the subject matter under discussion is of municipal or statewide concern. . . . courts will of course give great weight to the purpose of the Legislature in enacting general laws which disclose an intent to preempt the field to the exclusion of local regulation. . . . to determine [legislative intent] we may look to the whole purpose and scope of the legislative scheme . . . . the Legislature meant to and did achieve the same paramount control over charter amendment procedures through statutory enactment . . . . as a matter of uniform statewide concern.

O'Connor, 78 Cal. App. 3d at 272-74.

Similarly, the state legislature has expressed an intention in its Elections Code provisions that the Elections Code requirements for conducting an election preempt the local regulations when a municipal election is consolidated with a state election. Elections Code section 1301 provides in relevant part:

> (b)(1) Notwithstanding subdivision (a), a city council may enact an ordinance, pursuant to division 10 (commencing with Section 10000), requiring its general municipal election to be held on the same day as the statewide direct primary election, the day of the statewide general election, or on the day of school district elections as set forth in Section 1302 . . . . Any ordinance adopted pursuant to this subdivision shall become operative upon approval by the board of supervisors.
>
> (2) In the event of consolidation, the general municipal election shall be conducted in accordance with all applicable procedural requirements of this code

> pertaining to that primary, general, or school district election, and shall thereafter occur in consolidation with that election.

The counting of ballots is specifically governed by the Elections Code upon consolidation. Elections Code section 10418 provides:

> If consolidated, the consolidated election shall be held and conducted, election officers appointed, voting precincts designated, candidates nominated, ballots printed, polls opened and closed, *ballots counted* and returned, returns canvassed, results declared, certificates of election issued, and all other proceedings incidental to and connected with the election *shall be regulated and done in accordance with the provisions of law regulating the statewide or regularly scheduled election*. (emphasis added).

Another factor, in addition to the legislative intent, to be considered in determining whether a matter is a municipal affair or a statewide concern, is the extent to which the application of the law in question has impacts outside the jurisdiction of the municipality, or extraterritorial effects. *Committee of Seven Thousand v. Superior Court*, 45 Cal. 3d 491 (1988). A matter is a statewide concern rather than a municipal affair if its effect is regional, even if its effect is not statewide. *Id.*

In the instant situation, there is a strong argument that uniform application of the state write-in voting requirements is a statewide concern in the context of a consolidated election. First, uniformity in the election process, and in particular in vote counting procedures, has been held to be of such importance that it can override considerations of voter intent. *Fair v. Hernandez*, 116 Cal. App. 3d 868 (1981); *McFarland v. Spengler,* 199 Cal. 147 (1926); *Livingston v. Heydon,* 27 Cal. App. 3d 672 (1972).[3] Second, the goal of uniformity and efficiency underlying the legislature=s statutory election consolidation scheme would be thwarted by allowing different jurisdictions participating in a consolidated election on the same ballot to use different vote counting procedures. Third, a court is likely to find that the uniformity of vote counting procedures in a consolidated election is a statewide concern because of the Aextraterritorial effects@ that would occur if different counting procedures were used for different participating jurisdictions. The application of the SDMC write-in voting procedures to the City candidates in the election would affect the County, as the entity responsible for canvassing the election. The use of special procedures for the City elections would also have a potential effect on the other participating jurisdictions in the consolidated election. The Registrar has a limited amount of personnel responsible for canvassing the participating jurisdictions= election results, and the timing of the Registrar=s ability to canvass the other jurisdictions= election results may be impacted by having to use different, more time consuming procedures for the City=s part of the ballot. It might also have an impact on the Registrar=s ability to meet state-

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[3] For a more detailed discussion of these cases, see section D below, at page 9.

law imposed deadlines for canvassing the results of the election. *See*, e.g. Cal. Elec. Code § 10262.

For these reasons, the write-in vote counting procedures to be used in the consolidated municipal-state election are likely to be treated by a court as a matter of statewide concern, rather than a matter of purely local concern. Therefore, the state write-in voting requirements would apply and the City would not have the authority, even as a charter city, to demand that its own Municipal Code provisions be followed by the Registrar in canvassing the election.[4]

C. The November 2, 2004, Mayoral Election was a Consolidated Election for Purposes of Elections Code Section 10418

In the case of the November 2, 2004, mayoral election, there is no question that the election was conducted as a consolidated election, for purposes of Elections Code section 10418. On July 26, 2004, the City Council, in adopting Ordinance O-19304, ordered that the municipal general election called for November 2, 2004, be Aconsolidated with the California State General Election to be held on the same date.@ In adopting this ordinance, the City Council also authorized the Registrar to canvass the returns of this election.

On the same date, the City Council adopted Resolution R-299476, which formally requested that the County Board of Supervisors consolidate the City's municipal election with the California state general election, and that the Registrar canvass the returns of the City's election "in all respects as if there were only one election using only one form of ballot."

The provisions governing the consolidation of a City of San Diego election with a statewide election are found in Elections Code sections 10400 *et seq*. The two actions of the City Council discussed above correspond to the consolidation requirements set forth in Elections Code section 10403, which requires a city seeking to consolidate its election with a statewide election to adopt and file a resolution requesting the consolidation at the same time as the adoption of the ordinance calling the election.

The terms Aconsolidate@ and Aconsolidation@ are not explicitly defined in the Elections Code or the corresponding provisions of the California Code of Regulations. Nevertheless, the meaning of a Aconsolidated election@ is clear from the context of the Elections Code sections pertaining to such elections. Elections Code section 10403 requires cities seeking consolidation to use the same ballot being used for the statewide election. Elections Code section 10410 provides that cities consolidating an election with a statewide

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[4] It should be emphasized that even if the City had the authority to request that its SDMC provisions be followed by the Registrar in a consolidated election, the City did not make any such request in this case. In its resolution authorizing the Registrar to conduct the election and canvass the results, the City Council specifically directed that the Registrar conduct the election "in all respects as if there were only one election." See Attachment 2. Further, there is no other correspondence between the City and County in which any other direction was given regarding the canvassing procedures to be used.

election must use the same precincts, polling places, voting booths, and election officers. When a city authorizes county officials to canvass the results of the election, Elections Code section 10411 requires that Athe election shall be held in all respects as if there were only one election@ and Aonly one form of ballot shall be used.@ Moreover, Elections Code section 10418 states that all proceedings incidental to and connected with the election shall be regulated by state law.

In 1997, the California Attorney General was asked to opine on a matter in which the state law contained conflicting provisions for city elections and state elections. There were two different state laws governing the timing of when a newly elected councilmember could take office, one governing city elections, and the other governing statewide elections. 80 Op. Cal. Att=y Gen. 169 (1997). The question was whether the law specifically applicable to the city prevailed over the state law in the case of a consolidated election. The Attorney General concluded that the provision applicable to statewide elections prevailed, based on Elections Code section 10418's requirement that a consolidated election Ashall be regulated and done in accordance with the provisions of law regulating the statewide or regularly scheduled election.@

The November 2, 2004, election at issue meets all the criteria for being a consolidated election for purposes of the Elections Code provisions cited above. Therefore, the provisions of law regulating statewide elections apply to the November 2, 2004, mayoral election, including Elections Code section 15432(a), which requires that the oval next to a write-in candidate's name be marked in order for the write-in vote to be counted.

D. State Law Requirements for Marking the Ballot are Mandatory, Regardless of Clear Voter Intent

A separate issue that has arisen in the context of the disputed mayoral election is whether considerations of voter intent should be given priority over the technical requirements of the state law, even assuming that the state law, rather than the SDMC, controls how votes are counted. Some have argued that substantial compliance with the state voting requirements should be sufficient for the votes to be counted, and that the intent of the voter can be determined from the act of writing the name of the candidate in the write-in voting space.[5] This argument is at odds with the applicable case law. California courts have consistently ruled that in the case of failure to comply with statutory requirements for marking the ballot, the ballots are invalid, regardless of intent.

1. *McFarland v. Spengler*, 199 Cal. 147 (1926).

In *McFarland*, the write-in candidate for a board of supervisor's position gave out stickers with his name on them as a part of his campaign, instructing prospective voters to place them on the ballot in the blank space for write-in candidates. The ballots with the stickers on

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[5] This Office takes no position on the factual question of whether the act of writing the candidate's name in the write-in voting space is, on its own, sufficient evidence of the intent of the voter.

them were not counted toward the final result, but if they had been, the write-in candidate would have won the election. The appellate court upheld the decision not to count the ballots containing the stickers, finding that the use of stickers to vote violated a state law that required the Awriting in@ of a name on the ballot in order to vote for a candidate whose name was not printed on the ballot.

> ATrue, the intention of the voter must be ascertained, but it is not enough to find out generally the voter=s intention. Such intention must be expressed in the manner prescribed by law. . . . [T]he right to express one=s choice of a candidate at the polls is not unrestricted. It is subject to reasonable regulation in the interest of secrecy and uniformity of the ballot and the fairness of the vote.@ *Id* at 152.

2. *Fair v. Hernandez*, 116 Cal. App. 3d 868 (1981).

In *Fair*, a write-in candidate for city council was declared the winner of the election by four votes. The ballots used in the election were punchcard ballots with no space for a write-in candidate, but they were accompanied by an envelope that had the write-in ballot on the inside of it. The disputed ballots had the write-in candidate=s name written on the front or back of the punchcard, rather than on the write-in space on the envelope. The court found that the intent of the voters to choose the write-in candidate was evident in the case of the disputed ballots. Nevertheless, the court held that the disputed ballots should not have been counted, and that the court had a mandatory duty to enforce the statutory scheme that required use of the write-in space on the envelope. The court reasoned that if the elector was not bound by the provisions of the statute, Awrite-in votes might be cast in as many different ways as there were write-in voters,@ and that such variety would undermine the secrecy, uniformity, and fairness of the vote, as well as the integrity of the voting process. *Id.* at 877.

3. *Livingston v. Heydon*, 27 Cal. App. 3d 672 (1972).

Another California case involving irregularity in the marking of ballots is *Livingston v. Heydon*, 27 Cal. App. 3d 672 (1972), which involved ballots with marks made outside of the appropriate voting squares. At that time, state law required that the ballot be marked by stamping a cross Awithin@ the voting square. The ballot in this case had the printed names of candidates for city council, and a square box to the right of the printed names, with instructions to voters to stamp a cross in the voting square to choose a candidate. The disputed ballots had the cross stamped outside and to the left of the voting square, between the square and the printed name. As in the instant mayoral election, and the *McFarland* case, the number of disputed ballots was sufficient to change the result of the election. In *Livingston*, the court found that despite the clear intention of the voters, the markings were void and should not be counted as votes for the intended candidates.

The appellant argued that the failure to count the disputed ballots denied him, and voters who cast the disputed ballots, the constitutional right of equal protection. The court disagreed,

finding that the statutory requirement for marking the ballot within the voting square was reasonable, and added to the accuracy and efficiency of the vote counting process. In rejecting appellant=s equal protection argument, the court found that the distinction between the votes of those who marked their ballots in accordance with law, and those who did not, was not arbitrary. *Id.* at 681.

4. San Francisco City Attorney Opinion.

The Office of the San Francisco City Attorney has written an opinion dated March 23, 2004, regarding the mandatory applicability of Elections Code section 15342(a) to a write-in election using optical scan technology. A copy of the opinion is attached as Attachment 4. Following a primary election, a recount was conducted which revealed that a congressional write-in candidate received 229 votes that were not counted because the voters did not complete an arrow next to the candidate=s name. San Francisco voters received the following instructions for write-in voting: Awrite the person=s name on the blank line provided and complete the arrow.@ The optical scan voting equipment could not detect the write-in votes cast by voters who did not complete the arrow. The City Attorney opined that the arrow-marking requirement was mandatory pursuant to Elections Code section 15342(a), and had to be enforced regardless of voter intent. This opinion involves a congressional race, and therefore is not helpful on the issue of whether the application of Elections Code section 15342(a) to a municipal election is a statewide concern or municipal affair. However, it is instructive with regard to the mandatory nature of the state law write-in procedures, and their application regardless of voter intent.[6]

E. The Registrar Acted Properly by Distinguishing Between Write-In Votes with Partially Marked Ovals, and Write-In Votes with Unmarked Ovals

Another issue raised by parties challenging the results of the mayoral election is that the Registrar acted inconsistently or arbitrarily by not counting write-in votes without any mark in the accompanying oval, while counting write in votes where the oval was partially marked or darkened by the voter. *See*, e.g. Statement of Election Contest, ¶ 10, *Lawrence v. Murphy*, San Diego Superior Court Case No. GIC 840839. However, an examination of the state statutes reveals that the Registrar acted properly by making a distinction between votes with no mark on the oval, and votes with a partial marking of the oval. Additionally, in the case of partially marked ovals, the Registrar is authorized to enhance the marking so that it can be read by the optical scan equipment.

Elections Code section 15342(a), as stated above, requires that the space next to the write-in candidate's name be "marked or slotted." That provision contains no requirement that the space or oval be filled in to the fullest extent. Therefore, a write-in vote with some marking

[6] The congressional write-in candidate, Ms. Baum, filed suit in the San Francisco Superior Court regarding the failure of the Department of Elections to count the disputed votes. The San Francisco Superior Court denied the request for relief, and the United States Supreme Court denied Ms. Baum's petition for review. *Baum v. Superior Court*, –U.S. – , 125 S. Ct. 616 (2004)

in the oval meets the state law requirement that the space be Amarked,@ while a write in vote with no marking in the space next to the name does not.

The Registrar=s enhancement of some ballots with partially marked ovals is authorized by Elections Code section 15210, which provides that Aany ballot that is torn, bent, or otherwise defective shall be corrected so that every vote cast by the voter shall be counted by the automatic tabulating equipment.@ Because a partially marked oval next to a write-in candidate=s name meets the requirements of Elections Code section 15342(a) to be treated as a Avote cast," and a vote without any mark in the oval does not, the former qualifies as a Avote cast@ that can be enhanced to ensure that it will be counted by the tabulating equipment, while the latter does not. By making this distinction, the Registrar has acted properly pursuant to the state Elections Code.

II. Post-election Challenges to the Vote Counting Procedures Used in the November 2, 2004, Election May Be Barred by the Doctrine of Laches

All of the challenges to the vote-counting procedures in the November 2, 2004, mayoral election have been post-election challenges. A serious question exists regarding the propriety of the post-election challenges, and whether the various Plaintiffs should have raised the issues pre-election, based on the doctrine of laches.[7]

The essential elements of laches are unreasonable delay in bringing a lawsuit, plus either acquiescence in the act about which plaintiff is complaining, or prejudice to the defendant resulting from the delay. *Conti v. Board of Civil Service Commissioners*, 1 Cal. 3d 351 (1969). Knowledge by the plaintiff of the facts involved is necessary in order for laches to be invoked, but a plaintiff is charged with constructive knowledge of all information that he might have acquired through reasonably diligent inquiry. *Garstang v. Skinner,* 165 Cal. 721 (1913).

The facts regarding the procedures that the Registrar intended to use for counting write-in votes on November 2, 2004, were made public prior to the election. The Registrar published a General Election Day Fact Sheet stating that state law requires the write-in bubble to be filled in for the write-in vote to be counted. See Attachment 5. The Registrar was interviewed in the local electronic and print media, explaining the write-in procedures that would be used. The Office of the County Counsel sent a letter to Marco A. Gonzalez, Esq., legal counsel for Councilmember Frye, informing Mr. Gonzalez that the Registrar intended to follow the state law requiring that the write-in bubble be filled in. See Attachment 6. Additionally, campaign literature circulated by the Donna Frye for Mayor Campaign stated that the bubble needed to be filled in for the write-in vote to be counted. See Attachment 7.

Elections Code section 13314 authorizes an elector to Aseek a writ of mandate alleging

[7] The post-election challenges that have been adjudicated so far have all been rejected based on the doctrine of laches. *McKinney v. Superior Court*, 124 Cal. App. 4th 951 (2004); *League of Women Voters, et. al v. McPherson*, San Diego Superior Court Case No. GIC 838890 (2004); *McDonald v. County of San Diego,* U.S. District Court, Southern District, Case No. 04-CV2265 (2004).

that an error or omission has occurred, or is about to occur, in the placing of any name on, or in the printing of a ballot, sample ballot, voter pamphlet, or other official matter, or that any neglect of duty has occurred, or is about to occur.@ California courts have ruled that an elector cannot pass up a pre-election challenge in favor of a post-election challenge. *Kilbourne v. City of Carpinteria,* 56 Cal. App. 3d 11 (1976). Because of the prior notice of the vote counting procedures to be used and the availability of a pre-election remedy, a court may find that any further post-election challenges to the Registrar's vote-counting procedures are barred by the doctrine of laches. It should be noted that this doctrine applies not only to allegations that statutory procedures were not followed, but also to constitutional challenges. *Soules v. Kauaians for Nukoli Campaign Committee*, 849 F.2d 1176 (9th Cir. 1988).

III. Potential Constitutional Issues Related to State Write-In Voting Requirements

Although it is the position of this Office that state law write-in voting requirements applied to the November 2, 2004, mayoral election, an argument exists that the application of those requirements may violate voters' constitutional rights. A full analysis of this issue is beyond the scope of this memorandum, and is better resolved by the courts in the context of a specific challenge. However, a brief summary of the potential issue is provided below, in order to acknowledge the legitimate controversy surrounding the application of the state write-in requirements, and to illustrate the complexity of the issues facing the courts hearing future challenges to the election.

The United States Supreme Court now accepts that the right to vote is fundamental, and extends to having votes counted. *Anderson v. Celebrezze*, 460 U.S. 780 (1983); *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663 (1966). The California Supreme Court has stated: "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which . . . we must live." *Castro v. State of California*, 2 Cal. 3d 223, 234 (1970). Both courts have found this right to emanate from the First and Fourteenth Amendments. *Canaan v. Abdelnour*, 40 Cal. 3d 703, 713 (1985).

Any law that infringes on a fundamental right is generally subject to strict scrutiny. Such scrutiny requires the State to establish not only that it has a compelling interest that justifies the law but also that the distinctions drawn by the law are necessary to further its purpose. *Fullerton Joint Union High School Dist. v. State Bd. of Education*, 32 Cal. 3d 779, 798-799 (1982). In determining whether this standard has been met, a court must consider the nature of the claimed injury to the protected right and then evaluate the legitimacy of the interests that the State asserts as justification for the burden imposed. *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983).

Although the U.S. Supreme Court has not consistently applied a single standard when reviewing voting rights cases, it has offered a basis for reconciling Supreme Court precedent

on that subject using a balancing approach. *Anderson v. Celebrezze*, *Id*. In that case, the Court reaffirmed that voting rights are fundamental, but also stated that "not all restrictions imposed by the States . . . impose constitutionally-suspect [sic] burdens on voters' rights . . . . " *Id*. at 788. The Court stated further that a State's important regulatory interests "are generally sufficient to justify reasonable, nondiscriminatory restrictions." *Anderson*, *Id*.

Clarifying *Anderson*, the Court in *Burdick v. Takushi*, 504 U.S. 428, (1992), stated that subjecting every voting regulation to strict scrutiny and requiring that every regulation be both narrowly drawn and designed to advance a compelling state interest "would tie the hands of States seeking to assure that elections are operated equitably and efficiently." *Id*. at 433. The Court concluded that only severe restrictions on the rights of voters need meet this exacting standard. For reasonable, nondiscriminatory standards, the State need show only an important regulatory interest. *Id.* at 433-434.

Thus under *Anderson* and *Burdick*, the interests of the write-in voters disenfranchised by the omission of a marked oval must be balanced against the interests of the State in modernizing the voting process. This balancing test will need to be conducted by the courts, in the event that constitutional issues are raised as a part of future challenges to the November 2, 2004, mayoral election.

CONCLUSION

The purpose of this memorandum is to clarify the position of this Office regarding some key issues that have arisen in the context of the November 2, 2004, mayoral election. These issues include the legality of the methods used by the Registrar to count the write-in votes in the election, whether the technical procedures take precedence over voter intent, and the potential applicability of the doctrine of laches to any post-election challenges related to these issues. This memorandum is not intended to cover all possible legal issues related to this election. In particular, this Office is not expressing any opinion regarding potential constitutional issues related to the state write-in voting requirements. Any constitutional issues that may be raised in association with this election are more appropriately resolved by a court, which will need to balance the interests of the disenfranchised voters with the interests of the State in modernizing the election process.

There appears to be strong public sentiment favoring the counting of write-in ballots where the candidate=s name has been written in, whether or not the oval next to the candidate=s name has been marked. In light of the statutory voting requirements in the state Elections Code, which are mandatory in the case of a consolidated election, and which prevail over considerations of voter intent, it is unlikely that any further challenge to the rejection of those votes will be successful on that basis alone. This is particularly true considering the potential argument that post-election challenges to the vote counting procedures used in this election are untimely and barred by the doctrine of laches.

There are several alternative remedies which can be considered by the City Council in order to clarify the City=s write-in voting procedures, and to prevent confusion over those procedures in future City elections. These alternatives include (1) amendment of the SDMC provisions regarding write-in voting to add an oval marking requirement, to make them consistent with state law; (2) holding separate municipal elections, rather than consolidated elections, governed by the SDMC write-in procedures, rather than state law (it should be noted that this alternative would require a separate City ballot, would make the election more costly to the City, and could cause confusion to voters participating in a statewide election at the same time); or (3) proposing and supporting an amendment to the state Elections Code write-in voting requirements to eliminate the oval-marking requirement. This Office is prepared to assist the City Council in any way necessary in order to implement the remedy that the City Council deems appropriate.

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Attachments