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*In the*  
**Court of Appeal**  
*of the*  
**State of California**  
FOURTH APPELLATE DISTRICT  
DIVISION ONE

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**D073522**

CITIZENS OVERSIGHT, INC. and RAYMOND LUTZ,

*Plaintiffs-Appellants,*

v.

MICHAEL VU and SAN DIEGO COUNTY,

*Defendants-Respondents.*

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APPEAL FROM THE SUPERIOR COURT OF SAN DIEGO COUNTY  
HONORABLE KENNETH J. MEDEL · NO. 37-2017-27595-CU-MC-CTL  
**SERVICE ON ATTORNEY GENERAL REQUIRED PURSUANT TO C.R.C. RULE 8.29**

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**BRIEF OF APPELLANTS**

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**Court of Appeal**  
*of the*  
**State of California**

**CERTIFICATE OF INTERESTED ENTITIES OR PERSONS**

Court of Appeal Case No.: D073522

Case Name: Citizens Oversight, Inc. et al. v. Vu et al.

There are no interested entities or parties to list in this Certificate per California Rules of Court, 8.208

Interested entities or parties are listed below:

Name of Interested Entity or Person	Nature of Interest
1.	
2.	
3.	
4.	
5.	
6.	
7.	
8.	
9.	
10.	

/s/ Alan L. Geraci

Signature of Attorney/Party Submitting Form

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Party Represented: Citizens Oversight, Inc. and Raymond Lutz - Appellants

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CITIZENS OVERSIGHT INC. and RAYMOND LUTZ (herein “Appellant”) submit the following Appellants Opening Brief.

### INTRODUCTION

This matter follows a first lawsuit between the parties in which Appellant received a judgment against Respondent declaring and mandating that Respondents comply with Elections Code Section 15360.<sup>1</sup> Subsequent to the first case, Appellant brought a demand to inspect the ballots as public records under the California Public Records Act (“CPRA”). (CT, p.8) Respondent refused. (CT, p. 10) Appellant filed the action for declaratory relief and mandamus on July 25, 2017.<sup>2</sup> (CT, p.7) The trial court sustained Respondent’s demurrer without leave on October 13, 2017, (CT, p. 79-80) and entered judgment of dismissal on December 8, 2017 (CT, p. 81-82).

This appeal seeks review of the judgment for dismissal by the trial court after demurrer without leave was granted on October 13, 2017, on the ground that review is necessary to secure uniformity of decision and settle an important question of law. California Rules of Court Rule 8.500 (b)(1).

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<sup>1</sup> This Court reversed the judgment as moot after the California Legislature passed a new Elections Code Section 15360, effective January 2, 2018 (Case No. D071907). At the time of this brief, that matter has been submitted for review with the California Supreme Court.

<sup>2</sup> All citations to the Clerk’s Transcript are denoted “CT” followed by the stamped page number.

## I.

### ISSUES PRESENTED

California Constitution Article 1, Section 3(b) and the California Public Records Act as adopted by California voters in 1984, codified by the Legislature in California Government Code Section 6250, *et seq.* establish rights to citizens and voters in California and the “public's “right of access to information concerning the public's business” became a California Constitution Amendment in 2004. (Cal. Const., art. I, § 3, subd. (b)(1); *International Federation of Professional & Technical Engineers, Local 21, AFL–CIO v. Superior Court* (2007) 42 Cal.4th 319, 329).

The issue here is whether Respondent is required under CPRA, as the custodian of the ballots, to allow inspection of the ballots from the Presidential Primary which occurred on June 7, 2016.<sup>3</sup> The Supreme Court has observed, “Openness in government is essential to the functioning of a democracy. ‘Implicit in the democratic process is the notion that government should be accountable for its actions. In order to verify accountability, individuals must have access to government files. Such access permits checks against the arbitrary exercise of official power and

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<sup>3</sup> Although the allegations concern the ballots for the Presidential Primary in the County of San Diego in June 2016, Appellants request a published opinion as instruction for purpose of future elections.

secrecy in the political process.’ ” (*International Federation, supra*, at pp. 328–329.)

## II.

### STANDARD OF REVIEW

The standard of review on appeal from a judgment dismissing an action after the sustaining of a demurrer without leave to amend is well established. The function of a demurrer is to test the sufficiency of the [pleading] as a matter of law, and it raises only a question of law. On a question of law, a *de novo* standard of review on appeal is applied. (*Holiday Matinee, Inc. v. Rambus, Inc.* (2004) 118 Cal.App.4th 1413, 1420.)

## III.

### PROCEDURAL HISTORY

Between February 2, 2017, and February 17, 2017, Appellant and Respondent engaged in an email exchange wherein Appellants requested, *inter alia*, to view and review the ballots and Respondent declined to do so. (CT, p. 8)

Thereafter, Appellants, demanded access to inspect and copy the stored ballots of the Presidential Primary. (CT, p. 8) Respondent, declined Appellants request stating that the ballots are sealed pursuant to California



Elections Code Sections 15370 and 17301(b) and that the Respondent is not permitted to open any ballots or permit any ballots to be opened pursuant to California Elections Code Section 15307. (CT, p. 8.)

The “California Voters Bill of Rights,” which includes provisions that the public has both the right to observe the election process and to report any suspected illegal or fraudulent activity to a local elections official or to the Secretary of State. (California Elections Code Section 2300(a)(10).) Although governmental agencies may be subjected to public review using only CPRA, the elections departments are understood to allow a higher level of scrutiny by the public and an expectation that the public will be observing and reporting fraudulent activity. (CT, p.8.)

In the Presidential Primary, there were 1.52 million registered voters in San Diego County. There were 775,930 ballots cast in 184 contests involving 468 candidates and 52 state and local propositions. (CT, p.9.) Respondent is required to store all ballots following a federal election, such as the Presidential Primary, for 22 months. (CT, p.9) (California Elections Code Section 15209.)

#### IV.

### **ELECTION BALLOTS ARE PUBLIC RECORDS SUBJECT TO THE CALIFORNIA PUBLIC RECORDS ACT.**

CPRA was enacted for the purpose of increasing freedom of information by giving members of the public access to information in the possession of public agencies. (Gov.Code Section 6250 *et seq.*)<sup>4</sup> The definition of public records “includes any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics.” (Gov. Code Section 6252(e).) There is no question that election ballots are public records.

As public records, ballots “are open to inspection at all times during the office hours of the state or local agency and every person has a right to inspect any public record” and make records available for copying. (Gov. Code Section 6252(a)(b).) The custodian agency may not cause delay in compliance with the CPRA. (Gov. Code Section 6252(d).) Thus, the Respondent’s duty is to produce ballots as a public record.

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<sup>4</sup> All citations to the Gov. Code are to the California Government Code.

V.

**THERE IS NO SPECIFIC APPLICABLE  
EXEMPTION UNDER CPRA**

There is no specific exemption to allow withholding ballots under the CPRA. All existing exemptions relating to election records are to protect voter personal information and the need to respect the privacy of that information. Gov. Code Section 6254(k). Respondent raises the defense that it cannot comply with the CPRA because the “ballots have been sealed may only be opened in compliance with those statutes.” (CT, p.28)

The Respondent suggests that the Registrar of Voters may not comply with CPRA because the ballots have been sealed pursuant to Elections Code 15370 and 17301 and may only be opened in compliance with those statutes.<sup>5</sup> Accordingly, Respondent states that CPRA does not apply to official records which are exempted or prohibited from disclosure by other statutes. (Gov. Code Section 6254(k); Evidence Code Section 1040.) (CT., p. 28). The Respondent’s conclusion is non sequitur and its failure to comply with CPRA is unlawful.

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<sup>5</sup> The Elections Code requires the Registrar seal and maintain the ballots from an election involving contests of federal office for a period of 22 months.

First, Section 6254(k) relates to access to the public records (ballots) under seal by the custodian (election official). Gov. Code Section 6254(k). It would be counter intuitive to believe that once the Respondent has complied with the requirement of “sealing” under Elections Code Sections 15370 and 17301, that such sealing becomes a prophylactic to a public CPRA demand. In fact, the purpose of Election Code Section 17301 is to preserve the evidence and create a chain of custody that guards against alteration of the ballots. The reason for preserving the ballots is to allow access of ballots by the public. Other states have harmonized their laws to allow access by public records request.<sup>6</sup> A simple court order to unseal the ballots for inspection under CPRA, would suffice to relieve of Respondent of its perceived obligation.

Moreover, Respondent asserts that Government Code Section 6254(k) provides that the CPRA does not require the disclosure of “[r]ecords, the disclosure of which is exempted or prohibited pursuant to federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege.” (Gov. Code Section 6254(k).) (CT, p. 24-15.)

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<sup>6</sup> <https://www.rcfp.org/browse-media-law-resources/news/state-law-allows-public-inspect-ballots-presidential-race>

Evidence Code Section 1040 provides in pertinent part:

(a) As used in this section, 'official information' means information acquired in confidence by a public employee in the course of his or her duty and not open, or officially disclosed, to the public prior to the time the claim of privilege is made.

(b) A public entity has a privilege to refuse to disclose official information, and to prevent another from disclosing official information, if the privilege is claimed by a person authorized by the public entity to do so and:

(1) Disclosure is forbidden by an act of the Congress of the United States or a statute of this state;

(2) Disclosure of the information is against the public interest because there is a necessity for preserving the confidentiality of the information that outweighs the necessity for disclosure in the interest of justice . . . . In determining whether disclosure of the information is against the public interest, the interest of the public entity as a party in the outcome of the proceeding may not be considered."

The "official information" privilege in Evidence Code Section 1040, subdivision (b)(2), is expressly conditional, not absolute. Even if Respondent could satisfy the threshold burden of showing that the information was acquired in confidence, i.e. a ballot cast in an election, the statute requires the court next to weigh the interests and to sustain the

privilege only if "there is a necessity for preserving the confidentiality of the information that outweighs the necessity for disclosure in the interest of justice." (*Shepherd v. Superior Court* (1976) 17 Cal. 3d 107, 123-125; *PSC Geothermal Services Co. v. Superior Court* (1994) 25 Cal. App. 4th 1697, 1714; *Rubin v. City of Los Angeles* (1987) 190 Cal. App. 3d 560, 585-587; *CBS, Inc. v. Block* (1986) 42 Cal. 3d 646, 656.) Ballots, as public records, contain no traceable identification information including names, addresses, signatures or other personal markings. (CT, p. 45) That information is contained on the envelopes that are removed and separated from the ballots. (Id.) The ballots are simple dot coded papers showing subjective voter intent. (Id.) The ballots are tabulated by a central tabulation device which simply counts the markings and tallies the results. (CT, p. 46) Time, place and manner restrictions can guard against any unjust intrusion to the Respondent's usual business and is not burdensome in scope. Any balancing of interests as required for this privilege, if asserted, must favor the inspection of the ballots by the public.

When a court is confronted with resolving a statutory ambiguity related to the public's access to information, the California Constitution requires the court to construe the ambiguity to promote the disclosure of information to the public. (*POET, LLC v. State Air Resources Bd.* (2013)

217 Cal.App.4th 1214.) Where an ambiguity in the meaning or intent of the statutory language of the California Public Records Act (CPRA) is perceived, the California Constitution requires courts to broadly construe the CPRA to the extent it furthers the people's right of access and to narrowly construe the PRA to the extent it limits the right of access. Cal. Const. art. 1, § 3(b)(2); Cal. Gov't Code § 6250.

### **CONCLUSION**

The California Voters Bill of Rights sets forth the legislative and constitutional policy of the State of California to promote the transparency of elections and uphold the integrity of elections. Participation by citizens in the oversight process is paramount to these objectives. Ballots are clearly public records. Ballots are not traceable to the individual voter. Appellant asks this Court to reverse the Judgment for Dismissal entered in this case and to order the trial court to enter judgment in Appellant's favor consistent with the Court's opinion.

Dated: August 31, 2018

/s/ Alan L. Geraci

By: Alan L. Geraci, Esq.  
of CARE Law Group PC,  
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Citizens Oversight Inc. and Raymond Lutz

## CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rule 8.204(c)(1) or 8.504(d)(1) of the California Rules of Court, the enclosed Brief of Appellants is produced using 13-point or greater Roman type, including footnotes, and contains 1,962 words, which is less than the total words permitted by the rules of court. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: August 31, 2018

/s/ Alan L. Geraci

By: Alan L. Geraci, Esq.  
of CARE Law Group PC,  
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State of California )  
County of Los Angeles )  
)

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I, Kirstin Largent, declare that I am not a party to the action, am over 18 years of age and my business address is: 631 S Olive Street, Suite 600, Los Angeles, California 90014.

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