

**COURT OF APPEAL, STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT, DIVISION ONE**

0275

CITIZENS OVERSIGHT, INC., ET AL.,
Plaintiffs and Appellants,

v.

MICHAEL VU, ET AL.,
Defendants and Appellants.

FROM THE COUNTY OF SAN DIEGO

HON. JOEL R. WOHLFEIL

JUDGE

**COURT OF APPEAL CASE NUMBER
D071907**

CLERK'S TRANSCRIPT

Volume 2 of 3
Page 275 to 558

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9 **SUPERIOR COURT OF CALIFORNIA**
10 **COUNTY OF SAN DIEGO—CENTRAL DIVISION**

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

14 Plaintiffs,

15 vs.

16 MICHAEL VU, San Diego Registrar of)
17 Voters; HELEN N. ROBBINS-MEYER,)
18 San Diego County Chief Administrative)
19 Officer; COUNTY OF SAN DIEGO, a)
20 public entity; DOES 1-10,)

21 Defendants.)

CASE NO: 37-2016-00020273-CL-MC-CTL

**SECOND AMENDED COMPLAINT FOR
DECLARATORY RELIEF AND
MANDAMUS**

**CCP Section 1060
CCP Section 1085**

Hon. Joel R. Wohlfeil, Judge

Complaint filed: June 16, 2016
No Trial Date Set

22 COMES NOW, Plaintiffs who allege as follows:

23 **Parties:**

- 24 1. Plaintiff, Citizens Oversight Inc., is a Delaware non-profit corporation which conducts
25 selection oversight nationwide as a watchdog of election processes, doing business in the
26 County of San Diego.
27 2. Plaintiff, Raymond Lutz, are a resident and registered voter in the County of San Diego
28 unincorporated area. He is also the National Coordinator of CitizensOversight.org, and
has conducted extensive reports and reviews of the election processes used in San Diego
County since 2008, including a top-to-bottom report regarding the 2010 election.

- 1 3. Defendant Michael Vu, San Diego County Registrar of Voters ("Registrar") has held that
2 office since 2007 and is responsible for conducting election procedures in compliance
3 with California State Law, including the California State Elections Code.
- 4 4. Defendant Helen N. Robbins-Meyer, Chief Administrative Officer, County of San Diego,
5 has ultimate responsibility for operation of the County of San Diego to ensure
6 compliance with all laws, including compliance with the California Elections Code,
7 maintains an office at the County Administration Building located in the City of San
8 Diego at 1600 Pacific Highway, Rm 166, San Diego, CA, 92101. Robbins-Meyers is the
9 supervisor to Michael Vu.
- 10 5. Defendant County of San Diego is a public entity organized in the State of California and
11 operates as an election district under the California State Election Code, with principal
12 offices in the County Administration Building, 1600 Pacific Highway, San Diego,
13 California 92101.

14 **Summary of Case:**

- 15 6. The San Diego County Registrar of Voters has refused to comply with California
16 Elections Code Section 15360. Section 15360 requires the Registrar to canvass the
17 election process by conducting a manual tally of the ballots tabulated by voting devices
18 and ballots received from voters by mail. The purpose of Section 15360 is to provide an
19 objective and statistical basis to test the integrity of the voting method and process.
20 Discrepancies can isolate defective tabulation, employee error, or nefarious conduct such
21 as "hacking." The modern age of voting with electronic and automated systems has been
22 heavily scrutinized in recent election cycles. Only strict compliance with the legislative
23 intent of Section 15360 can assure the electorate of fair elections.

24 **Background:**

- 25 7. **One percent Manual Tally Options:** There are two options for conducting the one
26 percent manual tally, as specified in California Election Code Sec. 15360. The first is to
27 tally one percent of all the precincts, poll ballots and vote-by-mail ("VBM") ballots. The
28 second is to conduct the tally in two parts, one being the poll ballots and the other being

1 the VBM ballots, which are grouped into batches rather than being grouped by precinct.

2 8. California Election Code Section 15360 (full text suitable for judicial notice is attached
3 as "Exhibit A" and herein incorporated by this reference as if set forth in full herein)
4 describes the activities required in conduct of processing the votes with regard to the
5 "one percent Manual Tally."

6 9. At some point during the canvas of votes, Defendants, and each of them, changed their
7 intention to comply with Section 15360(a)(1) instead of Section 15360(a)(2). Public
8 Notice (a true and correct copy is attached hereto as "Exhibit C" and hereby incorporated
9 by this reference as if set forth in full) was posted on the Registrar's website and the
10 process noticed for the manual tally was for Section 15360(a)(1).

11 10. Defendants do not have, or have not produced on Plaintiffs' written request, a written
12 procedural manual describing how they, and each of them, will conduct a one percent
13 manual tally to comply with Election Code Section 15360(a), including the use of VBM
14 ballots.

15 11. The one percent manual tally is conducted by teams of workers who carefully manually
16 count and tally votes of all the ballots in selected precincts. One use of the one percent
17 manual tally is to detect discrepancies and any possible computer programming errors.
18 The one percent manual tally is also a means to ensure larger integrity of the
19 vote-counting process. The one percent manual tally, with careful oversight, can also a
20 check on the integrity of the workers at the Registrar and can detect hackers from the
21 outside who may alter the vote in the central tabulator. Regardless, the one percent
22 manual tally must be conducted according to the full extent of the provisions of law.

23 12. There are two major classes of ballots processed by the one percent manual tally:

- 24 • POLLS BALLOTS: Ballots cast in at a physical polling place to vote (generally)
25 on election day. Included in this set are all ballots that are not vote-by-mail
26 ballots, including provisional ballots. Provisional ballots are used at the polling
27 place if there is some question about the validity of the ballot, so these can be
28 reviewed later.

1 • VOTE-BY-MAIL (VBM) BALLOTS: Deposited in the mail and postmarked no
2 later than election day. VBM ballots may comprise as much as or more than 60%
3 of the total votes cast.

4 13. Defendants, and each of them, have decided that the Registrar of Voters (Defendant Vu)
5 does not need to fully comply with Section 15360. The Registrar does not include a
6 manual tally of all ballots cast in one percent of the precincts chosen at random.

7 Specifically, the Registrar does not include provisional ballots added to the tally nor does
8 the Registrar include all Vote-by-Mail (VBM) ballots.

9 14. Elections Code Section 15360 refers to "ballots cast." The common meaning is that a
10 ballot is "cast" when it leaves control of the voter and is turned over to the elections
11 official for tally. In the precinct polling place, a ballot is "cast" when it is inserted into the
12 ballot box. VBM ballots are "cast" when they are submitted to the U.S. Postal Service or
13 hand-delivered to a precinct polling place or to the Registrar of Voters.

14 15. **Scope of Manual Tally:** "Exhibit C" is the public notice of the manual tally procedure.
15 It states that "Pursuant to State Law, a manual tally of at least one percent of the precincts
16 and one percent of the mail ballots, selected at random, is required as part of the
17 post-Election Day canvass of the election." This is the full scope of the notice and there
18 are no other categories or exclusions. For example, the public notice does not say that
19 "the manual tally includes one percent of the precinct ballots minus the provisional
20 ballots and minus those omitted in the QC process." Nor does the public notice say that
21 it is "one percent of the mail ballots already processed, excluding about 285,000 ballots
22 not yet processed." California Elections Code section 15101 allows Defendants to begin
23 processing VBM ballots 10 business days prior to the election. The initial tally provided
24 to the public and media at that time are VBM ballots that were received early in the
25 process or voters who cast their ballot at the Registrar's office. After the polls close, poll
26 ballots are transported from each polling place to the Registrar of Voters' office and they
27 are scanned over the course of the night. The first step in this process is receiving the
28 boxes of ballots from the precinct.

- 1 16. **Quality Control ("QC") Inspection Removal of Ballots:** When received by the
2 Registrar of Voters, the boxes are opened and the ballots are given an initial inspection.
3 Some ballots may be removed from the precinct box. Historically, about 5% of the
4 ballots were removed at this point for any of a number of reasons, such as additional
5 marking, mutilation, etc. These ballots may be "remade" prior to scanning by a remaking
6 group. These ballots are currently not included in the one percent manual tally process.
7 We don't know how many ballots were removed in this fashion in this election because
8 the Registrar does not provide this information. We can, however, determine this number
9 by reviewing the number of signatures on sign-in rosters and then subtracting the number
10 actually scanned.
- 11 17. **Unofficial Results:** Soon after election day, the set of early VBM ballots has been
12 scanned and all the normal (not provisional and not removed due to QC inspection)
13 ballots from the precincts have been scanned. This forms the initial unofficial results of
14 the election. By the end of election night, the website of the Registrar reported that
15 285,000 ballots were yet to be counted. Attached as Exhibit B, and hereby incorporated
16 by this reference as if set forth in full herein, is a snapshot of the header of that page the
17 day after election day.
- 18 18. The unofficial results are determined by tabulation software called "GEMS" which runs
19 on the "central tabulator" computer. There is a possibility that a compromised worker or
20 external hacker who has gained access to this computer will have modified the results,
21 perhaps by shifting 10,000 or 20,000 votes from one candidate to another, by distributing
22 changes to perhaps 1,000 different precincts and shifting 10 to 20 votes in each one. As
23 long as the hacker does not modify a precinct included in the one percent manual tally, it
24 will be invisible to that audit procedure. So it is absolutely essential that the precincts and
25 VBM batches which are selected for the one percent manual tally are unknown until the
26 results are fixed as unofficial results. The element of surprise is essential to make sure
27 that the hacker is not able to simply avoid the precincts and batches which are involved in
28 the manual tally. Furthermore, it is essential that the unofficial results be provided to the

1 public and third parties prior to the random selection process. Otherwise, the hacker may
2 be able to reverse any changes to those specific precincts to cover their tracks and again,
3 the one percent manual tally would again be worthless. These constraints on the effective
4 implementation of a manual tally procedure are well known and implied by the concept
5 of random selection, and a manual tally procedure.

6 19. **Random Selection of Precincts and Batches:** The day after the election, the random
7 selection is performed. The selection is done only on the set of ballots already processed
8 (not including the 285,000 ballots mentioned as "still to be counted.")

9 20. Plaintiffs asked the Registrar of Voters to delay this selection process so as to include all
10 the VBM ballots but that demand was refused. (Attached as "Exhibit F," and hereby
11 incorporated by this reference as if set forth in full herein, is an email correspondence
12 with Defendant Michael Vu.)

13 21. Members of the public were requested to assist in the random selection of precincts and
14 VBM batches. There are 1522 precincts in San Diego County. The selection of precincts
15 was performed using three sets of ping pong balls marked 0-9 and one set of two ping
16 pong balls marked with 0 and 1. A member of the public selected one precinct out of
17 1522 by choosing one ball from each of the ones, tens, hundreds, and thousands
18 containers. A total of 16 precincts were chosen in this manner. Attached as Exhibit D,
19 and hereby incorporated by this reference as if set forth in full, is a photocopy of the lists
20 of precincts chosen. In addition to these 16 precincts, precincts and races are chosen by
21 the Registrar to ensure that all races in the election are checked by a manual tally
22 procedure. These additional precincts and races are added later. Unfortunately, the choice
23 of these precincts is not done in a public way nor using a random process. Thus, if it were
24 a compromised worker at the Registrar of Voters, that individual could choose additional
25 precincts and races to avoid modified precincts. The methodology for choosing random
26 precincts in this regard does not meet the obvious fact that randomly chosen precincts
27 should not be known by the party who may have modified the election results.

28 22. Immediately after choosing the 16 precincts, a member of the public selects one percent

1 of the VBM batches already scanned. This is done in a similar way to the selection of
2 precincts, using ping pong balls. Attached as Exhibit E, and hereby incorporated by this
3 reference as if set forth in full herein, is the published list of batches selected.

4 23. According to election officials who conducted the one percent manual tally random draw,
5 there were about 730 mail in "batches" included in the one percent manual tally selection
6 process. They said there are about 400 ballots in each batch. Thus, this represents about
7 (730x400) 292,000 ballots included in the VBM tally process.

8 24. Plaintiffs attended the public selection process and video recorded the process. Plaintiffs
9 mentioned the discrepancy between the 730 batches and the fact that the 285,000
10 unprocessed VBM and provisional ballots were not included in the selection process.
11 Election officials stated the one percent manual tally only included the VBM ballots
12 already scanned.

13 25. At the public meeting of the selection of the random precincts on June 9, 2016,
14 Registrar's staff provided "Policy Number [ES-08]" which provides the policy which
15 "establishes procedures for conducting the One Percent Manual Tally." A true and
16 correct copy of this policy memorandum is attached as "Exhibit G" and hereby
17 incorporated by this reference as if set forth in full herein Policy ES-08 provides
18 procedures for selecting one percent of the precincts for the one percent manual tally, but
19 does not describe any procedures for VBM ballots and the batches which are to be
20 manually tallied. Without a written procedure, there is no way for the public to
21 understand nor comment on the procedures for auditing the election for the VBM ballots,
22 which today comprised the majority of the ballots cast. Furthermore, this procedure does
23 not mention "batches" at all. Policy ES-08 describes in provision 6.1.11 and 6.2.16 that
24 "(t)he supervisor may request Technical Services rerun the ballots to confirm the manual
25 tally." This step is completed if there is a variance between the hand-tallied result and the
26 computer result from the central tabulator. If a re-scan of the sampled ballots suddenly
27 matches the manual tally result that would not "confirm the manual tally" but would
28 imply that a compromised worker or hacker has modified the election in the central

1 tabulator and it has been caught by the manual tally procedure. In such a case, steps
2 should exist in the procedure to declare that the election has been hacked and to require a
3 complete re-scan of all ballots.

4 26. In this election, there were also an unusually high number of provisional ballots primarily
5 due to No Party Preference (NPP) voters who have the option of choosing a partisan
6 ballot only for the presidential race for most parties (but not the Republican Party). These
7 "crossover" ballots included the presidential race for that party, all the nonpartisan races,
8 but not the strictly partisan races such as central committee members. The vast majority
9 of cases were NPP voters choosing the "crossover" Democratic Party ballot so they could
10 vote for Sen. Bernie Sanders. These ballots could have then have been placed with the
11 other ballots for the precinct but poll workers were trained to treat these as "provisional"
12 ballots. The normal and most prevalent use of a provisional ballot is to deal with a voter
13 who normally is a VBM voter and who does not have his VBM ballot to turn in. If the
14 voter accidentally also voted by mail, the VBM ballot would already have been received.
15 The VBM ballot will be used and the poll ballot will not. Otherwise, the voter could
16 unintentionally vote twice.

17 27. There were so many people requesting NPP/Democratic Party ballots that many precincts
18 ran out. In those cases, they opted to use a regular Democratic Party ballot but omit the
19 central committee race. These would also be treated as provisional ballots. Based upon
20 information and belief, there were about 74,000 provisional ballots received.

21 28. Democratic Party crossover ballots were placed in provisional envelopes, they were also
22 unfairly scrutinized as if they were true provisional ballots. Such scrutiny includes
23 signature comparisons. It is not supposed to include address comparisons, but it has been
24 reported that the ROV habitually compares the addresses and rejects any ballots that do
25 not compare.

26 29. During the official canvass, the election official is required to examine the records with
27 respect to all provisional ballots cast. Using the procedures that apply to the comparison
28 of signatures on VBM ballots pursuant to Section 3019, the election official shall

1 compare the signature on each provisional ballot envelope with the signature on the
 2 voter's affidavit of registration or other signature in the voter's registration record. If the
 3 signatures do not compare or the provisional ballot envelope is not signed, the ballot shall
 4 be rejected. A variation of the signature caused by the substitution of initials for the first
 5 or middle name, or both, shall not invalidate the ballot. (Elections Code 14310 (c) (1))

6 30. Although these crossover ballots received undue scrutiny as if they were a conventional
 7 provisional ballot, they were not classified as "provisional" ballots. Thus, they did not
 8 receive any tracking, as would other provisional ballots per Election Code 14310 (d)
 9 ("The Secretary of State shall establish a free access system that any voter who casts a
 10 provisional ballot may access to discover whether the voter's provisional ballot was
 11 counted and, if not, the reason why it was not counted.")

12 31. Instead, the Registrar applied section 14300 with regard to provisional ballots. This
 13 section says that if provisional ballots are used, they are not to be subjected to the
 14 requirements of section 14310. But there are many requirements in Section 14310. If a
 15 voter uses a crossover ballot, it should not be subjected to signature verification, but at
 16 the same time, it would be advantageous to track these as specified in 14310(d). The
 17 voter did vote using a provisional ballot, and even if the signature is not subjected to
 18 verification, the voter should still be able to track these ballots.

I.

FIRST CAUSE OF ACTION

(DECLARATORY RELIEF)

(All Defendants)

23 32. Plaintiffs repeat, re-allege and incorporate herein Paragraphs 1 through 31 inclusive, as
 24 though set forth in full herein.

25 33. An actual controversy has arisen and now exists between Plaintiffs and Defendants, and
 26 each of them. Plaintiffs alleges that the election code states clearly and succinctly that the
 27 one percent manual tally be performed in two parts, one part including one percent of all
 28 ballots cast at precincts (including provisional ballots and ballots removed in the QC

1 inspection) and one part including one percent of all VBM ballots cast (including the
2 VBM ballots already processed and those still in the queue to be processed).

3 34. Instead, the Defendants, and each of them, included only about 290,000 VBM ballots in
4 the set of batches that could be selected for the one percent manual tally process,
5 choosing 8 batches, with each batch being about 400 ballots. Defendants, and each of
6 them, did not include provisional ballots in the set of ballots included in the one percent
7 manual tally.

8 35. Defendants, and each of them, did not include the ballots removed during QC inspection
9 1 in the set audited by the manual tally. Defendants, and each of them, did not include the
10 VBM ballots still in the queue waiting to be processed in the one percent manual tally.
11 Thus, with 290,000 VBM ballots available for audit in the one percent manual tally, but
12 with about the same number waiting to be processed, instead of a one percent manual
13 tally, this should be called the "half-of-one-percent manual tally."

14 36. The Registrar is in violation of the clear intent of the law.

15 WHEREFORE, Plaintiffs pray that:

16 1. A declaration of the rights, duties and obligations of the parties concerning
17 their dispute including, but not limited to:

- 18 • Specifically, a larger sample of VBM ballots must be included in the manual tally
19 process. The percentage must be at least one percent of the VBM ballots known to
20 have been cast. In this case, it roughly double the number of batches originally
21 selected are required. Essentially all VBM ballots and provisional ballots should
22 be included in the set of ballots included in the manual tally process. By including
23 these ballots in the process, more of the process is checked, including the ballots
24 removed in the QC inspection.
- 25 • The definition for "batch" according to the election code "means a set of ballots
26 tabulated by the voting system devices, for which the voting system can produce a
27 report of the votes cast."
- 28 • Defendants, and each of them, be required to produce data files corresponding to

1 the "report of the votes cast" for batches in the VBM manual tally. The oversight
2 protocol is substantially enhanced if citizens get all the data files corresponding
3 to the batches prior to the one percent manual tally selection process.

4 2. That the Court require that the Registrar document their procedures
5 regarding VBM ballots in the one percent manual tally. The procedures
6 must include the steps to take if a variance exists that cannot be explained.
7 If a re-scan of those ballots results which results in a correction of the
8 variance shall result in the declaration that the election is tainted, and a
9 complete re-scan of the ballots must be performed, followed by another
10 one percent manual tally procedure on newly chosen precincts.

11 3 That the Court require that after procedures are documented, that
12 unofficial results be published and provided to the public, and the one
13 percent manual tally will be re-started for all VBM and provisional
14 ballots, including a new random selection after the results have been fixed.

15 4. For attorney fees and costs of suit, pursuant to California Code of Civil
16 Procedure Section 1021.5;

17 5. For such other and further relief as may be appropriate and just.

18 II.

19 SECOND CAUSE OF ACTION

20 (MANDAMUS CCP SECTION 1085)

21 (All Defendants)

22 37. Plaintiffs repeat, re-allege and incorporate herein Paragraphs 1 through 36 inclusive, as
23 though set forth in full herein.

24 38. Plaintiffs alleges that Defendants, and each of them, could not properly certify the
25 election of June 7, 2016, without complying with the clear intent of California Elections
26 Code Section 15360.

27 39. Despite Plaintiffs' attempt to gain Defendants, and each of them, voluntary compliance
28 with California Elections Code Section 15360, such voluntary compliance was and is not

1 forthcoming.

2 40. As a result Defendants certified the election results without compliance of Election Code
3 Section 15360, and caused irreparable harm to Plaintiffs and all the voters in the County
4 of San Diego by not complying with the law and jeopardizing the integrity of the recent
5 election.

6 WHEREFORE, Plaintiffs, and each of them, pray that:

- 7 1. Defendants and each of them be required to fully comply with the breadth
- 8 California Elections Code Section 15360.
- 9 2. Pending a hearing or trial on this matter, an order that Defendants, and
- 10 each of them, be stayed from certifying any future election;
- 11 3. For attorney fees and costs of suit, pursuant to California Code of Civil
- 12 Procedure Section 1021.5;
- 13 4. For such other and further relief as may be appropriate and just.

14
15 Dated: July 18, 2016

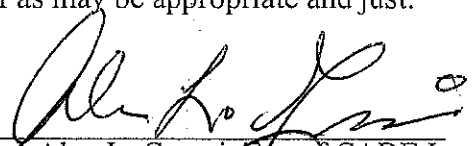
16 
 17 By: Alan L. Geraci, Esq of CARE Law
 18 Group PC, Attorneys for Plaintiffs Citizens
 19 Oversight Inc. and Raymond Lutz
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EXHIBIT A**ELECTIONS CODE
SECTION 15360**

15360. (a) During the official canvass of every election in which a voting system is used, the official conducting the election shall conduct a public manual tally of the ballots tabulated by those devices, including vote by mail ballots, using either of the following methods:

(1) (A) A public manual tally of the ballots, including vote by mail ballots, cast in 1 percent of the precincts chosen at random by the elections official. If 1 percent of the precincts is less than one whole precinct, the tally shall be conducted in one precinct chosen at random by the elections official.

(B) (i) In addition to the 1 percent manual tally, the elections official shall, for each race not included in the initial group of precincts, count one additional precinct. The manual tally shall apply only to the race not previously counted.

(ii) Additional precincts for the manual tally may be selected at the discretion of the elections official.

(2) A two-part public manual tally, which includes both of the following:

(A) A public manual tally of the ballots, not including vote by mail ballots, cast in 1 percent of the precincts chosen at random by the elections official and conducted pursuant to paragraph (1).

(B) (i) A public manual tally of not less than 1 percent of the vote by mail ballots cast in the election. Batches of vote by mail ballots shall be chosen at random by the elections official.

(ii) For the purposes of this section, a "batch" means a set of ballots tabulated by the voting system devices, for which the voting system can produce a report of the votes cast.

(iii) (I) In addition to the 1 percent manual tally of the vote by mail ballots, the elections official shall, for each race not included in the initial 1 percent manual tally of vote by mail ballots, count one additional batch of vote by mail ballots. The manual tally shall apply only to the race not previously counted.

(II) Additional batches for the manual tally may be selected at the discretion of the elections official.

(b) If vote by mail ballots are cast on a direct recording electronic voting system at the office of an elections official or at a satellite location of the office of an elections official pursuant to Section 3018, the official conducting the election shall either include those ballots in the manual tally conducted pursuant to paragraph (1) or (2) of subdivision (a) or conduct a public manual tally of those ballots cast on no fewer than 1 percent of all the direct recording electronic voting machines used in that election chosen at random by the elections official.

(c) The elections official shall use either a random number generator or other method specified in regulations that shall be adopted by the Secretary of State to randomly choose the initial precincts, batches of vote by mail ballots, or direct recording electronic voting machines subject to the public manual tally.

(d) The manual tally shall be a public process, with the official conducting the election providing at least a five-day public notice of the time and place of the manual tally and of the time and place of the selection of the precincts, batches, or direct recording electronic voting machines subject to the public manual tally prior to conducting the selection and tally.

(e) The official conducting the election shall include a report on the results of the 1 percent manual tally in the certification of the official canvass of the vote. This report shall identify any discrepancies between the machine count and the manual tally and a description of how each of these discrepancies was resolved. In resolving any discrepancy involving a vote recorded by means of a punchcard voting system or by electronic or electromechanical vote tabulating devices, the voter verified paper audit trail shall govern if there is a discrepancy between it and the electronic record.

EXHIBIT B

Heading on results page of San Diego ROV website the morning after the election

**PRIMARY
ELECTION**

COUNTY OF SAN DIEGO
PRESIDENTIAL PRIMARY ELECTION
Tuesday, June 7, 2016

THESE RESULTS ARE UNOFFICIAL
Last updated on: 06-08-16 at 03:21:51
There are APPROXIMATELY 285000 Mail / Provisional ballots still to be counted.

EXHIBIT C**PUBLIC NOTICE OF MANUAL TALLY FROM SAN DIEGO ROV WEBSITE****Public Notice**

Pursuant to State Law, a manual tally of at least 1% of the precincts and 1% of the mail ballots, selected at random, is required as part of the post-Election Day canvass of the election.

This process, as are all components of the official canvass of results, is open to public observation. State Law provides 30 days to complete the canvass prior to certification of the election results.

The random selections of 1% of precincts and mail ballots to be manually tallied for the June 7th, 2016 Presidential Primary Election will commence on:

Wednesday, June 8th, at 3:00 p.m.

The actual manual tally of the votes cast on these selected precinct and mail ballots will commence on:

Monday, June 13th, at 9:00 a.m.

The manual tally will be conducted each day, until completed, during normal business hours, Monday through Friday, from 8:00 a.m. to 4:30 p.m. If needed, manual tally hours could be extended to evenings until 8:00 pm and/or weekends.

If interested in observing this process, please contact Diane Elsheikh at 858-505-7225.

EXHIBIT D

ROV list of precincts

Sequence	Contribution
001	100000
002	100000
003	100000
004	100000
005	100000
006	100000
007	100000
008	100000
009	100000
010	100000
011	100000
012	100000
013	100000
014	100000
015	100000
016	100000
017	100000
018	100000
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065	100000
066	100000
067	100000
068	100000
069	100000
070	100000
071	100000
072	100000
073	100000
074	100000
075	100000
076	100000
077	100000
078	100000
079	100000
080	100000
081	100000
082	100000
083	100000
084	100000
085	100000
086	100000
087	100000
088	100000
089	100000
090	100000
091	100000
092	100000
093	100000
094	100000
095	100000
096	100000
097	100000
098	100000
099	100000
100	100000

EXHIBIT E

List of VBM Batches selected

1% Random Draw June 8, 2016

Batch	Count
001	1
002	1
003	1
004	1
005	1
006	1
007	1
008	1
009	1
010	1
011	1
012	1
013	1
014	1
015	1
016	1
017	1
018	1
019	1
020	1
021	1
022	1
023	1
024	1
025	1
026	1
027	1
028	1
029	1
030	1
031	1
032	1
033	1
034	1
035	1
036	1
037	1
038	1
039	1
040	1
041	1
042	1
043	1
044	1
045	1
046	1
047	1
048	1
049	1
050	1
051	1
052	1
053	1
054	1
055	1
056	1
057	1
058	1
059	1
060	1
061	1
062	1
063	1
064	1
065	1
066	1
067	1
068	1
069	1
070	1
071	1
072	1
073	1
074	1
075	1
076	1
077	1
078	1
079	1
080	1
081	1
082	1
083	1
084	1
085	1
086	1
087	1
088	1
089	1
090	1
091	1
092	1
093	1
094	1
095	1
096	1
097	1
098	1
099	1
100	1

1% of all batches were selected for the 1% random draw. The number of batches selected is 100.

EXHIBIT F

Email correspondence with Michael Vu. He refuses to follow the law to include 1% of all VBM ballots cast.

Subject: RE: 1% Manual Tally
 From: "Vu, Michael" <Michael.Vu@sdcounty.ca.gov>
 Date: 06/13/2016 7:43 PM
 To: Ray Lutz <raylutz@citizensoversight.org>
 CC: "electionintegrity@citizensoversight.org" <electionintegrity@citizensoversight.org>

Good Evening, Mr. Lutz.

To accommodate those that were in attendance for the initial pull, I will make arrangements to have a separate mail ballot batch pulled on Thursday, June 16 at 9 am.

With regard to your second concern, we respectfully decline your request.

Kind Regards,

Michael

MICHAEL VU | REGISTRAR OF VOTERS | 858-505-7201 | SDVOTE.COM

-----Original Message-----

From: Ray Lutz [<mailto:raylutz@citizensoversight.org>]
 Sent: Friday, June 10, 2016 2:34 PM
 To: Vu, Michael
 Cc: electionintegrity@citizensoversight.org
 Subject: Re: 1% Manual Tally

Michael:

Thank you for the update.

Two Problems:

1) I don't think you gave sufficient public notice of that public draw, as we were unable to attend. Please provide the required public notice (72 hours I think) and redraw that additional batch (plus the issue below).

2) While we are talking about the 1% manual tally, we would like to complain that the 1% of the batches pulled in the random draw DOES NOT represent 1% of the mail ballot batches expected in the election, but is 1% of the number of batches completed so far. A larger number of batches is required to meet the 1% random draw legal requirement, because it is 1% of the total, not 1% of the number processed so far. We understand that about 290,000 VBM ballots were included in the initial batches and an additional 285,000 ballots were left to be counted according to your website the morning of the draw. Thus, with 400 ballots in each batch, the total number of batches is $290K+285K=575K$ ballots / 400 ballots per batch = 1438 batches; 1% (rounding up) would be 15 batches. You chose only 7 batches. Please make this correction and chose an additional 8 batches.

--Ray Lutz

On 06/10/2016 8:39 AM, Vu, Michael wrote:
 The batch that doesn't exist is 719.

Sent from my iPhone

On Jun 10, 2016, at 8:24 AM, Vu, Michael <Michael.Vu@edcounty.ca.gov> wrote:

Ray:

It has come to my attention that when we pulled the random draw of one of our mail ballot batches, the batch number doesn't exist. As a result, we will need to randomly select another batch. It is is my understanding that you were present when the draw was made and wanted to apprise you of this issue.

To resolve this situation, we will be publicly drawing another mail ballot batch to get to the needed 1% at 10 am this morning.

Should you have any questions, please let me know.

mv

Sent from my iPhone

Ray Lutz
Citizens' Oversight Projects (COPs)
<http://www.citizensoversight.org>
619-828-5321



COUNTY OF SAN DIEGO
REGISTRAR OF VOTERS
DEPARTMENT POLICY MANUAL

Subject: One Percent Manual Tally	Policy Number [ES-08]	Page 1 of 5
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November 9, 2012

Effective Date

Registrar of Voters

PURPOSE:

This policy establishes procedures for conducting the One Percent Manual Tally.

BACKGROUND:

California Election Code 336.5. "One Percent manual tally" definition.

"One Percent manual tally" is the public process of manually tallying votes in 1 percent of the precincts, selected at random by the elections official, and in one precinct for each race not included in the randomly selected precincts. This procedure is conducted during the official canvass to verify the accuracy of the automated count.

STANDARDS/GUIDELINES:

California Elections Code (E.C.) 2012 Chapter 4, Article 5. One Percent Manual Tally. Section 15360. Manual tally when using a voting system.

PROCEDURES:

1. SELECT DATES FOR THE RANDOM DRAW OF PRECINCTS AND THE ONE PERCENT MANUAL TALLY (MANUAL TALLY); NOTIFY THE PUBLIC

1.1 Schedule the random draw of precincts (random draw) to begin two days after the election, or on a date the Registrar of Voters (Registrar) specifies.

1.2 The random draw is performed by a section or public observer(s) outside of the Election Services Division.

1.3 Schedule the manual tally to begin the Tuesday immediately following the election, or on a date the Registrar specifies.

1.4 Notify the Precinct Services and Technical Services Division Chiefs of the date for the random draw.

1.5 Place public notice of the random draw and manual tally at the front counter and on our website no later than five days prior to the date and time of the random draw and manual tally as per E.C. 15360.



COUNTY OF SAN DIEGO
REGISTRAR OF VOTERS
DEPARTMENT POLICY MANUAL

Subject: One Percent Manual Tally	Policy Number [ES-08]	Page 2 of 5
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1.6 Select personnel to participate in the manual tally and submit a Personnel Requisition to Administration Division.

1.7 Reserve room to conduct the random draw and manual tally.

1.8 Request warehouse support to set up the room for the manual tally.

2. RANDOM DRAW OF PRECINCTS

2.1 Calculate one percent of the precincts (e.g. one percent of 1,634 precincts would be 17 precincts) needed for the manual tally.

2.2 Check with Administrative Secretary for Observers scheduled to attend the random draw.

2.3 The ROV will use a method similar to that used to randomly draw lottery numbers. The procedure uses three sets of balls numbered from 0 to 9 and one set of balls numbered 0 and 1. Each set represents one of the four digits (ones, tens, hundreds, and thousands) in the sequence number assigned to election precincts. Listed below is a detailed description of the random selection procedure.

2.3.1 The balls will be displayed for public inspection in four clear containers. Observers will receive a list of the sequence numbers and their correlating precinct numbers.

2.3.2 The Registrar or his designee will shake the containers and the section or observer(s) outside of the Election Services Division will make the random selection.

2.3.3 The ones container will be shaken. A ball will be drawn randomly from the container. This will be the low order or ones digit.

2.3.4 The tens container will be shaken. A ball will be drawn randomly from the container. This will be the second or tens digit.

2.3.5 The hundreds container will be shaken. A ball will be drawn randomly from the container. This will be the third or hundreds digit.

2.3.6 Depending on the results of the third digit drawing, one of two actions will be taken¹.

2.3.6.1 A ball will be drawn randomly from the thousands container only if drawing a "1" would generate a valid sequence number. This number will be either 0 or 1 completing the random selection.

2.3.6.2 No ball needs to be drawn from the thousands container if drawing a "1" from the thousands container would cause the resulting four-digit number to exceed the total number of precincts.

¹ The thousands digit is only relevant if it, combined with the first three digits, will constitute a number that does not exceed the total number of precincts.



COUNTY OF SAN DIEGO
REGISTRAR OF VOTERS
DEPARTMENT POLICY MANUAL

Subject: One Percent Manual Tally	Policy Number [ES-08]	Page 3 of 5
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2.4 The Chief Deputy of Election Services and an Election Services supervisor will coordinate to read off the sequence numbers and correlate them to the precinct numbers.

3. RECORD PRECINCTS SELECTED BY RANDOM DRAW

3.1 Report the precincts randomly selected to the Registrar, Assistant Registrar and Chief Deputies of Election Services and Technical Services.

4. SELECT ADDITIONAL PRECINCTS FOR THE MANUAL TALLY TO COVER ALL REMAINING CONTESTS ON BALLOT

4.1 Request from Technical Services the list of contests, ballot types and corresponding precincts not covered in the initial random draw.

4.2 Use this report to help identify the ballot types and precincts that will cover most of the remaining contests not selected in the random draw.

4.3 Highlight the spreadsheet from TS with a different colors and symbols to represent add-on precincts.

4.4 Ask a member from the public to randomly select a precinct within the ballot types needed to cover all remaining contests in the election.

4.5 Record the precinct, ballot type and contest(s) covered by each additional precinct selected.

4.6 In the instance where only one precinct covers a contest, then that precinct will be selected as the add-on precinct. In some cases, this may be a declared precinct.

5. FINAL PREPARATION FOR MANUAL TALLY

5.1 Notify Technical Services of all the precincts selected for the manual tally in order for them to assemble:

5.1.1 summary reports from election night

5.1.2 precinct and mail ballots from the selected precincts

5.2 Create a consolidation log to record manual tally and summary report comparisons and variances.

5.3 Create a one percent manual tally sheet for workers to tally votes. Create two sets: one for precinct ballots (white paper), one for mail ballots (color paper).

5.4 Create memo to report results of one percent manual tally to the Registrar.

5.5 Create observer sign-in sheet and post observer rules.

5.6 Create log to record precinct sign-out, sign-in, date, time and team.

5.7 Gather supplies:

5.7.1 sign in sheet (election workers)

5.7.2 rubber fingers

5.7.3 tacky

5.7.4 scratch pads



COUNTY OF SAN DIEGO
REGISTRAR OF VOTERS
DEPARTMENT POLICY MANUAL

Subject: One Percent Manual Tally.	Policy Number [ES-08]	Page 3 of 5
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4.2 Use this report to help identify the ballot types and precincts that will cover most of the remaining contests not selected in the random draw.

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5.7.1 sign in sheet (election workers)

5.7.2 rubber fingers

5.7.3 tacky

5.7.4 scratch pads



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- 5.7.5 pencils
- 5.7.6 post its
- 5.7.7 rulers
(comes with the ballots)
- 5.7.9 stapler and staples
- 5.7.9.1 calculators
- 5.7.9.2 tally sheets
- 5.8 Inventory summary reports and ballots from TS.
- 5.9 Confirm manual tally schedule with election workers and assign teams.

6. CONDUCT MANUAL TALLY

The method used for tallying the ballots depends on the number of contests. If a ballot has several contests it is more efficient to read, call and tally each contest. If there are few contests it is more efficient to sort by contest, count, tally, repeat. (sort and stack method). In some cases a team may start with the Read and Tally method and switch to the Sort and Stack method if only a few contests need to be re-tallied.

Both methods begin by welcoming the boards, give an explanation of why the 1% is conducted, inform teams of work hours, lunch and break schedules, and explain tally instructions to tally boards and observers.

6.1 Read and Tally

- 6.1.1 Assign tally boards; each precinct will have one 3 person team. One will call out vote and 2 will tally.
- 6.1.2 Each team will receive two copies of tally sheets and all paper ballots for a particular precinct. Be sure to verify that the precinct number is the same on all ballots.
- 6.1.3 Record deck number onto the worksheet
- 6.1.4 Remove ballots from box, putting box onto the floor
- 6.1.5 Reader calls out votes and board records votes.
- 6.1.6 If there is a variance, the board will pull those ballots aside in case they need to be reviewed by a supervisor.
- 6.1.8 Combine all results and bring to supervisor for comparison against the summary report.
- 6.1.9 If the tally results do not match the election night report, the supervisor will ask the team to re-tally their results – crossing their previous slashes. If a third tally is needed, a vertical mark will be made through the cross slashes. The board will re-tally no more than two times.
 - 6.1.9.1 Descriptions of Variances could be as follows:
 - If less than 30% of the bubble is filled it is recorded as blank
 - If there is an invalid mark and the ink is light, the bubble is read as blank



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REGISTRAR OF VOTERS
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Subject: One Percent Manual Tally	Policy Number [ES-08]	Page 5 of 5
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If there is an invalid mark and the ink is dark, the bubble is recorded as a vote cast

- 6.1.10 The supervisor may opt to assign to another team.
- 6.1.11 The supervisor may request Technical Services to rerun the ballots to confirm the manual tally.
- 6.1.12 When finished tallying, the board signs the tally sheet and leaves with the supervisor.
- 6.1.13 Supervisor records results, variances, and causes (if known) on consolidation log.

6.2 Sort and Stack

- 6.2.1 Assign tally boards; each precinct will have one 2 - 4 person team.
- 6.2.2 Each team will receive one tally sheet and all paper ballots for a particular precinct. When the Sort and Stack method is used as a final tally in a precinct that started as a Read and Tally this form may be used as a worksheet with the information then transferred to the Read and Tally tally sheet. Be sure to verify that the precinct number is the same on all ballots.
- 6.2.3 Record precinct number onto the worksheet
- 6.2.4 Remove ballots from box, putting box onto the floor
- 6.2.5 Divide ballots amongst team members
- 6.2.6 Sort into one stack for each category i.e.: yes, no, blank, ambiguous, over vote
- 6.2.7 Count, and on a post it write the number counted and place on top of stack
- 6.2.8 Second team member repeats this process and places a check by the number on the post it if they come up with the same result
- 6.2.9 If the total in the stack does not match – recount
- 6.2.10 Once all stacks are counted and team count matches, record results on the worksheet in the "1st count" column
- 6.2.11 Call over a supervisor and read off the total ballots manually tallied (and to notify of any ambiguous markings) to be compared to the system count of total ballots
- 6.2.12 If the totals do not match, count the ballots a second time and record on the worksheet in the "2nd count" column.
- 6.2.13 Call over a supervisor and read off the total ballots manually tallied to be compared to the system count of total ballots
- 6.2.14 If the total ballots still do not match the system recorded count, then recount one final time and record results in "3rd count" column.
- 6.2.15 The supervisor may opt to assign to another team.
- 6.2.16 The supervisor may request Technical Services rerun the ballots to confirm the manual tally.



0301

COUNTY OF SAN DIEGO
REGISTRAR OF VOTERS
DEPARTMENT POLICY MANUAL

Subject: One Percent Manual Tally	Policy Number [ES-08]	Page 6 of 5
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6.2.17 Sign and date your worksheet

6.2.18 Supervisor will collect the ballots, box, worksheet, and record results onto the tracking log kept at the lead table.

6.2.19 Team will then repeat the process with the next deck assigned.

7. WHEN THE ONE PERCENT MANUAL TALLY IS COMPLETE

7.1 Return ballots to Technical Services for storage.

7.2 File tally sheets with other election materials.

7.3 Compile a memo of the results for the Registrar of Voters

REVIEW DATE:

This policy will be reviewed for continuance by February 28, 2011.

VERIFICATION

STATE OF CALIFORNIA, COUNTY OF San Diego

0302

I have read the foregoing Second Amended Complaint

and know its contents.

CHECK APPLICABLE PARAGRAPHS

I am a party to this action. The matters stated in the foregoing document are true of my own knowledge except as to those matters which are stated on information and belief, and as to those matters I believe them to be true.

I am an Officer a partner _____ a _____ of Citizens Oversight Inc.

a party to this action, and am authorized to make this verification for and on its behalf, and I make this verification for that reason. I am informed and believe and on that ground allege that the matters stated in the foregoing document are true. The matters stated in the foregoing document are true of my own knowledge, except as to those matters which are stated on information and belief, and as to those matters I believe them to be true.

I am one of the attorneys for _____ a party to this action. Such party is absent from the county of aforesaid where such attorneys have their offices, and I make this verification for and on behalf of that party for that reason. I am informed and believe and on that ground allege that the matters stated in the foregoing document are true.

Executed on 7/18/2016, at San Diego, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Raymond Lutz/Individually and for Citizens Oversight Inc.
Type or Print Name

[Signature]
Signature

PROOF OF SERVICE

1013a (3) CCP Revised 5/1/88

STATE OF CALIFORNIA, COUNTY OF _____

I am employed in the county of _____, State of California.

I am over the age of 18 and not a party to the within action; my business address is: _____

On, _____ I served the foregoing document described as _____

_____ on _____ in this action

by placing the true copies thereof enclosed in sealed envelopes addressed as stated on the attached mailing list:

by placing the original a true copy thereof enclosed in sealed envelopes addressed as follows:

BY MAIL

*I deposited such envelope in the mail at _____, California.

The envelope was mailed with postage thereon fully prepaid.

As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing.

Under that practice it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at _____ California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

Executed on _____, at _____, California.

****(BY PERSONAL SERVICE)** I delivered such envelope by hand to the offices of the addressee.

Executed on _____, at _____, California.

(State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

(Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Type or Print Name

Signature

*(BY MAIL SIGNATURE MUST BE OF PERSON DEPOSITING ENVELOPE IN MAIL SLOT, BOX, OR BAG)

**(FOR PERSONAL SERVICE SIGNATURE MUST BE THAT OF MESSENGER)

Legal Solutions Plus

Rev. 7/99

ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NO: NAME: Alan L. Geraci SBN108324 FIRM NAME: CARE Law Group PC STREET ADDRESS: 817 W. San Marcos Blvd. CITY: TELEPHONE NO.: 619-261-2048 STATE: ZIP CODE: E-MAIL ADDRESS: alan@carelaw.net FAX NO.: 760-650-3484 ATTORNEY FOR (name): Plaintiff Citizens Oversight Inc., Ray Lutz	FOR COURT USE ONLY
SUPERIOR COURT OF CALIFORNIA, COUNTY OF San Diego STREET ADDRESS: 330 W. Broadway MAILING ADDRESS: CITY AND ZIP CODE: San Diego, CA 92101 BRANCH NAME: Central	CASE NUMBER: 37-2016-00020273
Plaintiff/Petitioner: Citizens Oversight Inc. and Raymond Lutz Defendant/Respondent: Michael Vu, San Diego Registrar of Voters, et al	JUDICIAL OFFICER: 73
PROOF OF ELECTRONIC SERVICE	DEPARTMENT: Hon. Joel R. Wohlfeil

1. I am at least 18 years old.
- a. My residence or business address is (specify): 817 W. San Marcos Blvd, San Marcos, CA 92078
- b. My electronic service address is (specify): alan@carelaw.net

2. I electronically served the following documents (exact titles): Second Amended Complaint

The documents served are listed in an attachment (Form POS-050(D)/EFS-050(D) may be used for this purpose.)

3. I electronically served the documents listed in 2 as follows:

- a. Name of person served: Timothy Barry, Chief Deputy County Counsel

On behalf of (name or names of parties represented, if person served is an attorney): Michael Vu, San Diego County Registrar of Voters; Helen N. Robbins-Meyer, San Diego County Chief Administrative Officer; County of San Diego, a public entity

- b. Electronic service address of person served: Timothy.Barry@sdcounty.ca.gov

c. On (date): 8/11/2016

d. At (time): 12:00 p.m.

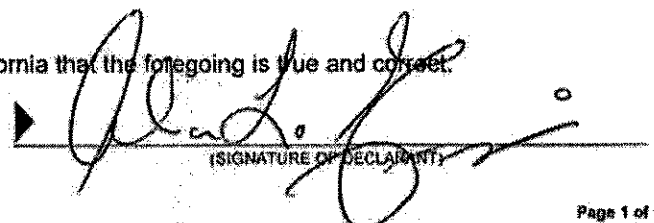
The documents listed in item 2 were served electronically on the persons and in the manner described in an attachment. (Form POS-050(F)/EFS-050(P) may be used for this purpose.)

Date: 8/11/2016

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Alan L. Geraci

(TYPE OR PRINT NAME OF DECLARANT)



(SIGNATURE OF DECLARANT)

1 THOMAS E. MONTGOMERY, County Counsel
County of San Diego
2 By TIMOTHY M. BARRY, Chief Deputy (State Bar No. 89019)
STEPHANIE KARNAVAS, Senior Deputy (State Bar No. 255596)
3 1600 Pacific Highway, Room 355
San Diego, CA 92101-2469
4 Telephone: (619) 531-6259
E-mail: timothy.barry@sdcounty.ca.gov
5 *Exempt From Filing Fees (Gov't Code § 6103)*

6 Attorneys for Defendants

7
8 **IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA**
9 **IN AND FOR THE COUNTY OF SAN DIEGO**
10 **CENTRAL DIVISION**

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, HELEN N. ROBBINS-MEYER, San
16 Diego County Chief Administrative Officer,
SAN DIEGO COUNTY, a public entity;
17 DOES 1-10,
18 Defendants.

No. 37-2016-00020273-CL-MC-CTL
Action Filed: June 16, 2016

**DEFENDANTS' ANSWER TO SECOND
AMENDED COMPLAINT FOR
DECLARATORY RELIEF AND
RESPONSE TO PETITION FOR WRIT
OF MANDATE**

IMAGED FILE
Trial Date: 10/3/2016
Time: 9:00 a.m.
Dept.: 73
ICJ: Hon. Joel Wohlfell

19
20 Michael Vu, sued in his official capacity as the Registrar of Voters for the County of San
21 Diego ("Vu"), Helen N. Robbins-Meyer, sued in her official capacity as the Chief
22 Administrative Officer for the County of San Diego ("Robbins-Meyer"), and the County of San
23 Diego ("County") respond to plaintiffs' second amended complaint and petition for writ of
24 mandate as follows:

25 **Parties:**

26 1. In response to Paragraphs 1 and 2 of the complaint/petition, defendants lack
27 sufficient information and belief to knowledgeably respond to the allegations contained therein,

28 ///

1 and based on such lack of information and belief generally and specifically deny the allegations
2 contained therein.

3 2. In response to Paragraphs 3 and 5 of the complaint/petition, defendants admit the
4 allegations contained therein.

5 3. In response to Paragraph 4 of the complaint/petition defendants admit that Helen
6 Robbins-Meyer is the Chief Administrative Officer for the County of San Diego and that she
7 maintains an office at 1600 Pacific Highway, San Diego, California. Defendants lack sufficient
8 information and belief to enable them to knowledgeably respond to the remaining allegations
9 contained therein, and based on such lack of information and belief generally and specifically
10 deny the remaining allegations.

11 **Summary of Case:**

12 4. In response to Paragraph 6 of the complaint/petition defendants admit Elections
13 Code § 15360 requires the Registrar to conduct a public manual tally of the ballots tabulated by
14 voting devices during the official canvass and that the purpose of the manual tally is to verify
15 the accuracy of the voting systems that are used to count the ballots. Defendants generally and
16 specifically deny that the Registrar of Voters has failed or refused to comply with the provisions
17 of Elections Code §15360. Defendants lack sufficient information and belief to enable them to
18 knowledgeably respond to the remaining allegations contained therein, and based on such lack
19 of information and belief generally and specifically deny the remaining allegations.

20 **Background:**

21 5. In response to Paragraph 7 of the complaint/petition, defendants admit the
22 allegations contained therein.

23 6. In response to Paragraph 8 of the complaint/petition, defendants assert that the
24 paragraph does not contain any factual or legal allegations and therefore there is nothing for
25 defendants to admit or deny.

26 7. In response to Paragraph 9 of the complaint/petition, defendants admit that during
27 the canvass the Registrar changed the method of conducting the one-percent manual tally from
28 the method set forth in Section 15360(a)(2) to the method set forth in Section 15360(a)(1).

1 Defendants also admit that public notice was posted on the Registrar's website. Defendants lack
2 sufficient information and belief to enable them to knowledgeably respond to the remaining
3 allegations contained therein, and based on such lack of information and belief generally and
4 specifically deny the remaining allegations.

5 8. In response to Paragraph 10 of the complaint/petition, defendants generally and
6 specifically deny the allegations contained therein.

7 9. In response to Paragraph 11 of the complaint/petition, defendants admit that the
8 one-percent manual tally is conducted by teams of workers who carefully manually tally votes
9 cast on ballots selected for the one-percent manual tally and that the purpose of the manual tally
10 is to verify the accuracy of the automated count of those ballots. Defendants generally and
11 specifically deny the remaining allegations.

12 10. In response to Paragraph 12 of the complaint/petition, defendants admit that
13 ballots cast at the polls and vote-by-mail (VBM) ballots are included in the one-percent manual
14 tally. Defendants lack sufficient information and belief to enable them to knowledgeably
15 respond to the remaining allegations contained therein, and based on such lack of information
16 and belief generally and specifically deny the remaining allegations.

17 11. In response to Paragraph 13 of the complaint/petition, defendants generally and
18 specifically deny that the Registrar does not fully comply with the requirements of Section
19 15360. Defendants admit that the Registrar does not include provisional ballots in the one-
20 percent manual tally but affirmatively allege that the Registrar is not required by law to include
21 provisional ballots in the one-percent manual tally. Defendants lack sufficient information and
22 belief to enable them to knowledgeably respond to the remaining allegations contained therein,
23 and based on such lack of information and belief generally and specifically deny the remaining
24 allegations.

25 12. In response to Paragraph 14 of the complaint/petition, defendants assert that the
26 allegations contained therein state legal conclusions and arguments to which no response is
27 necessary. However to the extent that a response is deemed required, defendants lack sufficient
28 information and belief to enable them to knowledgeably respond to the remaining allegations

1 contained therein, and based on such lack of information and belief generally and specifically
2 deny the remaining allegations.

3 13. In response to Paragraph 15 of the complaint/petition, defendants admit that
4 Exhibit C is the public notice of the manual tally for the June 2016 election. Defendants assert
5 that the remainder of the allegations contained in Paragraph 15 state legal conclusions and
6 arguments to which no response is necessary. However to the extent that a response is deemed
7 required, defendants lack sufficient information and belief to enable them to knowledgeably
8 respond to the remaining allegations contained therein, and based on such lack of information
9 and belief generally and specifically deny the remaining allegations.

10 14. In response to Paragraph 16 of the complaint/petition, defendants lack sufficient
11 information and belief to enable them to knowledgeably respond to the allegations contained
12 therein, and based on such lack of information and belief generally and specifically deny such
13 allegations.

14 15. In response to Paragraph 17 of the complaint/petition, defendants admit that
15 Exhibit B is a snapshot of the header of the Registrar's website. Defendants lack sufficient
16 information and belief to enable them to knowledgeably respond to the remaining allegations
17 contained therein, and based on such lack of information and belief generally and specifically
18 deny such allegations.

19 16. In response to Paragraph 18 of the complaint/petition, defendants admit that the
20 Registrar uses tabulation software called "GEMS" which runs on a central tabulator computer.
21 Defendants lack sufficient information and belief to enable them to knowledgeably respond to
22 the remaining allegations contained therein, and based on such lack of information and belief
23 generally and specifically deny the remaining allegations.

24 17. In response to Paragraph 19 of the complaint/petition, defendants admit that for the
25 June 2016 Presidential Primary the Registrar conducted the random selection for the one-percent
26 manual tally the day after the election and that the Registrar included those ballots in the manual
27 tally. Defendants lack sufficient information and belief to enable them to knowledgeably

28 ///

1 respond to the remaining allegations contained therein, and based on such lack of information
2 and belief generally and specifically deny the remaining allegations.

3 18. In response to Paragraph 20 of the complaint/petition, defendants acknowledge
4 that it received an email dated June 10, 2016, from plaintiff Ray Lutz, a copy of which is
5 attached to the complaint/petition as Exhibit F. Defendants lack sufficient information and
6 belief to enable them to knowledgeably respond to the remaining allegations contained therein,
7 and based on such lack of information and belief generally and specifically deny the remaining
8 allegations.

9 19. In response to Paragraph 21 of the complaint/petition, defendants admit the
10 allegations contained on page 6, ll. 13 through 22. Defendants lack sufficient information and
11 belief to enable them to knowledgeably respond to the remaining allegations contained therein,
12 and based on such lack of information and belief generally and specifically deny the remaining
13 allegations.

14 20. In response to Paragraph 22 of the complaint/petition, defendants admits that for
15 the June 2016 Presidential Primary a member of the public selected one percent of the VBM
16 batches included in the semi-official canvass using ping-pong balls and that Exhibit F lists the
17 batches selected. Defendants lack sufficient information and belief to enable them to
18 knowledgeably respond to the remaining allegations contained therein, and based on such lack
19 of information and belief generally and specifically deny the remaining allegations.

20 21. In response to Paragraph 23 of the complaint/petition, defendants lack sufficient
21 information and belief to enable them to knowledgeably respond to the allegations contained
22 therein, and based on such lack of information and belief generally and specifically deny such
23 allegations.

24 22. In response to Paragraph 24 of the complaint/petition, defendants lack sufficient
25 information and belief to enable them to knowledgeably respond to the allegations contained
26 therein, and based on such lack of information and belief generally and specifically deny such
27 allegations.

28 ///

1 23. In response to Paragraph 25 of the complaint/petition, defendants lack sufficient
2 information and belief to enable them to knowledgeably respond to the allegations contained
3 therein, and based on such lack of information and belief generally and specifically deny such
4 allegations.

5 24. In response to Paragraph 26 of the complaint/petition, defendants lack sufficient
6 information and belief to enable them to knowledgeably respond to the allegations contained
7 therein, and based on such lack of information and belief generally and specifically deny such
8 allegations.

9 25. In response to Paragraph 27 of the complaint/petition, defendants lack sufficient
10 information and belief to enable them to knowledgeably respond to the allegations contained
11 therein, and based on such lack of information and belief generally and specifically deny such
12 allegations.

13 26. In response to Paragraph 28 of the complaint/petition, defendants generally and
14 specifically deny that any ballots were unfairly scrutinized or excluded from the official count.
15 Defendants lack sufficient information and belief to enable them to knowledgeably respond to
16 the remaining allegations contained therein, and based on such lack of information and belief
17 generally and specifically deny such allegations.

18 27. In response to Paragraph 29 of the complaint/petition, defendants assert that the
19 allegations contained therein state legal conclusions and arguments to which no response is
20 necessary. However to the extent that a response is deemed required, defendants lack sufficient
21 information and belief to enable them to knowledgeably respond to the remaining allegations
22 contained therein, and based on such lack of information and belief generally and specifically
23 deny the remaining allegations.

24 28. In response to Paragraph 30 of the complaint/petition, defendants deny that any
25 ballots were unfairly scrutinized or excluded from the official count. Defendants lack sufficient
26 information and belief to enable them to knowledgeably respond to the remaining allegations
27 contained therein, and based on such lack of information and belief generally and specifically
28 deny such allegations.

RESPONSE TO REQUEST FOR WRIT OF MANDATE

1
2 35 In response to Paragraph 37 of the complaint/petition, defendants refer to and
3 incorporate herein by reference Paragraphs 1 through 36 above as though fully set forth herein.

4 36 In response to Paragraph 38 of the complaint/petition, defendants generally and
5 specifically deny that the Registrar did not properly certify the results of the June 2016
6 Presidential Primary and that the Registrar did not conduct the one-percent manual tally required
7 by Elections Code Section 15360 in conformity with the law.

8 37. In response to Paragraph 39 of the complaint/petition, defendants generally and
9 specifically deny that the Registrar did not conduct the one-percent manual tally required by
10 Elections Code Section 15360 in conformity with the law.

11 38. In response to Paragraph 40 of the complaint/petition, defendants generally and
12 specifically deny that the Registrar did not properly certify the results of the June 2016
13 Presidential Primary and further deny that defendants caused plaintiffs irreparable harm.

AFFIRMATIVE DEFENSE

14
15 39. As a first and separate affirmative defense, defendants allege that the
16 complaint/petition fails to set forth facts sufficient to constitute a cause of action or right of
17 relief against defendants, or any of them.

18 45. As a second and separate affirmative defense, defendants reserve the right to assert
19 additional defenses if facts warranting the assertion of defenses are discovered during the
20 prosecution and defense of this case.

21 ///

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1 WHEREFORE, Defendants, and each of them, pray for judgment as follows:

- 2 1. That plaintiffs/petitioners take nothing by their action;
- 3 2. That plaintiffs/petitioners be denied each and every demand and prayer for relief
- 4 contained in the complaint/petition;
- 5 3. For costs of suit incurred herein;
- 6 4. For such other and further relief as the Court deems just and proper.

7 DATED: August 19, 2016

THOMAS E. MONTGOMERY, County Counsel

8
 9 By: s/Timothy M. Barry
 10 TIMOTHY M. BARRY, Chief Deputy
 Attorneys for Defendants

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0313

08/19/2016 at 11:44:00 AM

Clerk of the Superior Court
By Jacqueline J. Walters, Deputy Clerk

Citizens Oversight, Inc., et al, v. Michael Vu, et al;
San Diego Superior Court Case No. 37-2016-00020273-CL-MC-CTL

DECLARATION OF SERVICE

I, the undersigned, declare under penalty of perjury that I am over the age of eighteen years and not a party to the case; I am employed in the County of San Diego, California. My business address is 1600 Pacific Highway, Room 355, San Diego, California, 92101.

On August 19, 2016, I served the following documents:

1. **DEFENDANTS' ANSWER TO SECOND AMENDED COMPLAINT FOR DECLARATORY RELIEF AND RESPONSE TO PETITION FOR WRIT OF MANDATE.**

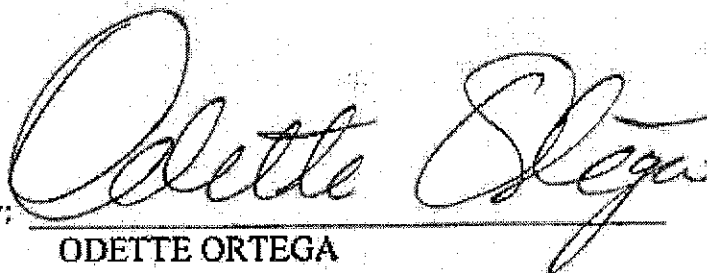
In the following manner:

- (BY E-mail) I cause to be transmitted a copy of the foregoing document(s) this date via OneLegal System, which electronically notifies all counsel as follows:

Alan L. Geraci, Esq.
CARE Law Group PC
817 W. San Marcos Blvd.
San Marcos, CA 92078
Ph: (619) 231-3131 Fax: (760) 650-3484
alan@carelaw.net

Executed on August 19, 2016, at San Diego, California.

By:


ODETTE ORTEGA

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO
CENTRAL

0314

MINUTE ORDER

DATE: 09/23/2016

TIME: 10:45:00 AM

DEPT: C-73

JUDICIAL OFFICER PRESIDING: Joel R. Wohlfeil

CLERK: Juanita Cerda

REPORTER/ERM: Not Reported

BAILIFF/COURT ATTENDANT: B. Lopez

CASE NO: 37-2016-00020273-CL-MC-CTL CASE INIT.DATE: 06/16/2016

CASE TITLE: Lutz vs Michael Vu [IMAGED]

CASE CATEGORY: Civil - Limited CASE TYPE: Misc Complaints - Other

EVENT TYPE: Trial Readiness Conference (Civil)

APPEARANCES

Alan L Geraci, counsel, present for Plaintiff(s).

Raymond Lutz, Plaintiff is present.

Timothy M Barry, counsel, present for Defendant(s).

Stephanie Karnavas, counsel, present for Defendant County of San Diego

Advance Trial Review Order signed and filed.

Joint Trial Readiness Report is reviewed and filed.

Attorney Geraci inquires about media request since some of the media request submitted at the last hearing were denied by the Court. The Court will address the issue at the start of the trial.

The Court continues the trial date and directs counsel to file trial briefs by 9:00 AM on 10/3/16. Courtesy copies to be filed directly with the department.

Civil Court Trial is continued pursuant to Court's motion to 10/04/2016 at 09:00AM before Judge Joel R. Wohlfeil.

Parties waive notice.

Joel R. Wohlfeil

Judge Joel R. Wohlfeil

0315

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO
CENTRAL DIVISION – DEPARTMENT 73
HONORABLE JOEL R. WOHLFEIL

FILED
Clerk of the Superior Court

CLERK: (619) 450-7073
IC CLERK: (619) 450-7006

SEP 23 2016

By: J. CERDA

CASE NAME: Lutz vs. Vu

CASE # 2016-20273

ADVANCE TRIAL REVIEW ORDER MADE BY DEPARTMENT 73 ON SEP 23 2016
BY THE HONORABLE JOEL R. WOHLFEIL

Trial counsel for the parties are ordered to meet in person within the County of San Diego at least three (3) court days before the initial trial call date for the purpose of arriving at stipulations and agreements resulting in the simplification of triable issues. At the meeting, the following information shall be prepared, displayed and/or exchanged:

- ✓ 1. Counsel shall produce and [pre]mark all exhibits the parties seek leave of Court to introduce at trial. Counsel shall prepare a joint numerical index of all exhibits for submission to the trial judge. There shall be no subparts to an exhibit. The index shall indicate: 1) the exhibit number, 2) by whom the exhibit is being offered, 3) a brief description of the exhibit, 4) whether the parties have stipulated to admissibility, and if not, 5) legal ground(s) for objection(s) that the objecting party intends in good faith to rely on at trial (see the attached example for joint exhibit list). The index shall be submitted in triplicate. Exhibits not included in the index are subject to exclusion at trial, with the exception of true impeachment exhibits. Exhibit tags must be completed and attached on the upper right hand corner of each exhibit. See example on page 6.
- ✓ 2. If depositions are intended to be used in lieu of live testimony, counsel shall submit the excerpts to be used, to opposing counsel, at the above meeting. Proposing and opposing counsel shall make a good faith effort to resolve any objections. Any remaining objections shall be brought to the Court's attention prior to the start of trial. It shall be the responsibility of the proponent of the evidence to prepare clean copies of the excerpts, which shall include the beginning and ending page and line numbers, to be given to the trial judge and placed in the record to eliminate the need of reporting the reading of the testimony. The original transcripts of all depositions which may be used at trial for any purpose shall be made available for use by the Court before the commencement of trial, along with a list of any changes made by the deponent after the taking of the deposition. Any problems in this regard shall be brought to the Court's attention prior to the start of trial.

3. With regard to any audio and video presentations intended to be used at trial, the proponent shall prepare a written transcript and the procedure set forth in the preceding paragraph shall apply.

4. Each party seeking monetary damages shall prepare a summary of the documentary evidence supporting the damages sought (i.e. medical bills, accounts, etc.), which shall be included in the exhibit summary and submitted at trial in lieu of the underlying documentary evidence in accordance with Evidence Code 1521.

VOIR DIRE

5. Counsel shall jointly prepare a brief non-argumentative summary of the factual nature of the case; including a brief summary of plaintiff's injuries, if applicable; for submission to the trial judge. The purpose of the summary is to provide an overview of the case for the jury. This statement shall include a joint list of the complete names of all witnesses who are likely to be called in alphabetical order. The joint witness list shall be submitted in triplicate.

6. If counsel wish to expand the scope of the judge's initial voir dire beyond the Judicial Council questions found in the Standards of Judicial Administration, Standard 3.25, they shall prepare written questions for submission to the trial judge. These written questions shall be submitted to opposing counsel not later than the above meeting. Duplicate questions shall be eliminated.

JURY INSTRUCTIONS

7. Counsel shall prepare a joint set of jury instructions. This set shall consist of one package of instructions for all parties. Judicial Council Civil Jury Instructions (CACI) preferred. These instructions are available on <http://www.courts.ca.gov/partners/juryinstructions.htm>. The instructions shall be in order they are to be given. Any objections to instructions shall be identified by a Post-It, which identifies the objecting party. Counsel may propose alternative jury instructions. When alternative instructions are presented, those instructions shall be successive instructions in the joint instruction package. The submission of a list of CACI numbers is not acceptable. Neither are multiple packages of instructions acceptable whether arranged by parties, objections or some other method. The full text of all proposed instructions must be presented to the trial judge at or before the time of trial call. If CACI instructions are used, all blanks shall be filled in and all bracketed material that is not applicable shall be deleted.

8. Jury instructions not listed in the parties' Joint Trial Readiness Conference Report and prepared in accordance with the above order are subject to exclusion at trial.

9. ~~_____~~ [name of party] waived its right to trial by jury by failing to post fees at least 25 calendar days before the date initially set for trial [CCP631(b)].

FILING DEADLINES / READINESS

10. Motions *in limine* shall be prepared and filed and faxed (in accordance with California Rule of Court 2008) or personally served at least five court days in advance of trial. The title of each *in limine* motion shall identify the moving party and the nature of the motion, and shall be numbered sequentially, indicating the total number of *In Limine* motions submitted by the moving party. Example: "Plaintiff JANE DOE's Motion *In Limine* to Exclude the Testimony of Joe Expert [NO. 1 of 6]". Written opposition to *in limine* motion, if any, shall be filed and faxed (in accordance with California Rule of Court 2.306) or personally served at least two court days in advance of the trial date and shall identify both the party filing the opposition, and the specific motion which is being opposed by name of moving party and motion number. Example: "Defendant RICHARD ROE's Opposition to Plaintiff JANE DOE's Motion *In Limine* NO.1". Counsel are urged to file trial briefs according to the same schedule.

WITNESSES / READINESS

- ✓
11. Trial will not be delayed to accommodate witness scheduling problems. In the absence of extraordinary circumstances, the party will be deemed to have concluded the presentation of his/her case once the examination of available witnesses is concluded.
- ✓
12. Witnesses not listed on the parties' Joint Trial Readiness Conference Report are subject to exclusion at trial.
- ✓
13. Each counsel is ordered to telephone 619-450-7006 prior to 12:00 noon on the day before the initial trial call date to report: 1) their readiness for trial, 2) the estimated trial length and 3) whether a jury will be required.
- ✓
14. The stipulation for release of exhibits (attached) shall be signed by counsel for all parties and filed with court at the time of trial call.

ADDITIONAL ORDERS

X EACH OF THE DOCUMENTS REQUESTED IN THIS TRIAL READINESS CONFERENCE REPORT SHALL BE SUBMITTED TO THE COURT ON THE FIRST DAY OF TRIAL.

X FAILURE OF COUNSEL FOR ANY PARTY TO COMPLY WITH THE ABOVE ORDERS MAY RESULT IN THE EXCLUSION OF EVIDENCE OR BE CONSIDERED AN ABANDONMENT OR FAILURE TO PROSECUTE OR DEFEND DILIGENTLY. ACCORDINGLY, JUDGMENT MAY BE ENTERED AGAINST THE DEFAULTING PARTY EITHER WITH RESPECT TO A SPECIFIC ISSUE OR ON THE ENTIRE CASE. IF COMPLIANCE WITH ANY PART OF THIS ORDER BECOMES UNDULY BURDENSOME, THAT FACT SHALL BE BROUGHT TO THE JUDGE'S ATTENTION IMMEDIATELY.

X WE THE UNDERSIGNED ATTORNEYS OF RECORD IN THIS CASE, HAVE READ AND UNDERSTAND THE ABOVE ADVANCE TRIAL REVIEW ORDERS:

Signature of counsel:

Counsel for [name of client]:

Michael Gomez

DeFuzos / Lutz
Defendants Michael V. et
al.

IT IS SO ORDERED:

DATE: 9-23-16

Joel R. Wohlfeil

JOEL R. WOHLFEIL
JUDGE OF THE SUPERIOR COURT

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN DIEGO
DEPARTMENT 73 – HONORABLE JOEL R. WOHLFEIL

TRIAL REQUIREMENTS

Please bring the following to the Friday Trial Call:

The Court requires a joint trial notebook be prepared that includes the following:

1. Table of contents;
2. Joint Trial Readiness Report;
3. In Limine Motions/Oppositions with an index of the motions;
4. Copy of joint witness list with a short sentence describing the witness (i.e. "Dr. Joe Smith, an internist from Mercy Hospital");
5. Copy of joint exhibit list (follow grid format – see attachment to Advance Trial Review Orders);
6. Copy of trial briefs
7. Joint statement of the case (if not in Joint Trial Readiness Report);
8. Voir Dire questions that counsel want the Court to ask;
9. Jury instructions – packet of agreed upon instructions and packet of not agreed upon instructions with a post-it note indicating who opposes the instruction
10. Special Verdict Form – either an agreed upon form or each side's proposed Special Verdict Form

Note on Exhibits: Try to eliminate duplicative exhibits. If exhibits are duplicative, the first exhibit used will be the official numbered exhibit for the balance of the trial. Exhibits should be individually marked. If an exhibit is multi paged, Bates Stamp the individual pages. If you are submitting photographs, each photograph should have an individual exhibit number.

Please bring the following to the first day of trial:

1. Two sets of exhibit binders, the original copied set is the official set which will be used by the witnesses. The second set is for the court to use;
2. Copies of Deposition Transcripts that will be used during trial;
3. Three copies of the joint witness list – if different than the one in the joint trial notebook;
4. Three copies of the joint exhibit list – if different than the one in the joint trial notebook

JOINT TRIAL EXHIBIT LIST

CASE NUMBER _____

TITLE _____ V. _____

COURT EXHIBIT NO.	SUBMITTED BY	DESCRIPTION	LEGAL GROUND FOR OBJECTION	(CLERK ENTRIES)	
				DATE IDENTIFIED	DATE ADMITTED

PRE-TRIAL CHECKLIST – DEPARTMENT 73

1. Time Estimate
2. Motions In Limine
3. 402 hearing issues
4. Witness Problems
5. Are the following ready:
 - a. Joint witness list
 - b. Joint exhibit list
 - c. Jury instructions – Court will have initial jury instruction conference prior to commencement of trial
 - d. Verdict form(s)
6. Jury Selection / Voir Dire Process:
 - a. Counsel will be asked to stipulate to pre-screening of jury panel for time and, general qualifications of jury panel.
 - b. Counsel will have approximately 30 minutes for voir dire to the prospective jury panel, (subject to expansion as necessary). When you pass for cause you pass as to the prospective jury panel.
 - c. Counsel should submit in writing, questions they want the Court to ask. No asking jurors how they would decide based on assumed facts; no asking for promises from jurors; no trading personal information about the lawyer with the jury
 - d. Peremptory challenges.
7. Courtroom Rules:
 - a. Counsel do not need to ask permission to approach a witness
 - b. Counsel should not cross-examine the witness leaning over the witness's shoulder, rather counsel should examine from behind counsel table or at the podium, unless it is necessary to go over an exhibit
 - c. Counsel may request sidebar only if absolutely necessary. Offer of proof may be made at the next break in the proceeding, if requested
8. Jury is not to be kept waiting:
 - a. Counsel are ordered to appear at least 10 minutes before Court begins each session
 - b. Counsel are ordered to have all witnesses on standby so there is no delay
 - c. Witnesses who are at any risk for not appearing should be placed under subpoena

- d. Counsel should be aware that they may be forced to rest if witnesses are not available
9. Exhibits:
- a. All exhibits are to be pre-marked with the brown Court's Exhibit tags and placed in 3 ring binders
 - b. Plaintiff's exhibits should start with number 1
 - c. Defendant's exhibits should start with the next hundred number, at least 100 numbers past the last number used by plaintiff
 - d. Counsel shall avoid duplicate exhibits
10. Counsel are ordered to meet and confer on jury instructions and verdict form(s) before the trial

0323

FILED
Clerk of the Superior Court

SEP 23 2016

By: J. CERDA

1 THOMAS E. MONTGOMERY, County Counsel
 County of San Diego
 2 By TIMOTHY M. BARRY, Chief Deputy (State Bar No. 89019)
 STEPHANIE KARNAVAS, Senior Deputy (State Bar No. 255596)
 3 1600 Pacific Highway, Room 355
 San Diego, CA 92101-2469
 4 Telephone: (619) 531-6259
 E-mail: timothy.barry@sdcountry.ca.gov
 5 stephanie.karnavas@sdcountry.ca.gov
 6 Attorneys for Defendants

7 Alan L. Geraci, Esq. (State Bar No. 108324)
 CARE Law Group PC
 8 817 W. San Marcos Blvd.
 San Marcos, CA 92078
 9 Telephone 419-231-3131 Facsimile: 760-650-3484
 E-mail: alan@carelaw.net

10 Attorney for Plaintiffs, Citizens Oversight Inc., and Raymond Lutz

11
 12 **IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA**
 13 **IN AND FOR THE COUNTY OF SAN DIEGO**
 14 **CENTRAL DIVISION**

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

17 Plaintiffs,

18 v.

19 MICHAEL VU, San Diego Registrar of
 Voters, HELEN N. ROBBINS-MEYER, San
 20 Diego County Chief Administrative Officer,
 SAN DIEGO COUNTY, a public entity;
 21 DOES 1-10,

22 Defendants.

No. 37-2016-00020273-CL-MC-CTL
 Action Filed: June 16, 2016

**JOINT TRIAL READINESS
 CONFERENCE REPORT**

IMAGED FILE

Trial Date: 10/3/2016
 Time: 9:00 a.m.
 Dept.: 73
 ICJ: Hon. Joel Wohlfell

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

23
 24 **A. The parties to the above case, by their attorneys:** Defense counsel Timothy
 25 Barry and Stephanie Karnavas met with Plaintiffs' counsel Alan Geraci but could not settle the
 26 case. They are prepared for trial.

27 //

28 //

B. Nature of Case:

This is a Declaratory Relief and Mandamus action filed by Plaintiffs Raymond Lutz and Citizens Oversight, Inc. against the County of San Diego, Michael Vu in his capacity of the Registrar of Voters, and Helen Robbins-Meyer in her capacity as Chief Administrative Officer of the County of San Diego. Plaintiffs contend that the manner in which the County conducts the one percent manual tally, as defined by Elections Code 336.5, does not meet the requirements of Elections Code Section 15360.

C. Legal issues which *are not* in dispute:

1. Elections Code Sections 336.5 and 15360 are the operative provisions of the Elections Code that define and govern the one percent manual tally.
2. Provisional voters are defined in Election Code Section 14310-14313.
3. Vote-by-mail voters are defined in Election Code Section 300.
4. The one percent manual tally must be conducted and completed during the official canvass.
5. The purpose of the manual tally is to verify the accuracy of the automated count.

D. Legal issues which *are* in dispute:

1. The requirements imposed on elections officials by Elections Code Sections 336.5 and 15360.
2. Plaintiffs contend the above includes whether verifying the accuracy of the automated count should include the review, supervision and oversight of ballots on which white out or ballots were remade. Defendants contend this is not a "legal issue" to be addressed in this action.

E. Exhibits:

The parties' joint exhibit list is submitted as Attachment A to this report.

F. Plaintiff's standard jury instructions: N/A

G. Defendant's standard jury instructions: N/A

H. Special verdict form: N/A

I. Witnesses:

PLAINTIFF

NAME OF WITNESS	TYPE OF WITNESS(Expert/Percipient)
Michal Vu	Party (Registrar of Voters)
Raymond Lutz	Party
Phillip Stark	Expert
Charlie Wallis	Expert/Percipient
Erin Mayer	Expert/Percipient
Reserved	Percipient
Reserved	Percipient
Reserved	Percipient

DEFENDANT

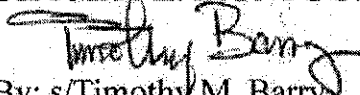
NAME OF WITNESS	TYPE OF WITNESS(Expert/Percipient)
Michael Vu	Party (Expert/Percipient)
Deborah Seiler	Expert/Percipient
Dean Logan	Expert/Percipient
Jill LaVine	Expert/Percipient
Charlie Wallis	Expert/Percipient
Diane Elsheikh	Percipient
Julie Rodewald	Expert/Percipient
Norma Westbrook	Percipient
Maria Alvarado	Percipient
Lori Barber	Percipient
Jana Lean	Expert/Percipient

The attorneys noted below certify that they have met and conferred jointly, made a good faith settlement demand or offer, but have been unable to settle the case. The parties are prepared for trial.

I certify under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

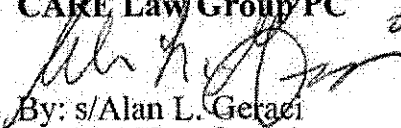
DATED: September 23, 2016,

THOMAS E. MONTGOMERY, County Counsel


By: s/Timothy M. Barry
TIMOTHY M. BARRY, Chief Deputy
Attorneys for Defendants

DATED: September 23, 2016,

CARE Law Group PC


By: s/Alan L. Geraci
ALAN L. Geraci
Attorneys for Plaintiffs

ATTACHMENT A

Citizens Oversight Inc, et al. v. Michael Vu, et al.

San Diego Superior Court Case No: 37-2016-00020273-CL-MC-CTL

TRIAL EXHIBIT LIST

Court Exhibit No.	Submitted by	Description	Legal Grounds for Objection	(CLERK'S ENTRIES)	
				Date Identified	Date Admitted
1.	Plaintiffs	Public Notice EC15360			
2.	Plaintiffs	Photo Doc of List of Precincts Drawn for 1% Manual Tally			
3.	Plaintiffs	Photo Doc of List of Batches Drawn for VBM 1% Manual Tally			
4.	Plaintiffs	ROV Policy Manual 1% Manual Tally dated 11/9/2012			
5.	Plaintiffs	Hall, Joseph "Procedures for California 1% Manual Tally" dated 4/24/2008			
6.	Plaintiffs	Nordon, Lawrence, et al, "Post-Election Audits: Restoring Trust in Elections—Executive Summary" Undated			
7.	Plaintiffs	Hall, Joseph, "Improving the Security, Transparency, and Efficiency of California's 1% Manual Tally Procedures" dated 6/30/2008			
8.	Plaintiffs	Correspondence COP –Vu dated 5/15/2014			
9.	Plaintiffs	Correspondence COP –Vu dated 10/9/2014			
10.	Plaintiffs	Correspondence COP –Vu dated 10/14/2014			

Court Exhibit No.	Submitted by	Description	Legal Grounds for Objection	(CLERK'S ENTRIES)	
				Date Identified	Date Admitted
11.	Plaintiffs	Correspondence COP -Vu dated 5/4/2016			
12.	Plaintiffs	Email thread COP-Vu dated 6/10/2016			
13.	Plaintiffs	Email thread COP-Vu dated 6/11/2016			
14.	Plaintiffs	Email thread COP-Vu dated 6/13/2016			
15.	Plaintiffs	Email thread COP-Vu dated			
16.	Plaintiffs	Email thread COP-Vu dated			
17.	Plaintiffs	Email thread COP-Vu dated			
18.	Plaintiffs	Email thread COP-Vu dated			
19.	Plaintiffs	County of San Diego Presidential Primary Election Tuesday, June 7, 2016, Official Results, dated 7/6/2016			
20.	Plaintiffs	Transcript of 1% Manual Tally Draw, dated 6/24/2016			
21.	Plaintiffs	Declaration of Raymond Lutz in Support of Motion for Injunctive relief, dated 6/24/2106			
22.	Plaintiffs	Declaration of Gail Pellerin in Support of Defendants' Opposition to Plaintiffs' Motion for Injunctive relief, dated 6/29/2106			
23.	Plaintiffs	Declaration of Jill Levine in Support of Defendants'			

Court Exhibit No.	Submitted by	Description	Legal Grounds for Objection	(CLERK'S ENTRIES)	
				Date Identified	Date Admitted
		Opposition to Plaintiffs' Motion for Injunctive relief, dated 6/28/2106			
24.	Plaintiffs	Declaration of Joseph E. Canciamilla in Support of Defendants' Opposition to Plaintiffs' Motion for Injunctive relief, dated 6/30/2106			
25.	Plaintiffs	Declaration of Neal Kelley in Support of Defendants' Opposition to Plaintiffs' Motion for Injunctive relief, dated 6/30/2106			
26.	Plaintiffs	Declaration of William Rousseau in Support of Defendants' Opposition to Plaintiffs' Motion for Injunctive relief, dated 6/28/2106			
27.	Plaintiffs	Declaration of Dean Logan in Support of Defendants' Opposition to Plaintiffs' Motion for Injunctive relief, dated 6/30/2106			
28.	Plaintiffs	Declaration of Mary Bedard in Support of Defendants' Opposition to Plaintiffs' Motion for Injunctive relief, dated 6/29/2106			
29.	Plaintiffs	Declaration of Jana M. Lean in Support of Defendants' Opposition to Plaintiffs' Motion for Injunctive relief, dated 6/30/2106			
30.	Plaintiffs	Declaration of Michael Vu in Support of Defendants'			

Court Exhibit No.	Submitted by	Description	Legal Grounds for Objection	(CLERK'S ENTRIES)	
				Date Identified	Date Admitted
		Opposition to Plaintiffs' Motion for Injunctive relief, dated 6/30/2106			
31.	Plaintiffs	Supp. Declaration of Raymond Lutz in Support of Motion for Injunctive relief, dated 7/4//2106			
32.	Plaintiffs	Declaration of Ben D. Cooper in Support of Motion for Injunctive relief, dated 7/5//2106			
33.	Plaintiffs	Deposition transcript of Michael Vu, dated 9/1/2016			
34.	Plaintiffs	Deposition transcript of Raymond Lutz, dated 9/9/2016			
35.	Plaintiffs	Deposition transcript of Raymond Lutz, dated 9/12/2016			
36.	Plaintiffs	Deposition transcript of Diane Elshiekh, dated 9/15/2016			
37.	Plaintiffs	Deposition transcript of Charles Wallis, dated 9/15/2016			
38.	Plaintiffs	Precinct Procedures for handling crossover voters in the precincts.			
39.	Plaintiffs	Report showing the ballot voting data of NPP to NPP, NPP to DEM, NPP			
40.	Plaintiffs	Ballot Inventory Report - Number of ballots originally			

Court Exhibit No.	Submitted by	Description	Legal Grounds for Objection	(CLERK'S ENTRIES)	
				Date Identified	Date Admitted
		printed, distributed to precincts, returned unvoted, returned spoiled or voted			
41.	Plaintiffs	Spoiled Ballot Report -- Ballots spoiled and by whom, and did that voter cast a replacement ballot.			
42.	Plaintiffs	Security Seals Report -- Number of security seals broken, missing, or having an incorrect number and/or any follow-up investigation			
43.	Plaintiffs	Additional Races Report			
44.	Plaintiffs	Report showing which precincts are in that "BATCH or "Deck" and any other reports or documentation regarding BATCH or "Decks"			
45.	Plaintiffs	Shredded material Report from June 1, 2016, to present			
46.	Plaintiffs	white-out Report showing "Polls Ballots," "Early VBM ballots," "Later VBM Ballots," and/or "Validated Provisionals."			
47.	Plaintiffs	Remake Report for ballots on which marks were added or remade and with reasons for applying or remaking.			
48.	Plaintiffs	Provisional ballots Report for ballots which were rejected with reasons why said ballot was rejected.			

Court Exhibit No.	Submitted by	Description	Legal Grounds for Objection	(CLERK'S ENTRIES)	
				Date Identified	Date Admitted
49.	Plaintiffs	1% Manual Tally Summary Report dated July 7, 2016			
50.	Plaintiffs	1% Manual Tally of Polls for June 7, 2016 Presidential Primary Election			
51.	Plaintiffs	1% Manual Tally of VBM for June 7, 2016 Presidential Primary Election			
52.	Plaintiffs	1% Manual Tally of Polls-Additional for June 7, 2016 Presidential Primary Election			
53.	Plaintiffs	Curricula Vitae Phillip Stark			
54.	Plaintiffs	Memorandum 16295 Steven J. Reyes, Chief Counsel Re: County Clerks and Registrars of Voters, dated 9/15/2016			
55.	Plaintiffs	Correspondence from Raymond Lutz to Steven J. Reyes, Chief Counsel in Reply to Memorandum 16295			
56.	Plaintiffs	Unofficial Results of June 8, 2016, at 3:00 p.m. "Snapshot File"			
57.	Plaintiffs				
58.	Plaintiffs				
59.	Plaintiffs				
60.	Plaintiffs				
61.	Plaintiffs				
62.	Plaintiffs				

Court Exhibit No.	Submitted by	Description	Legal Grounds for Objection	(CLERK'S ENTRIES)	
				Date Identified	Date Admitted
63.	Plaintiffs				
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Court Exhibit No.	Submitted by	Description	Legal Grounds for Objection	(CLERK'S ENTRIES)	
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100.	Defendants	Senate Bill No. 1235, as introduced, February 6, 2006			
101.	Defendants	Senate Bill No, 1235, as amended, August 7, 2006			
102.	Defendants	Senate Bill No, 1235, as amended, August 21, 2006			
103.	Defendants	Senate Bill No. 1235, as chaptered, September 30,			

Court Exhibit No.	Submitted by	Description	Legal Grounds for Objection	(CLERK'S ENTRIES)	
				Date Identified	Date Admitted
		2006			
104.	Defendants	Senate Bill No. 2769 as chaptered, September 30, 2006			
105.	Defendants	Senate Bill No. 46 as chaptered, June 22, 2010			
106.	Defendants	Senate Bill No. 985 as chaptered, July 1, 2011			
107.	Defendants	Letter dated September 15, 2016 from Alex Padilla, Secretary of State to County Registrars/Clerks			
108.	Defendants	Letter dated January 30, 2008 from Debra Bowe, Secretary of State, to County Clerks/Registrar of Voters (08048) with Suggested Steps for Completing PEMT attached			
109.	Defendants	Letter dated April 14, 2009 from Debra Bowen, Secretary of State to County Clerk/Registrars with attached Notice of Approval of Emergency Regulatory Action DAL File No. 2009-0403-05-EE with Text of Proposed Regulations, dated April 13, 2009.			
110.	Defendants	Letter dated February 26, 2010 from San Diego ROV to Raymond Lutz			
111.	Defendants	Letter dated May 15, 2014 from Raymond Lutz to San Diego ROV			
112.	Defendants	Letter dated October 9, 2014 from Raymond Lutz to San Diego ROV			

Court Exhibit No.	Submitted by	Description	Legal Grounds for Objection	(CLERK'S ENTRIES)	
				Date Identified	Date Admitted
113.	Defendants	Letter dated October 14, 2014 from Raymond Lutz to San Diego ROV			
114.	Defendants	Letter dated May 4, 2016 from Raymond Lutz to San Diego ROV			
115.	Defendants	Sample Ballot for June 7, 2016 Presidential Primary-Nonpartisan Democratic			
116.	Defendants	Sample Ballot for June 7, 2016 Presidential Primary-Democratic			
117.	Defendants	Sample Ballot for June 7, 2016 Presidential Primary-Republican			
118.	Defendants	Postcards Sent to All Nonpartisan Mail Ballot Voters			
119.	Defendants	News Releases (3/16- 5/16)			
120.	Defendants	Sample Ballot & Voter Information- Presidential Primary Election, June 7, 2016			
121.	Defendants	Nonpartisan Sample Ballot & Voter Information- Presidential Primary Election, June 7, 2016			
122.	Defendants	Application for a Vote by Mail Ballot			
123.	Defendants	Flyer re: Voting for President			
124.	Defendants	2016 Presidential Primary Election June 7th Poll Worker Manual			
125.	Defendants	Political Party Ballot Chart			
126.	Defendants	Newsletter to All Poll Workers, Spring 2016			
127.	Defendants	Classroom Poll Worker Training Materials			

Court Exhibit No.	Submitted by	Description	Legal Grounds for Objection	(CLERK'S ENTRIES)	
				Date Identified	Date Admitted
128.	Defendants	Poll Worker Reminder re: Issuance of Primary Party Ballots			
129.	Defendants	Political Party Ballot Chart – Five Languages			
130.	Defendants	Summary Report – 1% Manual Tally of Ballots and 100% Manual Tally of Early Voting Touchscreens, dated June 7, 2016			
131.	Defendants	Chart re: 1% Manual Tally of Polls and Mail Ballots & 100% Manual Tally of Early Voting Touchscreens, dated June 7, 2016 – Presidential Primary Election			
132.	Defendants	Hart Voting System Use Procedures – Updated August 6, 2010			
133.	Defendants	Premier Election Solutions – Windows Configuration Guide Revision 1.0, September 17, 2007			
134.	Defendants	Premier Election Solutions – Plan for Formatting and Cleaning Program Storage on Voting Systems, Revision 1.0, September 4, 2007			
135.	Defendants	Premier Election Solutions – Updating Security of Microsoft Windows on GEMS Servers, Revision 1, August 30, 2007			
136.	Defendants	Election Systems & Software, Inc. – California Election Procedures, August 2010			
137.	Defendants	Procedures Required for Use of the InkaVote Optical Scan Voting System, November 2010			

Court Exhibit No.	Submitted by	Description	Legal Grounds for Objection	(CLERK'S ENTRIES)	
				Date Identified	Date Admitted
138.	Defendants	Deborah Seiler CV			
139.	Defendants	Dean Logan CV			
140.	Defendants	Michael Vu CV			
141.	Defendants	Jana Leau CV			
142.	Defendants	Lori Barber CV			
143.	Defendants	Letter dated, July 19, 2007 from Los Angeles CO ROV Connie McCormick to David Jefferson			
144.	Defendants	Letter dated April 6, 2009 from San Diego CO ROV Deborah Seiler to Office of Administrative Law			
145.	Defendants	E-mail dated May 4, 2009 From Jennie Bretschneider to PEMT Working Group			
146.	Defendants	Procedures for Processing VBM Ballots			
147.	Defendants	Procedures for Processing Provisional Ballots			
148.	Defendants	Provisional Ballot Result Report			
149.	Defendants	SOS Uniform Vote Counting Standards			
150.	Defendants	November 2016 Election Night Counting Floor Configuration			
151.	Defendants	One Minute ROV Video			
152.	Defendants	Photo			
153.	Defendants	Photo			
154.	Defendants	Photo			
155.	Defendants	Photo			

Court Exhibit No.	Submitted by	Description	Legal Grounds for Objection	(CLERK'S ENTRIES)	
				Date Identified	Date Admitted
156.	Defendants	Photo			
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160.	Defendants	Photo			
161.	Defendants	Photo			
162.	Defendants	Photo			
163.	Defendants	Photo			
164.	Defendants	Photo			
165.	Defendants	Photo			
166.	Defendants	Photo			
167.	Defendants	Photo			
168.	Defendants	Photo			
169.	Defendants	Photo			
170.	Defendants	Reserved			
171.	Defendants	Reserved			
172.	Defendants	Reserved			
173.	Defendants	Reserved			
174.	Defendants	Reserved			
175.	Defendants	Reserved			
176.	Defendants	Reserved			

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Superior Court of California,
County of San Diego
10/03/2016 at 08:00:00 AM
Clerk of the Superior Court
By Lee McAlister, Deputy Clerk

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9 **SUPERIOR COURT OF CALIFORNIA**
10 **COUNTY OF SAN DIEGO—CENTRAL DIVISION**

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

14 Plaintiffs,)

15 vs.)

16 MICHAEL VU, San Diego Registrar of)
17 Voters; HELEN N. ROBBINS-MEYER,)
18 San Diego County Chief Administrative)
19 Officer; COUNTY OF SAN DIEGO, a)
20 public entity; DOES 1-10,)

21 Defendants.)

CASE NO: 37-2016-00020273-CL-MC-CTL

PLAINTIFFS' TRIAL BRIEF

Hon. Joel R. Wohlfeil, Judge

Complaint filed: June 16, 2016

Trial Date: October 4, 2016

Hearing Time: 9:00 a.m.

Dept: C-73

22 Plaintiffs submit the following Trial Brief for consideration of issues which are
23 anticipated at trial.

24 **I.**

25 **INTRODUCTION**

26 This is an action to enforce election integrity. This matter was filed after the
27 presidential primary election of June 7, 2016. After the precincts all report a result from their
28 polling place, the real work of verification and certification of results begins. The San Diego
County Registrar of Voters (Defendant Michael Vu, hereafter "Registrar") has refused to

1 comply with California Elections Code Section 15360.¹ Section 15360 requires the Registrar
2 to conduct a manual tally of the ballots tabulated by voting devices and ballots received from
3 voters by mail by randomly selecting 1% of the precincts, including all votes-by-mail (VBM)
4 ballots, and compare the manual audit to the automated count. The purpose of Section 15360
5 is to provide an objective and statistical basis to verify the integrity of the voting method and
6 process. Discrepancies can isolate defective tabulation, employee error, or nefarious conduct
7 such as “hacking.”

8 The modern age of voting with electronic and automated systems has been heavily
9 scrutinized in recent election cycles. Only strict compliance with the legislative intent of
10 Section 15360 is one method that can assure the electorate of fair elections. By not complying
11 with Section 15360, the San Diego Registrar leaves doubt about the stated results.

12 II.

13 NATURE OF THE CASE

14 The San Diego Registrar only includes ballots cast by the end of election night at 1% of
15 the precincts and the corresponding VBM ballots received and fully tabulated by election day.
16 This is a failure to comply because the Registrar is not including a manual tally of *all ballots*
17 *cast* in 1% of the precincts chosen at random. Specifically, the Registrar’s selections do not
18 include provisional ballots added to the tally nor does the Registrar include all VBM ballots.

19 The evidence will show that there is an increasing trend for voters to use VBM ballots
20 as it allows voters to consider their choices while they can research options. There is also an
21 increasing trend in number of provisional ballots cast at the precincts. Provisional ballots are
22 intended to be used at the polling place if there is some question about the validity of the ballot
23 or the eligibility of the voter, so that these can be reviewed later. This year some precincts were
24 using provisional envelopes to process “crossover” ballots where a nonparty preference voter
25 selects a party which permits “crossover” to vote in their primary, i.e., Democratic Party,
26 American Independent Party, and Green Party allowed voters to “crossover” and vote in their
27 primary. By putting these ballots in “provisional envelopes,” the Registrar put the ballots
28

¹ All references to Code without full title are to the California Election Code.

1 through the added scrutiny during the official canvass. By excluding those ballots from the 1%
2 manual tally process, NONE of those ballots were audited under Election Code Section 15360.

3 Section 15360 of the Elections Code refers to "ballots cast." The word "cast" is not
4 explicitly defined by the elections code, but the common meaning is that a ballot is "cast" when
5 it leaves control of the voter and is turned over to the elections official for tally. In the precinct
6 polling place, a ballot is "cast" when it is inserted into the ballot box. VBM ballots are "cast"
7 when they are submitted to the U.S. Postal Service or hand-delivered to a precinct polling place
8 or to the Registrar of Voters. After the June 7th Primary Election, there were approximately
9 285,000 VBM and provisional ballots still to be counted or 37% of the total ballots cast.

10 Elections Code §15101 allows Defendants to begin processing VBM ballots 10
11 business days prior to the election. The initial tally provided to the public and media on
12 Election Day after the polls have closed consisted of VBM ballots that were received early in
13 the process or ballots cast by voters at the Registrar's office.

14 After the polls close, precinct polling place (PPP) ballots are to be transported from
15 each polling place directly to the Registrar of Voters' office and they are scanned over the
16 course of the night. The unofficial results are determined by tabulation software called
17 "GEMS" which runs on the "central tabulator" computer.

18 By failing to comply with Section 15360, the Registrar, a nefarious insider or a
19 "hacker" could alter the results and the alterations would be invisible to this audit procedure
20 thereby making the audit procedure useless. So it is absolutely essential that the precincts and
21 VBM batches are randomly selected for the 1% manual tally after the results are fixed as
22 unofficial results. The element of surprise is essential to make sure that the "hacker" is not able
23 to simply avoid detection by altering votes in the precincts and VBM batches which are NOT
24 involved in the manual tally, thus rendering the 1% manual tally worthless. Furthermore, it is
25 essential that the unofficial results are fixed and provided to the public prior the random
26 selection process. Otherwise, the "hacker" may be able to reverse any alterations made to those
27 specific precincts to cover their tracks, in which case, the 1% manual tally would again be
28 worthless. These constraints are designed to ensure the effective implementation of a manual
tally procedure under the law. They are well understood and implied by the concept of random

1 selection necessary to effectuate an accurate, meaningful manual tally procedure.

2 **III.**

3 **THE LEGISLATURE CLEARLY INTENDED**
 4 **THAT "ALL BALLOTS CAST" IS INCLUDED**
 5 **IN THE 1% MANUAL TALLY**

6 In analyzing this matter for trial, the court should not only hear from the experts who
 7 study elections and election processes for a living, but analyze the history of Section 15360.

8 Election Code section 15360 describes the 1% manual tally audit procedure. This
 9 provision begins as follows:

10 15360(a) During the official canvass of every election in which a voting
 11 system is used, the official conducting the election shall conduct a public
 12 manual tally of the ballots tabulated by those devices, including vote by
 13 mail ballots, using either of the following methods:

14 (1) (A) A public manual tally of the ballots, including vote by mail ballots,
 15 cast in 1 percent of the precincts chosen at random by the elections
 16 official. If 1 percent of the precincts is less than one whole precinct, the
 17 tally shall be conducted in one precinct chosen at random by the
 18 elections official.

19 Section 15360(a) requires that "[d]uring the official canvass of every election in
 20 which a voting system is used, the official conducting the election shall conduct a public
 21 manual tally of the ballots tabulated by those devices, including VBM ballots." This process is
 22 called the 1% manual tally. The purpose of the 1% manual tally is "to verify the accuracy of
 23 the automated count." Section 336.5 (emphasis added).

24 Section 15360 clearly states that "not less than 1 percent of the VBM ballots cast" must
 25 be included in the 1% manual tally. Section 15360(a)(2)(B)(i). This quantity must be
 26 calculated based on the total number of vote by mail ballots cast, not the number of vote by
 27 mail ballots counted to date. 1% of the total number of ballots counted at that point is less than
 28 1% of the total number of ballots cast and ultimately counted after that point. Thus, including a
 mere 1% of the total number of ballots counted to date is in direct violation of the requirement

1 that "not less than 1% of the VBM ballots cast in the election" be counted. Section
2 15360(a)(2)(B)(i) (emphasis added).

3 The stated purpose of the 1% tally, "to verify the accuracy of the automated count,"
4 supports this conclusion. Section 336.5. The legislative history of Section 15360 also supports
5 this conclusion. "In 2006, Elections Code § 15360 was amended to require that *all*
6 *vote-by-mail ballots be included* in the 1% manual tally by precinct. This requirement resulted
7 in over 540 additional staff hours to complete the manual tally process and approximately
8 \$12,000 in additional costs for each election" 06/03/11- Senate Elections And
9 Constitutional Amendments, 2011 Cal Stat. Ch. 52 (emphasis added). Clearly, *all vote-by-mail*
10 *ballots* have to be counted. The onerous nature of this requirement led the legislators to add
11 the option to manually tally VBM ballots separately, in batches, to ensure, that all of them
12 could be counted efficiently. *Id.* The proponents of AB707 state the intent clearly: "The votes
13 on absentee ballots are no less valid or important than the votes cast at the polling place, and
14 the potential for the vote to be incorrectly tabulated on an absentee ballot is just as likely as a
15 vote cast in a traditional polling booth. Therefore, it makes no sense to exclude absentee
16 ballots, provisional ballots and ballots cast at satellite locations from the 1% manual tally. By
17 excluding them from the manual tally, there is no way to verify that the votes cast on them are
18 being recorded accurately. Moreover, in the event that counties are authorized to conduct an
19 all-mail election, this provision would ensure that the manual tally is still conducted in those
20 counties." (Exhibit 54, page 3) Further support was provided by the then-serving Secretary of
21 State Bruce McPherson (served from March 2005 - December 2006)²: "This proposal also
22 requires a county election official to include all ballots cast in a precinct in the 1% manual
23 tally. This means that a county will need to include any ballots cast at the polls, via absentee
24 ballot, provisional voters, and any ballots cast on direct recording electronic (DRE) voting
25 machines." (Exhibit 54, page 15). In the final recommendation to Governor Schwarzenegger:
26 "Summary: This bill establishes a uniform procedure for elections' officials to conduct the 1%
27 manual tally of the ballots including (1) the requirement that absentee ballots, provisional
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² Democrat, Debra Bowen defeated Bruce McPherson in the November 2006 election.

1 ballots, and ballots cast at satellite locations be included in the tally of ballots . . .” (Exhibit
2 54, page 37.)

3 Precedent furthers the supports for this conclusion. "Section 15360 appears on its face
4 to be concerned solely with assuring the accuracy of the vote, not with limiting unnecessary
5 vote tallying. Indeed, the explicit intent of section 15360, as expressed in a companion statute,
6 is "to verify the accuracy of the automated count." *County of San Diego v. Bowen*, 166 Cal.
7 App. 4th 501, 511-12 (Cal. Ct. App. 2008).

8 2. It would be arbitrary and capricious to exclude provisional ballots from
9 the 1% manual tally.

10 The ability to cast a ballot that will be counted is a fundamental freedom that protects
11 the other essential rights that Americans hold dear. The freedom to vote is how Californians,
12 regardless of privilege or economic status, maintain the power to hold their elected
13 representatives accountable for the decisions that impact their lives.

14 A legitimate government “of the people, by the people, and for the people” must
15 vigorously promote and protect the freedom to vote so that all eligible voters can participate in
16 this fundamental exercise in self-governance. Right now, already powerful interests are
17 threatening our freedom to vote, and the ability of us all to exercise our constitutional right to
18 participate in our democracy. Provisional ballots are only intended to test the validity of the
19 ballot or the eligibility of the voter, so that these can be reviewed later. By creating an audit
20 system that excludes 100% of the ballots cast provisionally, the Registrar is arbitrarily and
21 capriciously allowing a system where the provisional ballot may not be tested and verified.
22 Such an arbitrary and capricious means violates the fundamental freedom to vote and must not
23 be tolerated.

24 An additional issue in this case is the sloppy execution of the manual tally provisions.
25 Not only did the Registrar exclude 37% of the ballots from the manual tally process, but also
26 started the process using the second option in section 15360, i.e., a combination of precinct and
27 batch mode processing. However, the written procedures being used by the Registrar to
28 conduct the manual tally only included the precinct option. Michael Vu said they “use those
procedures but do not necessarily follow them.” They were unable to produce unofficial

1 results for each batch prior to the selection, thus opening the door to hackers to modify the
2 results of those batches once the batch numbers were announced to undo any previous changes.
3 Midstream, the Registrar, switched (without public notice) from batch-mode to precinct mode,
4 thereby requiring that VBM ballots for the selected precincts had to be manually extracted
5 from batches because the VBM ballots were not sorted to the precinct, and each batch may
6 contain ballots from multiple (perhaps 40 or so) different precincts. Manually pulling ballots
7 from batches is not observable by the public, is subject to pre-counting and tampering by
8 compromised employees. Plaintiffs will show that the Registrar generated a new computer
9 report for the limited number of VBM ballots that were included in the 1% manual tally
10 process, thus casting the entire procedure in doubt. For this reason, Plaintiffs have demanded
11 that the manual tally process be restarted without these numerous issues. The manual tally
12 procedure is a method for self-auditing the results and must be done according to exacting
13 procedures to maintain trust in the results of the election.

14 IV.

15 CONCLUSION

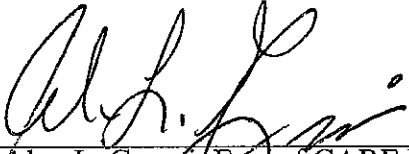
16 In sum, history has shown that election fraud is not theoretical. Computer experts have
17 demonstrated that voting systems can be hacked. But even setting aside the chance of
18 voter fraud or tampering, no voting system – no machine – can operate to perfection.
19 Neither can humans. Machines misinterpret ballots, people mis-mark ballots. Errors
20 happen, and auditing determines whether those errors matter – in other words, whether a
21 full hand count would show a different winner. Only an audit system that tests a random
22 sample of 100% of the ballots cast can be reliable as a verifiable tool of the accuracy of the
23 automated count. By seeking Declaratory Relief and Mandamus, we are asking the Court to
24 both protect the voters of San Diego County from misuse of the audit process and to both
25 declare that the Primary Election of June 7, 2016, was not audited pursuant to Elections Code
26 Section 15360 and to order the Registrar to fully comply with the full intention of the audit law
27 and conduct his 1% manual tally of “all ballots cast,” including 100% of ballots cast at
28 precincts (including verified provisional ballots) and all VBM ballots.

In rendering a final outcome of this action, the Court should not only declare the rights,

1 duties and obligations of the parties suitable for a declaratory judgment, but should grant
2 Plaintiffs' prayer for mandamus and order that the Registrar redo the manual tally for the June
3 7, 2016 primary election.

4 Respectfully Submitted,

5 Dated: October 3, 2016

6 By: 
7 Alan L. Geraci, Esq of CARE Law
8 Group PC Attorney for Plaintiffs
9 Citizens Oversight Inc. and Raymond Lutz

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ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NO: NAME: Alan L. Geraci SBN108324 FIRM NAME: CARE Law Group PC STREET ADDRESS: 817 W. San Marcos Blvd. CITY: TELEPHONE NO.: 619-261-2048 E-MAIL ADDRESS: alan@carelaw.net ATTORNEY FOR (name): Plaintiff Citizens Oversight Inc., Ray Lutz	FOR COURT USE ONLY 1318
SUPERIOR COURT OF CALIFORNIA, COUNTY OF San Diego STREET ADDRESS: 330 W. Broadway MAILING ADDRESS: CITY AND ZIP CODE: San Diego, CA 92101 BRANCH NAME: Central	
Plaintiff/Petitioner: Citizens Oversight Inc. and Raymond Lutz Defendant/Respondent: Michael Vu, San Diego Registrar of Voters, et al	CASE NUMBER: 37-2016-00020273
PROOF OF ELECTRONIC SERVICE	JUDICIAL OFFICER: 73
	DEPARTMENT: Hon. Joel R. Wohlfeil

1. I am at least 18 years old.

- a. My residence or business address is (specify): 817 W. San Marcos Blvd, San Marcos, CA 92078
- b. My electronic service address is (specify): alan@carelaw.net

2. I electronically served the following documents (exact titles): Plaintiffs' Trial Brief

The documents served are listed in an attachment (Form POS-050(D)/EFS-050(D) may be used for this purpose.)

3. I electronically served the documents listed in 2 as follows:

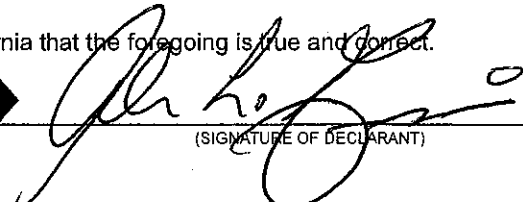
- a. Name of person served: Timothy Barry, Chief Deputy County Counsel
 On behalf of (name or names of parties represented, if person served is an attorney): Michael Vu, San Diego County Registrar of Voters; Helen N. Robbins-Meyer, San Diego County Chief Administrative Officer; County of San Diego, a public entity
- b. Electronic service address of person served: Timothy.Barry@sdcountry.ca.gov;
 Stephanie.Karnavas@sdcountry.ca.gov
- c. On (date): 10/3/2016
- d. At (time): 9:00 a.m.

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Date: 10/3/2016

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Alan L. Geraci
 (TYPE OR PRINT NAME OF DECLARANT)


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6 Attorneys for Defendants
7

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

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, HELEN N. ROBBINS-MEYER, San)
16 Diego County Chief Administrative Officer,)
SAN DIEGO COUNTY, a public entity;)
17 DOES 1-10,)
18 Defendants.)

No. 37-2016-00020273-CL-MC-CTL
Action Filed: June 16, 2016

DEFENDANTS' TRIAL BRIEF
IMAGED FILE

Trial Date: October 4, 2016
Time: 9:00 a.m.
Dept.: 73
ICJ: Hon. Joel Wohlfell

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1 Michael Vu, sued in his official capacity as the Registrar of Voters for the County of San
2 Diego ("Vu"), Helen N. Robbins-Meyer, sued in her official capacity as the Chief
3 Administrative Officer for the County of San Diego ("Robbins-Meyer"), and the County of San
4 Diego ("County") respectfully submit the following trial brief in opposition to plaintiffs' action
5 for declaratory relief and petition for writ of mandate.

6 **INTRODUCTION**

7 In this action, Raymond Lutz, a self-proclaimed election observer, is asking the court to
8 impose what he considers to be best business practices relating to the conduct of a statutorily
9 mandated post-election manual tally of ballots cast in the upcoming November Presidential
10 General Election and in all future elections conducted in San Diego County. While Mr. Lutz
11 may believe that his methodology is superior, it is not required by law. As a result, the relief
12 sought by Mr. Lutz should be directed to the Legislature and not to the courts.

13 **I.**

14 **THE POST ELECTION MANUAL TALLY**

15 The Registrar is required to complete the official canvass and certify election results to
16 the Secretary of State's office no later than 30 days after an election.¹ Elections Code Section
17 15372.² As part of the official canvass, Section 15360(a) directs the Registrar to conduct a
18 "public manual tally of the ballots tabulated by [the vote tabulating system], including vote by
19 mail ballots" using one of two approved methods. Section 15360(a)(1) directs elections officials
20 to complete a manual tally of the ballots, including vote-by-mail ("VBM") ballots, cast at 1
21 percent of the precincts chosen at random and, for each race not included in the initial group of
22 precincts, one additional precinct. Alternatively, elections officials may opt to conduct a two
23 part manual tally that includes the ballots cast in 1 percent of the precincts on election-day,
24 excluding VBM ballots, and 1 percent of the VBM ballots cast in the election in batches
25 randomly selected by the elections official. Section 15360(a)(2). The purpose of the manual

26 _____
27 ¹ 28 days for persons voted for at the presidential primary for delegates to national
28 conventions and for results for presidential electors. Section 15375(c) and (d).

² Unless otherwise noted, all references are to the Elections Code.

1 tally is to verify the accuracy of the voting systems that are used to count the ballots. Section
 2 336.5. It is not a recount of election results. This lawsuit involves a challenge to the
 3 methodology utilized by the Registrar for completing this manual tally.

4 II.

5 LEGISLATIVE HISTORY OF THE 1% MANUAL TALLY IN CALIFORNIA

6 In 1965, with the introduction of electronic vote tabulating systems, the California
 7 Legislature enacted Section 15417. Section 15417 required elections officials to conduct a
 8 public manual count of 1% of randomly selected ballots within 15 days after an election, the
 9 purpose of which was to verify the accuracy and reliability of the software used to count the
 10 ballots. (Stats. 1965, ch. 2040.) Section 15417 was repealed, reenacted, amended and
 11 renumbered several times over the next 23 years, which amendments are not relevant to the
 12 present controversy.³

13 In 1998, the Legislature amended and renumbered the previous iteration of the manual
 14 tally as new Section 15360. (Stats. 1997-1998, ch. 1073, § 31.) As enacted, Section 15360
 15 clarified that the process required a “manual tally” and not a recount of the ballots tabulated by
 16 the devices cast in 1 percent of the precincts. In addition, at that time, the Legislature repealed
 17 the term “semi-official canvass,” and added Sections 335.5, 336.5, and 353.5 defining “the
 18 official canvass,” “1% manual tally,” and “semifinal official canvass,” respectively. (See Stats
 19 1997-1998, ch. 1073, §§ 3, 4, and 5.)

20 In 2006 two competing bills worked their way through the legislative process. SB 1235
 21 was introduced by then State Senator Debra Bowen. **As introduced**, SB 1235 proposed to
 22 amend the sentence of Section 15360 to expressly provide as follows:

23 During the official canvass of every election in which a voting system is
 24 used, the official conducting the election shall conduct a public manual tally of the
 25 ballots tabulated by those devices *including absent voter's* [sic] ballots,
provisional ballots and ballots cast in satellite locations, cast in 1 percent of the
 precincts chosen at random by the elections official. (Emphasis added.)

26 ///

27 _____
 28 ³ See Stats 1976, ch. 246, Stats 1978, ch. 847; Stats 1986, ch. 1277; and Stats. 1993-
 1994, ch. 920, § 2.

1 In addition, SB 1235 proposed to add language requiring election officials to use either a
2 random number generator or other method specified in regulations to be adopted by the
3 Secretary of State to randomly choose the initial precincts to be included in the manual tally.

4 AB 2769 was introduced by Assembly Member John Benoit and sponsored by then
5 Secretary of State Bruce McPherson. As introduced, AB 2769 focused on the timing and notice
6 requirements for the manual tally; the reporting requirements for reporting the results of the
7 manual tally to the Secretary of State; and the establishment of uniform procedures for the
8 manual tally by the Secretary of State's office. **As introduced**, AB 2769 also provided that:
9 "[t]he manual tally shall include **all** ballots cast by voters in each of the precincts selected,
10 including absentee, provisional, and special absentee ballots" but when amended on May 26,
11 2006, the specific language set forth immediately above **was deleted**.

12 On August 7, 2006, SB 1235 was amended expressly deleting the reference to
13 "*provisional ballots, and ballots cast at satellite locations*". As amended, proposed Section
14 15360(a) read:

15 During the official canvass of every election in which a voting system is
16 used, the official conducting the election shall conduct a public manual tally of the
17 ballots tabulated by those devices *including absent voter's* [sic] ballots,
~~*provisional ballots and ballots cast in satellite locations*~~, cast in 1 percent of the
precincts chosen at random by the elections official." (Emphasis added.)

18 On August 7, 2006, AB 2769 was also amended to provide in relevant part that: "This bill
19 shall become operative only if Senate Bill 1235 of the 2005-06 Regular Session is enacted and
20 becomes effective on or before January 1, 2007.

21 SB 1235 was again amended on August 21, 2006 and AB 2769 was again amended on
22 August 24, 2006. The amendments essentially conformed the language of each bill to
23 substantially mirror the other. The Governor subsequently signed both bills into law but
24 because AB 2769 (Stats 2006, ch. 894) was chaptered after SB 1235 (Stats 2006, ch. 893) AB
25 2769 "chaptered out" SB 1235, and became the operative amendment going forward. **As**
26 **enacted** by AB 2769 Section 15360 provided that:

27 During the official canvass of every election in which a voting system is
28 used, the official conducting the election shall conduct a public manual tally of the
ballots tabulated by those devices including absent voters' ballots, cast in 1
percent of the precincts chosen at random by the elections official.

1 In 2010, the Legislature enacted AB 46 as urgency legislation effective June 22, 2010.
2 (Stats 2010, ch. 28.) As enacted AB 46 added and repealed Section 15360.5. AB 46 was
3 necessitated by the fact that the Governor had declared a special election to take place in San
4 Luis Obispo, Santa Barbara, Santa Clara and Santa Cruz counties on June 22, 2010, (and
5 possibly August 17, 2010, if a runoff proved necessary) just two weeks after the regular
6 Statewide Primary Election on June 8, 2010.

7 The purpose of AB 46 was to streamline the process and reduce the costs incurred by
8 those four counties in conducting the manual tally of polling place and vote by mail ballots.
9 Specifically, Section 15360.5 provided election officials with an alternative method for
10 conducting the manual tally. Election officials could conduct the manual tally by precinct as
11 provided under AB 2769 (see § 15360.5(a)(1)) or, alternatively could conduct a two part manual
12 tally that allowed elections officials to manually tally randomly selected batches of VBM
13 ballots, thereby avoiding the cost and time of having to integrate the VBM ballots into the
14 randomly selected precincts (see § 15360.5(a)(2)). By its own terms, AB 46 expired January 1,
15 2011.

16 In 2011, the Legislature enacted AB 985 (Stats 2011, c. 52, § 1.) amending Section 15360
17 by incorporating the operative provisions of Section 15360.5 and making those provisions
18 applicable to all jurisdictions in the State. (See Section 15360(a)(2)(A) and (B).) Section 15360
19 as amended by SB 985 is the operative iteration of that section for purposes of this case.

20 **III.**

21 **VOTING IN CALIFORNIA**

22 California's election laws are designed to promote voting and to make it as easy as
23 possible for every eligible voter to register, cast his or her ballot, and have that ballot counted.
24 Section 2103-2105.7. Individuals can register online. Section 2196. Individuals can register to
25 vote when they register they apply, renew or submit a change of address for a state driver license
26 or identification card. Section 2102, 2107 and 2119. Voters can now register to vote up to 15
27 days before an election. Section 2107. Individuals who become new citizens within fifteen
28 days of an election can register to vote up to and including election day. Section 3500. New

1 residents to San Diego County can register up to 7 days before an election. Section 3400.

2 Voters can change from a poll voter to a VBM voter up to 7 days before an election. Section
3 3006.

4 Since 1984 voters have been permitted to vote provisional ballots. Sections 14310-
5 14313. Voters have been allowed to cast absentee ballot in limited circumstances since the
6 1920's. Since 1979 all voter have had the option to vote-by-mail. Sections 3000-3025. As of
7 this this year's elections, elections officials will count VBM ballots received up to three days
8 after the election, provided they are postmarked by election day. Section 3020 Voters who
9 inadvertently fail to sign their vote-by-mail ballot have up to eight days after the election to
10 come into the Registrar's office to sign there ballot envelope. In addition, voters can contact the
11 Registrar's office to inquire whether his or her ballot has been counted, and if not, why not.
12 Section 3019.5.

13 The Registrar mails military and overseas voters their ballots not earlier than 60 days but
14 not less than 45 days before an election. Section 3105. Military and overseas voters may return
15 their ballot in the mail or facsimile. Section 3106.

16 **IV.**

17 **CONDUCTING THE ELECTION AND COMPLETING THE OFFICIAL CANVASS**

18 While the process for casting a ballot has been made easier for voters, the same cannot be
19 said for the obligations and duties imposed on election officials in conducting an election. The
20 duties and obligations imposed on election officials have increased significantly over the years,
21 increasing the pressure on elections officials to be able to certify elections within the statutorily
22 mandated period after an election.

23 **A. Election Day**

24 On election-day there will be more than 7,000 poll workers manning 1,552 voting
25 precincts throughout the County. Each of these poll-workers will have participated in both in-
26 person and online training. In addition to the Registrar's permanent staff of 65, the Registrar is
27 in the process of hiring and training an additional 800-900 seasonal election workers.

28 ///

1 The Registrar's office has printed 623 ballot types in five different languages for the
2 upcoming November 2016 Presidential General Election. Each ballot type is coded so that the
3 devices used to tabulate the ballots can recognize each ballot type and properly count the ballots.
4 Each ballot type must be correctly distributed to one or more of the 1,552 voting precincts and
5 1,378 physical polling locations. Due to the high number of contests (184), including a
6 historical number of 52 statewide propositions and local measures across the County, the
7 Registrar must print for the first time a two-card ballot for every registered voter within the
8 County.

9 The Registrar expects there to be more than 1.6 million registered voters in San Diego
10 County for the November Presidential General Election and voter turnout to be in excess of
11 77%. Of the 1.6 million registered voters, more than 62% are permanent vote by mail voters.

12 The Registrar expects that there will be more than 425,000 poll ballots and 450,000 VBM
13 ballots included in the semifinal official canvass at the conclusion of election night

14 **B. The Official Canvass**

15 As mentioned above, with limited exceptions, the Registrar must complete the official
16 canvass and certify the election results to the Secretary of State no later than 30 days after an
17 election. Section 15372. The official canvass includes, but is not limited to, the following:

18 "(a) An inspection of all materials and supplies returned by poll workers.

19 (b) A reconciliation of the number of signatures on the roster with the number of ballots
20 recorded on the ballot statement.

21 (c) In the event of a discrepancy in the reconciliation required by subdivision (b), the
22 number of ballots received from each polling place shall be reconciled with the number of
23 ballots cast, as indicated on the ballot statement.

24 (d) A reconciliation of the number of ballots counted, spoiled, canceled, or invalidated
25 due to identifying marks, overvotes, or as otherwise provided by statute, with the number of
26 votes recorded, including vote by mail and provisional ballots, by the vote counting system.

27 (e) Processing and counting any valid vote by mail and provisional ballots not included in
28 the semifinal official canvass.

1 (f) Counting any valid write-in votes.

2 (g) Reproducing any damaged ballots, if necessary.

3 (h) Reporting final results to the governing board and the Secretary of State, as required.”

4 Section 15302.

5 Of significance in this action is the processing and counting of vote by mail and
6 provisional ballots not included in the semifinal official canvass.⁴

7 **1. The Processing of VBM Ballots**

8 VBM ballots may be sent to voters beginning 29 days before the election and can be
9 returned to the Registrar up to three days after the election. The processing of VBM ballots
10 begins immediately after the Registrar begins mailing the ballots to voters. Section 15101.

11 The Registrar has extensive procedures for processing VBM ballots. The procedures for
12 processing VBM ballots are both complicated and time consuming. Each VBM ballot envelope
13 is manually reviewed by the Registrar’s staff. VBM ballots must be scanned, sorted, and
14 signature checked against the records on file with the Registrar’s office before the ballots are
15 extracted from the envelopes and tabulated. New legislation has further complicated the
16 processing and handling of VBM ballots. As of this election, the Registrar’s office accepts and
17 processes all VBM ballots that are received within three days of the election provided they are
18 postmarked as of election day. In addition, voters who failed to sign their VBM ballot envelope
19 now have up to eight days after the election to provide the Registrar’s office with their signature.
20 If there are any anomalies in the envelope or the ballot, the Registrar’s staff will further review
21 the ballot/envelope and liberally construe any defects in the envelope/ballot in favor of the voter.

22 The Registrar utilizes approximately 281 election workers working every day both before
23 and after election-day to process the VBM ballots. The review and verification of the VBM
24 ballots requires tens of thousands of man hours to complete.

25 ///

26 _____
27 ⁴ The “semifinal official canvass” “is the public process of collecting, processing, and
28 tallying ballots and, for state or statewide elections, reporting results to the Secretary of State on
election night. The semifinal official canvass may include some or all of the vote by mail and
provisional ballot totals.” Section 353.5.

2. The Processing of Provisional Ballots

Voters may be required to vote provisionally on the day of the election for a number of reasons. One reason that a voter may be asked to vote provisionally is because the voter is registered as a VBM voter and has been issued a mail ballot, but wants to vote at the poll. The purpose of having a voter registered as a VBM voter vote provisionally is to provide a safeguard against the possibility that the VBM voter has already returned his or her VBM ballot and had his or her VBM ballot counted. In the June Presidential Primary more than one-half of the 75,386 voters who voted provisionally were VBM voters who appeared at the polls on election-day but who could not surrender their VBM ballot. And, in fact, during the canvass, the Registrar determined that 521 voters voted both their VBM ballot and a provisional ballot.

Another reason for requiring a voter to vote provisionally is because the voter does not appear on the roster of voters at the precinct where they appear to vote. For example, if a non-VBM voter is registered to vote in a precinct in Poway but the voter appears at a poll in Chula Vista, that voter would be given a provisional envelope in which the voter would place his voted ballot, which is then returned to the Registrar's office unopened for final determination. After voting, the voter is instructed to complete all of the information required on the outside of the provisional ballot envelope, including, among other things, the voter's current residence address. The voter is also required to sign and seal the envelope, and return the envelope to the poll worker for deposit into the ballot box. In the June Presidential Primary more than 12,000 voters appeared at a poll other than where they were registered and voted provisionally.

Another reason for requiring a voter to vote provisionally is unique to "semi-open primary" elections like the June Presidential Primary. The Republican, Green, and Peace and Freedom party primaries were "closed elections" meaning that only voters registered with one of those particular parties were allowed to vote for that party's presidential candidates. In contrast, the Democratic, American Independent, and Libertarian party primaries were "open primaries" meaning that voters who had registered "No Party Preference" ("NPP") were allowed to vote for any one of those parties' presidential candidates. In no instance could a voter registered with a

///

1 particular party vote for the presidential candidates of another political party. These rules are
2 established by the parties, not the State and not by local election officials.

3 In the June Presidential Primary, NPP voters were not allowed to vote for the Democratic
4 central committee contests that appear on the Democratic ballot. As a result, if a NPP voter
5 wanted to vote for the Democratic presidential candidates, poll-workers were trained to give the
6 voter a ballot that did not include the Democratic central committee contests. If a voter insisted
7 on voting a ballot of a party with which he or she is not registered, or if a person who is
8 registered as NPP insisted on voting a Republican, Green, or Peace and Freedom party ballot,
9 those persons were asked to vote provisionally.

10 Because of these many nuances and variations a large percentage of provisional ballots
11 must be remade to eliminate votes for contests for which the provisional voter was not eligible
12 to vote. This process is also labor intensive, requiring election workers to place white-out tape
13 over invalid votes cast by the voter.

14 The work that must be expended during the official canvass is intense and must be
15 completed within the truncated 30 day period after the election. The amount of labor required to
16 be able to timely certify an election with confidence in the results is truly massive involving
17 hundreds of thousands of man-hours. It is this reality that makes it all the more important that
18 the court not impose additional obligations on election officials that are not otherwise required
19 by statute.

20 V.

21 **SECURITY MEASURES FOR TESTING AND SECURING**
22 **THE VOTE TABULATING SYSTEMS**

23 All ballots are cast on paper ballots, except for a limited number of ballots cast on
24 electronic voting machines, which are then remade onto paper ballots. In San Diego County,
25 ballots are tabulated by the GEMS central tabulating system in one of two ways. All ballots are
26 tabulated at the Registrar's central office and the GEMS central tabulating system is never
27 connected to the internet or any other computer network.

28 ///

1 Precinct ballots returned to the central office on election night are scanned through
2 optical scanners and the results are saved to a memory card inserted into the scanner. The
3 memory cards are then taken to a secured room and uploaded into the GEMS central tabulating
4 system. VBM and provisional ballots are also scanned through optical scanners but these
5 scanners are located in a secure room and directly (hard-wired) to the GEMS central tabulating
6 system, also referred to as the "central count."

7 Besides, physical security which includes security cameras, anti-virus software, system
8 log files, server password restrictions, limited badge access to the secured room containing the
9 tabulating system, and hardening of the system utilizing various methods, the Registrar is
10 constantly taking steps to ensure the security of the vote tabulating system. This includes logic
11 and accuracy testing before the election and before any ballots are counted; deposit of the
12 election computer vote count program with the Secretary of State; calibration testing of the
13 scanner used to tabulate the ballots; and constant software testing before and after any ballots
14 are tabulated by the system. In addition, the County's software vendor is required to deposit its
15 "source code" with a private escrow vendor(Section 19212) and the County is required to submit
16 use and security procedures with the Secretary of State's office, and cannot change those use
17 procedures without approval of the Secretary of State.

18 **A. Logic and Accuracy Testing**

19 Prior to every election, the Registrar's office conducts a logic and accuracy test of the
20 voting systems used to tabulate the election returns. The purpose of the logic and accuracy test
21 is to ensure that vote tabulating system correctly counts the ballots. Section 15000. The logic
22 and accuracy test includes the following activities:

- 23 • Generating a pre-marked test deck which tests each contest and choices across each
24 voting precinct in the election and tests the hardware and software in which ballots are to
25 be tabulated.
- 26 • Scanning the pre-marked test deck through each method (i.e. central count and precinct
27 count optical scan) in which ballots are tabulated.
- 28 • Testing the Direct Record Electronic (i.e. touchscreen) by manually casting votes onto it.

- 1 • Verifying the results of each method by comparing the pre-determined results against the
2 results of tabulation system reports.

3 The logic and accuracy test for the June 7, 2016 election occurred over a 10-day
4 timeframe using approximately 20,000 cards for the test desk. Notably, pursuant to Section
5 15004, each qualified political party or any bona fide association of citizens or media
6 organization may employ, and may have present at the central counting place, representatives to
7 check and review the preparation and operation of the tabulating devices, their programming and
8 testing.

9 **B. Deposit of Election Computer Vote Count Program with the**
10 **Secretary of State**

11 The Registrar is required to deposit a copy of each election computer vote count program
12 with the Secretary of State no later than 7 days prior to an election. Section 15001(a). No
13 changes to the computer program can be made without immediately notifying the Secretary of
14 State's office and depositing the modified program with the Secretary of State. Section
15 15001(b). The Secretary of State is required to hold the program for not less than six months
16 then return the program to the Registrar, who is required to hold the program for an additional
17 16 months. Section 15001(c). The program deposited in accordance with Section 15001 can be
18 used only for a recanvass of the vote, an official recount, court action, or for logic and accuracy
19 tests required by the Secretary of State. Section 15501(d).

20 **C. Calibration Testing.**

21 Calibration testing is run on every optical scanner used to tabulate voted ballots during an
22 election. The testing occurs each time/session a run of voted ballots are to be scanned. This
23 process, which is used to calibrate the scanners, requires a pre-marked card to be run through the
24 scanner multiple times. Once this is accomplished a printout report is generated and compared
25 to the pre-marked card to ensure appropriate calibration.

26 ///

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28 ///

VI.

**PLAINTIFFS/PETITIONERS' CLAIMS FOR RELIEF AND
BURDEN OF PROOF**

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2
3
4 Plaintiffs have alleged two claims for relief. One for declaratory relief pursuant to Code
5 of Civil Procedure (CCP) § 1060, and the other for the issuance of a writ of mandate pursuant to
6 CCP § 1085.

7 Under CCP § 1061 the court has discretion whether to grant relief sought by declaratory
8 relief. *Communist Party of United States v. Peck*, 20 Cal.2d 536, 540 (1942). Where, as here, it
9 appears from the face of the complaint that plaintiffs have a speedy and adequate remedy it is
10 within the court's discretion to refuse to grant declaratory relief. *Id.*

11 With respect to the mandamus relief sought by plaintiffs, Section 13314 provides that "an
12 elector may seek a writ of mandate alleging that ... any neglect of duty has occurred or is about
13 to occur" but is only entitled to relief upon proof that the "neglect is in violation of this code or
14 the Constitution" and "the issuance of a writ will not substantially interfere with the conduct of
15 the election." Section 13314 (a)(1) and (2). It is also presumed that the Registrar has and will
16 properly perform the duties and obligations of his office. CCP § 664. Plaintiffs in this action
17 must therefore prove that the Registrar has or is about to fail to perform a duty in violation of the
18 Elections Code and that the granting of any relief would not substantially interfere with the
19 conduct of the upcoming November Presidential General Election.

VII.

**WHEN THE LANGUAGE OF A STATUTE IS AMBIGUOUS AND SUBJECT TO
MORE THAN ONE INTERPRETATION, THE COURT MAY CONSIDER EXTRINSIC
AIDS IN INTERPRETING THE STATUTE**

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21
22
23 In interpreting a statute the court must first ascertain the Legislature's intent so as to be
24 able to adopt an interpretation that best gives effect to the purpose of the statute. *Varshock v.*
25 *Department of Forestry & Fire Protection*, 194 Cal.App.4th 635, 641 (2011). The analysis
26 begins with an examination of the actual words of the statute, giving them their usual, ordinary
27 meaning. *Coburn v. Sievert* 133 Cal.App.4th 1483, 1495 (2005). While in some cases, the
28 initial examination of the words and grammar of the statute may suggest a single unambiguous

1 meaning, “a court may not simply adopt a literal construction and end its inquiry” where a party
 2 argues there is a latent ambiguity in the statute. *Id.* at 1495. A latent ambiguity exists where
 3 “some extrinsic factor creates a need for interpretation or a choice between two or more possible
 4 meanings.” *Varshock*, 194 Cal.App.4th at 644 citing *Mosk v. Superior Court*, 25 Cal.3d 474,
 5 495, fn. 18 (1979). Such a necessity is present where a literal construction would frustrate rather
 6 than promote the purpose of the statute.” *Coburn*, 133 Cal.App.4th at 1495.

7 Where an ambiguity exists, the court must “look to ‘extrinsic aids, including *the*
 8 *ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy,*
 9 *contemporaneous administrative construction, and the statutory scheme of which the statute*
 10 *is a part.*’ [Citation]” *Hoeschst Celanese Corp. v. Franchise Tax Bd.*, 25 Cal.4th 508, 519
 11 (2001) (emphasis added). In addition, the court must consider “the entire substance of a statute
 12 and the scheme of law of which it is a part to determine the scope and purpose, construe its
 13 words in context and harmonize its various parts.” *Varshock*, 194 Cal. App. 4th at 641. The
 14 goal is to arrive at a “reasonable and common sense interpretation consistent with the apparent
 15 purpose and intention of the lawmakers, practical rather than technical in nature, which upon
 16 application will result in wise policy rather than mischief or absurdity.’ [Citation]” *City of*
 17 *Poway City of San Diego*, 229 Cal.App.3d 847, 858 (1991).

18 VIII.

19 **THE OPERATIVE LANGUAGE OF SECTION 15360 IS AMBIGUOUS AND SUBJECT** 20 **TO MORE THAN ONE INTERPRETATION**

21 Section 15360, at issue here, contains several latent ambiguities.

22 Plaintiffs contend that in using the words “ballots cast in the election” in Section
 23 15360(a)(2)(b), the Legislature intended that elections officials include *all ballots*, including all
 24 provisional ballots, all ballots that must be remade, and all VBM ballots. To accept their
 25 interpretation of the statute, plaintiffs would have the court ignore the overarching language set
 26 forth in Section 15360(a) that the manual tally is to occur “[d]uring the official canvass . . .” By
 27 this language, the Legislature explicitly recognized that the manual tally is to be conducted
 28 simultaneously with the processing and tabulation of VBM and provisional ballots during the
 official canvass. That process is not completed until the very end of the canvass. Delaying the

1 conduct of the manual tally to the end of the official canvass would lead to an unreasonable and
2 impractical result—that being the inability to certify the election results within the statutorily
3 mandated timeframe. Plaintiffs have recognized the practical impossibility of waiting until the
4 end of the canvass to conduct the tally. In their reply memorandum in support of their motion
5 for injunctive relief, plaintiffs’ conceded “they are not suggesting that the Registrar wait until all
6 of the vote-by-mail ballots have been processed and included in the official canvass.” Plaintiffs’
7 Reply Memorandum of Points and Authorities, p. 11, l. 28 – p.12, l. 2. Given the above
8 explanation of how provisional ballots in particular are processed, plaintiffs’ concession is at
9 odds with plaintiffs’ “literal” interpretation of the statute as requiring *all* ballots to be included
10 in the tally.

11 Plaintiffs also contend that their interpretation of the statute is supported by what they
12 contend is the plain meaning of the word “cast” – to wit, leaving the voter’s control and being
13 turned over to the elections official. Second Amended Complaint, ¶ 14. Under plaintiffs’
14 definition of “cast”, all ballots, including those ballots that are validly rejected from the count,
15 would be included in the one-percent manual tally. Such an interpretation is clearly at odds with
16 the stated purpose of the manual tally “to verify the accuracy of the automated count” and could
17 not have been intended by the Legislature. Section 336.5.

18 Third, plaintiffs’ interpretation of Section 15360 would require the court to insert the
19 word “all” into the statute. The word “all” nowhere appears in Section 15360. Importantly,
20 when introduced AB 2769 expressly referenced “*all* ballots cast by voters in each of the
21 precincts selected including absentee, provisional, and special absentee ballots” but once
22 enacted the reference to “all” and “provisional ballots” was deleted. When interpreting a statute
23 the court is “to ascertain and declare what is in terms or in substance contained therein not to
24 insert what has been omitted” CCP § 1858.

25 Finally, the interpretation urged by plaintiffs fails to take into account the deference the
26 court must give to the administrative construction of Section 15360 that has been applied by
27 election officials. The court must “defer to an administrative agency’s interpretation of a statute
28 or regulation involving its area of expertise, unless the interpretation flies in the face of the clear

1 language and purpose of the interpreted provision.” *Communities for a Better Environment v.*
2 *State Water Resources Control Board* 109 Cal.App.4th 1089, 1104 (2003). See also, *Carson*
3 *Citizens for Reform v. Kawagoe*, 178 Cal.App.4th 357, 366 - 367, (2009). [“An agency
4 interpretation of the meaning and legal effect of a statute is entitled to consideration and respect
5 by the courts”]

6 In this case, the Secretary of State who is charged with oversight of elections in
7 California issued a 3-page directive/guideline on September 15, 2016, to all county clerks and
8 registrars in the State regarding Section 15360. After discussing the legislative history of
9 Section 15360, the Secretary of State concluded that “neither provisional ballots nor all vote-by-
10 mail ballots are required to be included in the one percent manual tally.” A copy of this
11 directive/guideline will be introduced at trial. In addition, elections officials throughout the state
12 have consistently interpreted and applied Section 15360 in a manner consistent with the manner
13 in which San Diego County has interpreted and applied that provision. The administrative
14 construction of Section 15360 by the Secretary of State and election officials around the State is
15 due deference from the court.

16 IX.

17 SECTION 15360 DOES NOT REQUIRE PROVISIONAL BALLOTS AND ALL VBM 18 BALLOTS TO BE INCLUDED IN THE 1% MANUAL TALLY

19 When conducting the random sample selected for the manual tally by the Registrar
20 includes all ballots included in the semifinal official canvass the day after the election, including
21 VBM ballots. The County does not include VBM ballots that have yet to be processed and
22 added into the official canvass results. Similarly, the Registrar does not include any provisional
23 ballots in the manual tally. The practice followed by the Registrar is consistent with the intent
24 and purpose of the manual tally and satisfies the requirements of Section 15360.

25 A. Section 15360 does not Require Provisional Ballots to be 26 Included in the Manual Tally.

27 The Registrar does not include provisional ballots in the manual tally. This practice is
28 consistent with the practices of other counties and the opinion of the Secretary of State. It is

1 also consistent with the original intent of the Legislature in conducting the 1 % manual tally and
2 does not run afoul of the requirements of Section 15360.

3 As detailed above, prior to 2006, Section 15360 did not expressly require VBM or
4 provisional ballots to be included in the manual tally. In 2006, the Legislature enacted AB 2769
5 (Stats. 2006, c. 893, § 1) and AB 2769 (Stats. 2006, ch. 894) amending Section 15360 to read, in
6 relevant part as follows: "... the official conducting the election shall conduct a public manual
7 tally of the ballots tabulated by those devices, *including absent voters' ballots*, cast in 1 percent
8 of the precincts" (Emphasis added.)

9 When introduced, SB 1235 proposed that Section 15360 be amended to also include "...
10 *provisional ballots, and ballots cast at satellite locations*, cast in 1 percent of the precincts"
11 (Emphasis added.) But, the reference to "*provisional ballots, and ballots cast at satellite*
12 *locations*" was deleted before the second reading of the bill in committee. Similarly, AB 2769
13 when introduced also proposed to include VBM and provisional ballots in the manual tally, but
14 also like SB 1235, once amended all references to provisional ballots were deleted. "'When the
15 Legislature chooses to omit a provision from the final version of a statute which was included in
16 an earlier version, this is strong evidence that the act as adopted should not be construed to
17 incorporate the original provision.' [citation]" *UFCW & Employers Benefit Trust v. Sutter*
18 *Health* 241 Cal.App.4th 909, 927 (2015), citing *People v. Delgado* 214 Cal.App.4th 914, 918
19 (2013). As such, it is clear that the Legislature considered but rejected the idea that provisional
20 ballots were to be included in the manual tally.

21 **B. The Registrar Properly Includes Vote by Mail Ballots in the 1 Percent**
22 **Manual Tally**

23 VBM ballots are received at different times by different means of delivery. The VBM
24 ballots associated with a particular precinct are by the very nature of the process sprinkled
25 throughout all of the VBM ballots included in the semifinal official canvass. Prior to 2012, after
26 the precincts to be included in the manual tally were selected, elections officials were required to
27 locate the VBM ballots associated with the randomly selected precincts and integrate those
28 ballots into the ballots cast at the precincts. This process had to be initiated within several days

1 of the election in order to complete the manual tally “during the official canvass” and of course
2 could not include VBM ballots that have not yet been processed and counted.

3 In 2011, in an effort to streamline the process and reduce the costs of completing the
4 manual tally, the Legislature enacted AB 985 amending Section 15360. As amended by AB
5 985, Section 15360 election officials now have an option for conducting the manual tally.
6 Election officials can now conduct the manual tally by precinct as provided under 15360(a)(1)
7 or, alternatively may conduct a two part manual tally that allows elections officials to manually
8 tally randomly selected batches of VBM ballots, thereby avoiding the cost and time of having to
9 integrate the VBM ballots into the randomly selected precincts (see § 15360(a)(2)).

10 The intended purpose of AB 985 was to streamline the process and make it easier, more
11 efficient and less costly to conduct the manual tally. If the court now interprets AB 985 to
12 require the Registrar to include all VBM in the manual tally, that interpretation would make the
13 process more difficult, less efficient and more costly, all of which are contrary to the stated
14 purpose of the amendment.

15 Both before and after the enactment of AB 985, the Registrar has only included VBM
16 ballots included in the semifinal official canvass in the manual tally. This practice is consistent
17 with the intent and purpose of the statute as amended and is also consistent with the practices of
18 other counties. The practice also reflects the practical necessity of having to complete the
19 official canvass of the election and certify the results within the statutorily mandated period after
20 the election.

21 Another reason for not waiting to conduct the manual tally until all of the VBM ballots
22 are included in the official canvass is that if the Registrar waited and then determined that the
23 vote tabulating devices were not recording the votes accurately, there would be no time left to
24 correct the error and rerun all of the ballots previously included in the official canvass. It is in
25 the public’s interest and it is a prudent business practice to begin and complete the manual tally
26 as soon as possible. Waiting until all of the VBM ballots have been processed and included in
27 the official canvass would inarguably substantially delay that process.

28 ///

CONCLUSION

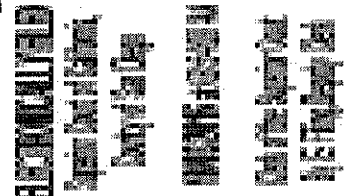
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Plaintiffs believe that Section 15360 is to be used as a tool in detecting nefarious conduct on the part of a corrupted election worker or hacker. That is not the function of the manual tally. As stated by the Legislature, the purpose of Section 15360 is to verify the accuracy of the automated vote tabulating system. The manner in which the Registrar conducts the manual tally satisfies both the intent and purpose of Section 15360. In contrast, plaintiffs urge the court to adopt and interpretation of Section 15360 that is not supported by the facts and which would run contrary to the intended purpose of the manual tally. For the reasons stated above, defendants respectfully request the court to deny the relief requested by plaintiff.

DATED: October 3, 2016

THOMAS E. MONTGOMERY, County Counsel

By: /s/Timothy M. Barry
TIMOTHY M. BARRY, Chief Deputy
Attorneys for Defendants



DECLARATION OF SERVICE

I, the undersigned, declare under penalty of perjury that I am not a party to the case; I am employed in the County of San Diego, California. My business address is 1600 Pacific Highway, Room 355, San Diego, California, 92101.

On October 3, 2016, I served the following documents:

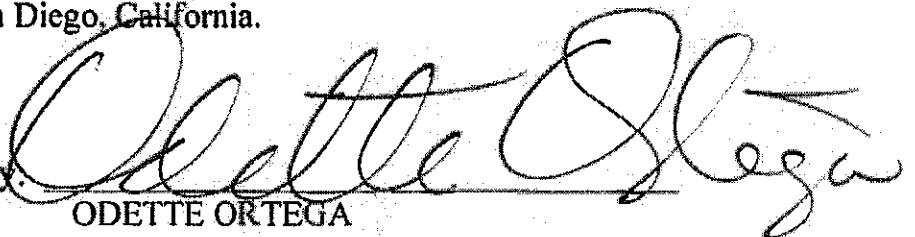
1. DEFENDANTS' TRIAL BRIEF.

In the following manner:

- (BY E-mail) I cause to be transmitted a copy of the foregoing document(s) this date via OneLegal System, which electronically notifies all counsel as follows:

Alan L. Geraci, Esq.
CARE Law Group PC
817 W. San Marcos Blvd.
San Marcos, CA 92078
Ph: (619) 231-3131 Fax: (760) 650-3484
alan@carelaw.net

Executed on October 3, 2016, at San Diego, California.

By: 
ODETTE ORTEGA

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO
CENTRAL

0373

MINUTE ORDER

DATE: 10/04/2016 TIME: 09:00:00 AM DEPT: C-73

JUDICIAL OFFICER PRESIDING: Joel R. Wohlfeil
CLERK: Juanita Cerda
REPORTER/ERM: Kristy Montalban CSR# 13551
BAILIFF/COURT ATTENDANT: R. Camberos

CASE NO: 37-2016-00020273-CL-MC-CTL CASE INIT.DATE: 06/16/2016
CASE TITLE: Lutz vs Michael Vu [IMAGED]
CASE CATEGORY: Civil - Limited CASE TYPE: Misc Complaints - Other

EVENT TYPE: Civil Court Trial

APPEARANCES

Alan L Geraci, counsel, present for Plaintiff(s).
Raymond Lutz, Plaintiff is present.
Timothy M Barry, counsel, present for Defendant(s).
Michael Vu, Defendant, present.
Stephanie Karnavas, counsel, present for Defendant(s)

9:14 am This being the time set for short cause Court Trial in the above-entitled cause, having been assigned to this department, all parties and counsel appear as noted above and trial commences.

Court informs counsel the request for media coverage is denied. Court and counsel discuss exhibit list and witness list as to time schedule. The Court directs counsel to provide a more inclusive list.

Attorney Karnavas submits a Motion for Nonsuit which the Court will address later this afternoon.

The Court denies defendant(s) request for a Motion to Exclude Witnesses.

The Court informs counsel it has a jury deliberating on another matter and there will be interruptions.

9:51 am Attorney Geraci presents opening statement on behalf of Plaintiff Raymond Lutz.

10:08 am Attorney Barry presents opening statement on behalf of Defendant(s) County of San Diego, Michael Vu, Helen N. Robbins-Meyer.

10:20 am Court is in recess.

10:34 am Court reconvenes with plaintiff(s), defendant(s) and counsel present as noted above. 0374

Court and counsel discuss deposition of Julie Rodewald. Attorney Geraci has no objection of it's reading.

10:38 am Michael Vu, called pursuant to Evidence Code 776, is sworn and examined by Attorney Geraci on behalf of Plaintiff Raymond Lutz.

10:42 am Unreported sidebar conference is held until 10:47 am, thereafter trial resumes. The Court overrules the objection discussed at sidebar.

Direct examination of Michael Vu resumes by Attorney Geraci on behalf of Plaintiff, Raymond Lutz.

The following Court's exhibit(s) are marked for identification and admitted on behalf of Plaintiff:

4. **ROV Policy Manual 1% Manual Tally dated 11/9/2012**
19. **County of San Diego Presidential Primary Election Tuesday, June 7, 2016, Official Results, dated 7/6/2016**

The following Court's exhibit(s) are marked for identification on behalf of Plaintiff:

1. Public Notice EC15360
30. Declaration of Michael Vu in Support of Defendants Opposition to Plaintiffs' Motion for Injunctive relief, dated 6/30/2106

11:23 am Cross examination of Michael Vu commences by Attorney Barry on behalf of Defendant(s), County of San Diego, Michael Vu, Helen N. Robbins-Meyer.

Attorney Barry makes an oral motion to strike testimony as to Cuyahoga testimony.

The witness is excused, subject to recall.

Court and counsel discuss Attorney Barry's oral motion to strike as to Cuyahoga testimony. The Court denies the motion to strike.

11:29 am Raymond Lutz is sworn and examined by Attorney Geraci on behalf of Plaintiff, Raymond Lutz.

The following Court's exhibit(s) are marked for identification and admitted on behalf of Plaintiff:

58. **CV Raymond Lutz**
12. **Email Vu-Lutz dated 6/10/2016 8:24 a.m.**
13. **Email Vu-Lutz dated 6/10/2016 2:34 p.m.**
14. **Email Vu-Lutz dated 6/13/2016 7:43 p.m.**

The following Court's exhibit(s) are marked for identification on behalf of Plaintiff:

2. Photo Doc of List of Precincts Drawn for 1% Manual Tally

3. Photo Doc of List of Batches Drawn for VBM 1% Manual Tally

0375

11:58 am Court is in recess.

1:22 pm Court reconvenes with plaintiff(s), defendant(s) and counsel present as noted above.

Court and counsel discuss Motion for Nonsuit as to witness Helen Robbins-Meyer. The Court grants the Motion for Nonsuit and informs counsel Ms. Robbins-Meyer will not be appearing to testify.

1:35 pm Raymond Lutz, previously sworn, resumes the stand for further direct examination by Attorney Geraci on behalf of Plaintiff, Raymond Lutz.

The following Court's exhibit(s) is marked for identification on behalf of Plaintiff:

62. Citizens Oversight Projects: Review of SD County Registrar of Voters Procedure dated 2/10/2010

Witness Raymond Lutz is asked to leave the courtroom so the Court and counsel can discuss exhibit 62.

The Court sustains the objection on hearsay.

Direct examination of Raymond Lutz resumes by Attorney Geraci on behalf of Plaintiff, Raymond Lutz.

The following Court's exhibit(s) is marked for identification on behalf of Plaintiff:

64. SD ROV Manual Tally Schedule Review, June 7, 2016 Election

Attorney Barry objects to it being referred to. Attorney Geraci informs the Court it is being referred to for demonstrative purposes only.

The following Court's exhibit(s) are marked for identification and admitted on behalf of Plaintiff:

50. **1% Manual Tally of Polls for June 7, 2016 Presidential Primary Election**
51. **1% Manual Tally of VBM for June 7, 2016 Presidential Primary Election**
52. **1% Manual Tally of Polls-Additional for June 7, 2016 Presidential Primary Election**
49. **1% Manual Tally Summary Report dated July 7, 2016**

The following Court's exhibit(s) is marked for identification on behalf of Plaintiff:

67. Summary - Roster Review

2:28 pm Witness Raymond Lutz is asked to leave the courtroom while Court and counsel discuss deposition of Raymond Lutz and supplemental documents.

2:40 pm The bailiff informs the Court a jury note has been received. Court informs counsel it will be taking a break to address jury note.

3:24 pm Court in recess.

3:33 pm Court reconvenes with plaintiff(s), defendant(s) and counsel present as noted above.

Court and counsel discuss evidentiary issues.

3:35 pm Raymond Lutz resumes the stand for further direct examination by Attorney Geraci on behalf of Plaintiff, Raymont Lutz.

Attorney Geraci request the Court take judicial notice of Court's exhibit 59. The Court will defer.

3:50 pm Cross examination of Raymond Lutz commences by Attorney Barry on behalf of Defendant(s), County of San Diego, Michael Vu, Helen N. Robbins-Meyer.

The following Court's exhibit(s) is marked for identification on behalf of Defendant(s):

109. Letter dated April 14, 2009 from Debra Bowen, Secretary of State to County Clerk/Registrars with attached Notice of Approval of Emergency Regulatory Action DAL File No. 2009-0403-05-EE with Text of Proposed Regulations, dated April 13, 2009

3:40 pm The bailiff informs the Court the jury has reached a verdict. The Court informs counsel it will be stopping proceedings as soon as counsel on the other matter arrive.

4:10 pm Court is adjourned until 10/05/2016 at 09:00AM in Department 73.

Joel R. Wohlfeil

Judge Joel R. Wohlfeil

TRIAL EXHIBIT LIST

By: J. CERDA

Court Exhibit No.	Submitted by	Description	Legal Grounds for Objection	(CLERK'S ENTRIES)	
				Date Identified	Date Admitted
1.	Plaintiffs	Public Notice EC15360	1	10-4-16	10-11-16
2.	Plaintiffs	Photo Doc of List of Precincts Drawn for 1% Manual Tally	1	10-4-16	
3.	Plaintiffs	Photo Doc of List of Batches Drawn for VBM 1% Manual Tally	1	10-4-16	
4.	Plaintiffs	ROV Policy Manual 1% Manual Tally dated 11/9/2012	1	10-4-16	10-4-16
5.	Plaintiffs	Hall, Joseph "Procedures for California 1% Manual Tally" dated 4/24/2008	2, 3, 6		
6.	Plaintiffs	Nordon, Lawrence, et al, "Post-Election Audits: Restoring Trust in Elections—Executive Summary" Undated	2, 3, 6		
7.	Plaintiffs	Hall, Joseph, "Improving the Security, Transparency, and Efficiency of California's 1% Manual Tally Procedures" dated 6/30/2008	2, 3, 6		
8.	Plaintiffs	Correspondence COP - Vu dated 5/15/2014	1		

GROUND FOR OBJECTION

1. No Objection; Admissibility Stipulated	6. Insufficient Foundation (§ 403) (Relevancy, Personal Knowledge, Authenticity) (§ 1400, Identity)
2. Irrelevant (§ 210)	7. Unduly Time Consuming, Prejudicial, Confusing, or Misleading (§ 352)
3. Hearsay (§1200)	8. Subsequent Repair (§ 1151)
4. Best Evidence (§ 1500)	9. Other (Specify)
5. Inadmissible Opinion (§ 800)	

Court Exhibit No.	Submitted by	Description	Legal Grounds for Objection	(CLERK'S ENTRIES)	
				Date Identified	Date Admitted
9.	Plaintiffs	Correspondence COP -Vu dated 10/9/2014	1	10-5-16	10-5-16
10.	Plaintiffs	Correspondence COP -Vu dated 10/14/2014	1	10-5-16	10-5-16
11.	Plaintiffs	Correspondence COP -Vu dated 5/4/2016	1	10-5-16	10-5-16
12.	Plaintiffs	Email Vu-Lutz dated 6/10/2016 8:24 a.m.	1	10-4-16	10-4-16
13.	Plaintiffs	Email Lutz-Vu dated 6/10/2016 2:34 p.m.	1	10-4-16	10-4-16
14.	Plaintiffs	Email Vu-Lutz dated 6/13/2016 7:43 p.m.	1	10-4-16	10-4-16
15.	Plaintiffs	OMIT			
16.	Plaintiffs	OMIT			
17.	Plaintiffs	OMIT			
18.	Plaintiffs	OMIT			
19.	Plaintiffs	County of San Diego Presidential Primary Election Tuesday, June 7, 2016, Official Results, dated 7/6/2016	1	10-4-16	10-4-16
20.	Plaintiffs	Transcript of 1% Manual Tally Draw, dated 6/24/2016	2, 3, 4, 6		
21.	Plaintiffs	Declaration of Raymond Lutz in Support of Motion for Injunctive relief, dated 6/24/2106	3, 5, 6, 7		

GROUND FOR OBJECTION

1. No Objection; Admissibility Stipulated	6. Insufficient Foundation (§ 403) (Relevancy, Personal Knowledge, Authenticity) (§ 1400, Identity)
2. Irrelevant (§ 210)	7. Unduly Time Consuming, Prejudicial, Confusing, or Misleading (§ 352)
3. Hearsay (§1200)	8. Subsequent Repair (§ 1151)
4. Best Evidence (§ 1500)	9. Other (Specify)
5. Inadmissible Opinion (§ 800)	

Court Exhibit No.	Submitted by	Description	Legal Grounds for Objection	(CLERK'S ENTRIES)	
				Date Identified	Date Admitted
22.	Plaintiffs	Declaration of Gail Pellerin in Support of Defendants' Opposition to Plaintiffs' Motion for Injunctive relief, dated 6/29/2106	3		
23.	Plaintiffs	Declaration of Jill Lavine in Support of Defendants' Opposition to Plaintiffs' Motion for Injunctive relief, dated 6/28/2106	3		
24.	Plaintiffs	Declaration of Joseph E. Canciamilla in Support of Defendants' Opposition to Plaintiffs' Motion for Injunctive relief, dated 6/30/2106	3		
25.	Plaintiffs	Declaration of Neal Kelley in Support of Defendants' Opposition to Plaintiffs' Motion for Injunctive relief, dated 6/30/2106	3		
26.	Plaintiffs	Declaration of William Rousseau in Support of Defendants' Opposition to Plaintiffs' Motion for Injunctive relief, dated 6/28/2106	3		
27.	Plaintiffs	Declaration of Dean Logan in Support of Defendants' Opposition to Plaintiffs' Motion for Injunctive relief, dated 6/30/2106	3		

GROUNDS FOR OBJECTION

1. No Objection; Admissibility Stipulated	6. Insufficient Foundation (§ 403) (Relevancy, Personal Knowledge, Authenticity) (§ 1400, Identity)
2. Irrelevant (§ 210)	7. Unduly Time Consuming, Prejudicial, Confusing, or Misleading (§ 352)
3. Hearsay (§1200)	8. Subsequent Repair (§ 1151)
4. Best Evidence (§ 1500)	9. Other (Specify)
5. Inadmissible Opinion (§ 800)	

Court Exhibit No.	Submitted by	Description	Legal Grounds for Objection	(CLERK'S ENTRIES)	
				Date Identified	Date Admitted
28.	Plaintiffs	Declaration of Mary Bedard in Support of Defendants' Opposition to Plaintiffs' Motion for Injunctive relief, dated 6/29/2106	3		
29.	Plaintiffs	Declaration of Jana M. Lean in Support of Defendants' Opposition to Plaintiffs' Motion for Injunctive relief, dated 6/30/2106	3		
30.	Plaintiffs	Declaration of Michael Vu in Support of Defendants' Opposition to Plaintiffs' Motion for Injunctive relief, dated 6/30/2106	1	10-4-16	
31.	Plaintiffs	Supp. Declaration of Raymond Lutz in Support of Motion for Injunctive relief, dated 7/4//2106	3, 5, 6, 7		
32.	Plaintiffs	Declaration of Ben D. Cooper in Support of Motion for Injunctive relief, dated 7/5//2106	3, 5, 6, 7		
33.	Plaintiffs	Deposition transcript of Michael Vu, dated 9/1/2016	Reserve		
34.	Plaintiffs	Deposition transcript of Raymond Lutz, dated 9/9/2016.	Reserve		

GROUNDS FOR OBJECTION

1. No Objection; Admissibility Stipulated	6. Insufficient Foundation (§ 403) (Relevancy, Personal Knowledge, Authenticity) (§ 1400, Identity)
2. Irrelevant (§ 210)	7. Unduly Time Consuming, Prejudicial, Confusing, or Misleading (§ 352)
3. Hearsay (§1200)	8. Subsequent Repair (§ 1151)
4. Best Evidence (§ 1500)	9. Other (Specify)
5. Inadmissible Opinion (§ 800)	

Court Exhibit No.	Submitted by	Description	Legal Grounds for Objection	(CLERK'S ENTRIES)	
				Date Identified	Date Admitted
35.	Plaintiffs	Deposition transcript of Raymond Lutz, dated 9/12/2016	Reserve		
36.	Plaintiffs	Deposition transcript of Diane Elshiekh, dated 9/15/2016	Reserve		
37.	Plaintiffs	Deposition transcript of Charles Wallis, dated 9/15/2016	Reserve		
38.	Plaintiffs	Poll Worker Manual—2016 Presidential Primary	1		
39.	Plaintiffs	Demonstrative	Reserve (not produced at the time of exhibit review)		
40.	Plaintiffs	Demonstrative	Reserve (not produced at the time of exhibit review)		
41.	Plaintiffs	Demonstrative	Reserve (not produced at the time of exhibit review)		
42.	Plaintiffs	Security Seals Report -- Number of security seals broken, missing, or having an incorrect number and/or	1		

GROUND FOR OBJECTION

1. No Objection; Admissibility Stipulated	6. Insufficient Foundation (§ 403) (Relevancy, Personal Knowledge, Authenticity) (§ 1400, Identity)
2. Irrelevant (§ 210)	7. Unduly Time Consuming, Prejudicial, Confusing, or Misleading (§ 352)
3. Hearsay (§1200)	8. Subsequent Repair (§ 1151)
4. Best Evidence (§ 1500)	9. Other (Specify)
5. Inadmissible Opinion (§ 800)	

Court Exhibit No.	Submitted by	Description	Legal Grounds for Objection	(CLERK'S ENTRIES)	
				Date Identified	Date Admitted
		any follow-up investigation			
43.	Plaintiffs	Additional Races Report	1		
44.	Plaintiffs	Report showing which precincts are in that "BATCH or "Deck" and any other reports or documentation regarding BATCH or "Decks"	1	10-5-16	
45.	Plaintiffs	Shredded material Report from June 1, 2016, to present	2, 6, 7		
46.	Plaintiffs	OMIT			
47.	Plaintiffs	OMIT			
48.	Plaintiffs	Provisional ballots Report for ballots which were rejected with reasons why said ballot was rejected.	1		
49.	Plaintiffs	1% Manual Tally Summary Report dated July 7, 2016	1	10-4-16	10-4-16 x
50.	Plaintiffs	1% Manual Tally of Polls for June 7, 2016 Presidential Primary Election	1	10-4-16	10-4-16 x
51.	Plaintiffs	1% Manual Tally of VBM for June 7, 2016	1	10-4-16	10-4-16

GROUND'S FOR OBJECTION

1. No Objection; Admissibility Stipulated	6. Insufficient Foundation (§ 403) (Relevancy, Personal Knowledge, Authenticity) (§ 1400, Identity)
2. Irrelevant (§ 210)	7. Unduly Time Consuming, Prejudicial, Confusing, or Misleading (§ 352)
3. Hearsay (§1200)	8. Subsequent Repair (§ 1151)
4. Best Evidence (§ 1500)	9. Other (Specify)
5. Inadmissible Opinion (§ 800)	

Court Exhibit No.	Submitted by	Description	Legal Grounds for Objection	(CLERK'S ENTRIES)	
				Date Identified	Date Admitted
		Presidential Primary Election			
52.	Plaintiffs	1% Manual Tally of Polls-Additional for June 7, 2016 Presidential Primary Election	1	10-4-16	10-4-16
53.	Plaintiffs	Curricula Vitae Phillip Stark	2	10-11-16	10-11-16
54.	Plaintiffs	Memorandum 16295 Steven J. Reyes, Chief Counsel Re: County Clerks and Registrars of Voters, dated 9/15/2016	1		
55.	Plaintiffs	Correspondence from Raymond Lutz to Steven J. Reyes, Chief Counsel in Reply to Memorandum 16295	2, 3, 5,7		
56.	Plaintiffs	Unofficial Results of June 8, 2016, at 3:00 p.m ."Snapshot File" CD	Reserve (not produced at the time of exhibit review)	10-5-16	10-5-16
57.	Plaintiffs	Citizens Oversight Projects:Precinct Roster Review Report (Preliminary)	Reserve (not produced at the time of exhibit review)		
58.	Plaintiffs	CV Raymond Lutz	2	10-4-16	10-4-16

GROUND FOR OBJECTION

1. No Objection; Admissibility Stipulated	6. Insufficient Foundation (§ 403) (Relevancy, Personal Knowledge, Authenticity) (§ 1400, Identity)
2. Irrelevant (§ 210)	7. Unduly Time Consuming, Prejudicial, Confusing, or Misleading (§ 352)
3. Hearsay (§1200)	8. Subsequent Repair (§ 1151)
4. Best Evidence (§ 1500)	9. Other (Specify)
5. Inadmissible Opinion (§ 800)	

Court Exhibit No.	Submitted by	Description	Legal Grounds for Objection	(CLERK'S ENTRIES)	
				Date Identified	Date Admitted
59.	Plaintiffs	Legislative History of 15360 (54 pages). 5N	pp. 3-14 = 2, 3, 5, 6, 7 p. 15 = 6, 9 (incomplete) pp. 16-17 = 2, 6 p. 22 = 2, 6 pp. 23-24 = 2, 6 pp. 25-26 = 2, 3, 6 pp. 27-30 = 6, 9 (incomplete) pp. 30-44 = 6 p. 45 = 2, 6 pp. 48- = 2, 6	10-5-14	10-5-16
60.	Plaintiffs	Tally Reconciliation Work Sheet	1		
61.	Plaintiffs	Memo Erin Mayer dated 8/2/2016 to Diane Elsheikh	2, 6		
62.	Plaintiffs	Citizens Oversight Projects: Review of SD County Registrar of Voters Procedures dated 2/10/2010	2,3,5,6,7	10-4-14	10-5-16
63.	Plaintiffs	Citizens Oversight Election Integrity Report: Snapshot Protocol and Roster	2,3,5,6,7		

GROUND FOR OBJECTION

1. No Objection; Admissibility Stipulated	6. Insufficient Foundation (§ 403) (Relevancy, Personal Knowledge, Authenticity) (§ 1400, Identity)
2. Irrelevant (§ 210)	7. Unduly Time Consuming, Prejudicial, Confusing, or Misleading (§ 352)
3. Hearsay (§1200)	8. Subsequent Repair (§ 1151)
4. Best Evidence (§ 1500)	9. Other (Specify)
5. Inadmissible Opinion (§ 800)	

Court Exhibit No.	Submitted by	Description	Legal Grounds for Objection	(CLERK'S ENTRIES)	
				Date Identified	Date Admitted
53.	Plaintiffs	Curricula Vitae Phillip Stark			
54.	Plaintiffs	Memorandum 16295 Steven J. Reyes, Chief Counsel Re: County Clerks and Registrars of Voters, dated 9/15/2016			
55.	Plaintiffs	Correspondence from Raymond Lutz to Steven J. Reyes, Chief Counsel in Reply to Memorandum 16295			
56.	Plaintiffs	Unofficial Results of June 8, 2016, at 3:00 p.m. "Snapshot File" CD			
57.	Plaintiffs	Citizens Oversight Projects: Precinct Roster Review Report (Preliminary)			
58.	Plaintiffs	CV Raymond Lutz			
59.	Plaintiffs	Legislative History of 15360 (54 pages).			
60.	Plaintiffs	Tally Reconciliation Work Sheet			
61.	Plaintiffs	Memo Erin Mayer dated 8/2/2016 to Diane Elsheikh			
62.	Plaintiffs	Citizens Oversight Projects: Review of SD County Registrar of Voters Procedures dated 2/10/2010			
63.	Plaintiffs	Citizens Oversight Election Integrity Report: Snapshot Protocol and Roster Review Investigation for San Diego County Dated September 23, 2016			
64.	Plaintiffs	SD ROV Manual Tally Schedule Review, June 7,		10-3-16	

Demonsrative Purposes
only

Court Exhibit No.	Submitted by	Description	Legal Grounds for Objection	(CLERK'S ENTRIES)	
				Date Identified	Date Admitted
		2016 Election			
65.	Plaintiffs	Snapshot Data File "Unofficial Results as of 3 pm on June 8, 2016			
66.	Plaintiffs	Comparison of Snapshot Ballot Count with Manual Tally System Ballot Count		10-5-16	
67.	Plaintiffs	Summary—Roster Review		10-4-16	
68.	Plaintiffs	Memo County of Sacramento ROV 11/19/2014		10-6-16	10-6-16
69.	Plaintiffs	Memo County of Sacramento ROV 06/30/2016		10-6-16	10-6-16
70.	Plaintiffs	Email Raymond Lara, County Counsel to Ray Lutz dated 8/12/2016			
71.	Plaintiffs				
72.	Plaintiffs				
73.	Plaintiffs				
74.	Plaintiffs				
75.	Plaintiffs				
76.					
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Court Exhibit No.	Submitted by	Description	Legal Grounds for Objection	(CLERK'S ENTRIES)	
				Date Identified	Date Admitted
		Review Investigation for San Diego County Dated September 23, 2016			
64.		50 10-2-16			
65.					
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GROUNDS FOR OBJECTION

1. No Objection; Admissibility Stipulated	6. Insufficient Foundation (§ 403) (Relevancy, Personal Knowledge, Authenticity) (§ 1400, Identity)
2. Irrelevant (§ 210)	7. Unduly Time Consuming, Prejudicial, Confusing, or Misleading (§ 352)
3. Hearsay (§1200)	8. Subsequent Repair (§ 1151)
4. Best Evidence (§ 1500)	9. Other (Specify)
5. Inadmissible Opinion (§ 800)	

Court Exhibit No.	Submitted by	Description	Legal Grounds for Objection	(CLERK'S ENTRIES)	
				Date Identified	Date Admitted
79.					
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95.					
96.					

GROUNDS FOR OBJECTION

1. No Objection; Admissibility Stipulated	6. Insufficient Foundation (§ 403) (Relevancy, Personal Knowledge, Authenticity) (§ 1400, Identity)
2. Irrelevant (§ 210)	7. Unduly Time Consuming, Prejudicial, Confusing, or Misleading (§ 352)
3. Hearsay (§1200)	8. Subsequent Repair (§ 1151)
4. Best Evidence (§ 1500)	9. Other (Specify)
5. Inadmissible Opinion (§ 800)	

Court Exhibit No.	Submitted by	Description	Legal Grounds for Objection	(CLERK'S ENTRIES)	
				Date Identified	Date Admitted
97.					
98.					
99.					
100.	Defendants	Senate Bill No. 1235, as introduced, February 6, 2006		10-5-16	10-5-16
101.	Defendants	Senate Bill No, 1235, as amended, August 7, 2006		10-5-16	10-5-16
102.	Defendants	Senate Bill No, 1235, as amended, August 21, 2006		10-5-16	10-5-16
103.	Defendants	Senate Bill No. 1235, as chaptered, September 30, 2006		10-5-16	10-5-16
104.	Defendants	Senate Bill No. 2769 as chaptered, September 30, 2006		10-5-16	10-5-16
105.	Defendants	Senate Bill No. 46 as chaptered, June 22, 2010		10-5-16	10-5-16
106.	Defendants	Senate Bill No. 985 as chaptered, July 1, 2011		10-5-16	10-5-16
107.	Defendants	Letter dated September 15, 2016 from Alex Padilla, Secretary of State to County Registrars/Clerks. J.N.		10-6-16	10-6-16

GROUND FOR OBJECTION

1. No Objection; Admissibility Stipulated	6. Insufficient Foundation (§ 403) (Relevancy, Personal Knowledge, Authenticity) (§ 1400, Identity)
2. Irrelevant (§ 210)	7. Unduly Time Consuming, Prejudicial, Confusing, or Misleading (§ 352)
3. Hearsay (§1200)	8. Subsequent Repair (§ 1151)
4. Best Evidence (§ 1500)	9. Other (Specify)
5. Inadmissible Opinion (§ 800)	

Court Exhibit No.	Submitted by	Description	Legal Grounds for Objection	(CLERK'S ENTRIES)	
				Date Identified	Date Admitted
108.	Defendants	Letter dated January 30, 2008 from Debra Bowen, Secretary of State, to County Clerks/Registrar of Voters (08048) with Suggested Steps for Completing PEMT attached.			
109.	Defendants	Letter dated April 14, 2009 from Debra Bowen, Secretary of State to County Clerk/Registrars with attached Notice of Approval of Emergency Regulatory Action DAL File No. 2009-0403-05-EE with Text of Proposed Regulations, dated April 13, 2009.		10-4-16	10-5-16
110.	Defendants	Letter dated February 26, 2010 from San Diego ROV to Raymond Lutz.		10-5-16	10-5-16
111.	Defendants	Letter dated May 15, 2014 from Raymond Lutz to San Diego ROV.			
112.	Defendants	Letter dated October 9, 2014 from Raymond Lutz to San Diego ROV			
113.	Defendants	Letter dated October 14, 2014 from Raymond Lutz to San Diego ROV			

GROUND FOR OBJECTION

1. No Objection; Admissibility Stipulated	6. Insufficient Foundation (§ 403) (Relevancy, Personal Knowledge, Authenticity) (§ 1400, Identity)
2. Irrelevant (§ 210)	7. Unduly Time Consuming, Prejudicial, Confusing, or Misleading (§ 352)
3. Hearsay (§1200)	8. Subsequent Repair (§ 1151)
4. Best Evidence (§ 1500)	9. Other (Specify)
5. Inadmissible Opinion (§ 800)	

Court Exhibit No.	Submitted by	Description	Legal Grounds for Objection	(CLERK'S ENTRIES)	
				Date Identified	Date Admitted
114.	Defendants	Letter dated May 4, 2016 from Raymond Lutz to San Diego ROV			
115.	Defendants	Sample Ballot for June 7, 2016 Presidential Primary-Nonpartisan Democratic			
116.	Defendants	Sample Ballot for June 7, 2016 Presidential Primary-Democratic.			
117.	Defendants	Sample Ballot for June 7, 2016 Presidential Primary-Republican			
118.	Defendants	Postcards Sent to All Nonpartisan Mail Ballot Voters			
119.	Defendants	News Releases (3/16- 5/16)			
120.	Defendants	Sample Ballot & Voter Information- Presidential Primary Election, June 7, 2016			
121.	Defendants	Nonpartisan Sample Ballot & Voter Information- Presidential Primary Election, June 7, 2016			
122.	Defendants	Application for a Vote by Mail Ballot			
123.	Defendants	Flyer re: Voting for President			
124.	Defendants	2016 Presidential Primary Election June 7th Poll Worker Manual			

GROUND'S FOR OBJECTION

1. No Objection; Admissibility Stipulated	6. Insufficient Foundation (§ 403) (Relevancy, Personal Knowledge, Authenticity) (§ 1400, Identity)
2. Irrelevant (§ 210)	7. Unduly Time Consuming, Prejudicial, Confusing, or Misleading (§ 352)
3. Hearsay (§1200)	8. Subsequent Repair (§ 1151)
4. Best Evidence (§ 1500)	9. Other (Specify)
5. Inadmissible Opinion (§ 800)	

Court Exhibit No.	Submitted by	Description	Legal Grounds for Objection	(CLERK'S ENTRIES)	
				Date Identified	Date Admitted
125.	Defendants	Political Party Ballot Chart.			
126.	Defendants	Newsletter to All Poll Workers, Spring 2016			
127.	Defendants	Classroom Poll Worker Training Materials			
128.	Defendants	Poll Worker Reminder re: Issuance of Primary Party Ballots			
129.	Defendants	Political Party Ballot Chart – Five Languages			
130.	Defendants	Summary Report – 1% Manual Tally of Ballots and 100% Manual Tally of Early Voting Touchscreens, dated June 7, 2016		10-11-16	
131.	Defendants	Chart re: 1% Manual Tally of Polls and Mail Ballots & 100% Manual Tally of Early Voting Touchscreens, dated June 7, 2016 – Presidential Primary Election			
132.	Defendants	Hart Voting System Use Procedures – Updated August 6, 2010			
133.	Defendants	Premier Election Solutions – Windows Configuration Guide Revision 1.0, September 17, 2007			

GROUND FOR OBJECTION

1. No Objection; Admissibility Stipulated	6. Insufficient Foundation (§ 403) (Relevancy, Personal Knowledge, Authenticity) (§ 1400, Identity)
2. Irrelevant (§ 210)	7. Unduly Time Consuming, Prejudicial, Confusing, or Misleading (§ 352)
3. Hearsay (§1200)	8. Subsequent Repair (§ 1151)
4. Best Evidence (§ 1500)	9. Other (Specify)
5. Inadmissible Opinion (§ 800)	

Court Exhibit No.	Submitted by	Description	Legal Grounds for Objection	(CLERK'S ENTRIES)	
				Date Identified	Date Admitted
134.	Defendants	Premier Election Solutions -- Plan for Formatting and Cleaning Program Storage on Voting Systems, Revision 1.0, September 4, 2007			
135.	Defendants	Premier Election Solutions -- Updating Security of Microsoft Windows on GEMS Servers, Revision 1, August 30, 2007			
136.	Defendants	Election Systems & Software, Inc. -- California Election Procedures, August 2010			
137.	Defendants	Procedures Required for Use of the InkaVote Optical Scan Voting System, November 2010			
138.	Defendants	Deborah Seiler CV		10-5-16	10-5-16 r
139.	Defendants	Dean Logan CV		10-6-16	10-6-16 r
140.	Defendants	Michael Vu CV		10-6-16	10-6-16 r
141.	Defendants	Withdrawn			
142.	Defendants	Withdrawn			
143.	Defendants	Letter dated, July 19, 2007 from Los Angeles CO ROV Connie McCormick to David Jefferson		10-11-16	

GROUND'S FOR OBJECTION

1. No Objection; Admissibility Stipulated	6. Insufficient Foundation (§ 403) (Relevancy, Personal Knowledge, Authenticity) (§ 1400, Identity)
2. Irrelevant (§ 210)	7. Unduly Time Consuming, Prejudicial, Confusing, or Misleading (§ 352)
3. Hearsay (§1200)	8. Subsequent Repair (§ 1151)
4. Best Evidence (§ 1500)	9. Other (Specify)
5. Inadmissible Opinion (§ 800)	

Court Exhibit No.	Submitted by	Description	Legal Grounds for Objection	(CLERK'S ENTRIES)	
				Date Identified	Date Admitted
144.	Defendants	Letter dated April 6, 2009 from San Diego CO ROV Deborah Seiler to Office of Administrative Law		10-11-16	
145.	Defendants	E-mail dated May 4, 2009 From Jennie Bretschneider to PEMT Working Group			
146.	Defendants	Procedures for Processing VBM Ballots		10-6-16	10-6-16
147.	Defendants	Procedures for Processing Provisional Ballots		10-6-16	10-6-16
148.	Defendants	Provisional Ballot Result Report		10-6-16	
149.	Defendants	SOS Uniform Vote Counting Standards		10-5-16	10-5-16
150.	Defendants	November 2016 Election Night Counting Floor Configuration		10-5-16	10-5-16
151.	Defendants	ROV Video	Demonstrative only	10-5-16	
152.	Defendants	Photos re: Poll Scanner and Memory Card		10-5-16	10-5-16
153.	Defendants	Photos re: Scanner to Central Tabulator		10-5-16	
154.	Defendants	Photos re: TSX Machine		10-5-16	10-5-16
155.	Defendants	Photos re: Server and Tabulation Room		10-5-16	10-5-16
156.	Defendants	Photos re: Pitney Bowes Machine			
157.	Defendants	Demonstrative - Batch Start Card		10-5-16	

GROUNDS FOR OBJECTION

1. No Objection; Admissibility Stipulated	6. Insufficient Foundation (§ 403) (Relevancy, Personal Knowledge, Authenticity) (§ 1400, Identity)
2. Irrelevant (§ 210)	7. Unduly Time Consuming, Prejudicial, Confusing, or Misleading (§ 352)
3. Hearsay (§1200)	8. Subsequent Repair (§ 1151)
4. Best Evidence (§ 1500)	9. Other (Specify)
5. Inadmissible Opinion (§ 800)	

Court Exhibit No.	Submitted by	Description	Legal Grounds for Objection	(CLERK'S ENTRIES)	
				Date Identified	Date Admitted
158.	Defendants	Demonstrative – Ender Card		10-5-16	10-5-16 ✓
159.	Defendants	Demonstrative – Calibration Card		10-5-16	
160.	Defendants	Demonstrative – Scanner Paper Tape			
161.	Defendants	OMITTED			
162.	Defendants	OMITTED			
163.	Defendants	OMITTED			
164.	Defendants	OMITTED			
165.	Defendants	OMITTED			
166.	Defendants	OMITTED			
167.	Defendants	OMITTED			
168.	Defendants	OMITTED			
169.	Defendants	OMITTED			
170.	Defendants	Jill LaVine CV			
171.	Defendants	Ballot Processing Chart		10-6-16	10-6-16 ✓
172.	Defendants	Non-Partisan “Crossover” Provisional E. Vlots Cast			
173.	Defendants	Official Voters Information Guide – June 7, 2016			
174.	Defendants	Confirming Elections – Chapter 4, Dean Logan			

GROUND FOR OBJECTION

1. No Objection; Admissibility Stipulated	6. Insufficient Foundation (§ 403) (Relevancy, Personal Knowledge, Authenticity) (§ 1400, Identity)
2. Irrelevant (§ 210)	7. Unduly Time Consuming, Prejudicial, Confusing, or Misleading (§ 352)
3. Hearsay (§1200)	8. Subsequent Repair (§ 1151)
4. Best Evidence (§ 1500)	9. Other (Specify)
5. Inadmissible Opinion (§ 800)	

Court Exhibit No.	Submitted by	Description	Legal Grounds for Objection	(CLERK'S ENTRIES)	
				Date Identified	Date Admitted
175.	Defendants	Summary for 105000 Rancho Bernardo, All Races 15 Manual Tally - Polls Ballot		10-5-16	10-5-16 e
176.	Defendants	Provisional Ballot Envelope		10-6-16	10-6-16 e
177.	Defendants	Processing Mail Ballots Chart		10-6-16	10-6-16 e
178.	Defendants	Provisional Ballot Processing		10-6-16	10-6-16 e
179.	Defendants	1% Manual Tally Sheets		10-6-16	10-6-16 e
180.	Defendants	Assembly Bill No, 2769, as Amended, May 26, 2009		10-5-16	10-5-16 e
181.	Defendants	Pitney Bowes Video ^{Demonstrative} _{ONLY}		10-6-16	
182.	Defendants				
183.	Defendants				
184.	Defendants				
185.	Defendants				
186.	Defendants				
187.	Defendants				
188.	Defendants				
189.	Defendants				
190.	Defendants	PAPER TAPE		10-5-16	10-5-16
191.	Defendants				

GROUND FOR OBJECTION

1. No Objection; Admissibility Stipulated	6. Insufficient Foundation (§ 403) (Relevancy, Personal Knowledge, Authenticity) (§ 1400, Identity)
2. Irrelevant (§ 210)	7. Unduly Time Consuming, Prejudicial, Confusing, or Misleading (§ 352)
3. Hearsay (§1200)	8. Subsequent Repair (§ 1151)
4. Best Evidence (§ 1500)	9. Other (Specify)
5. Inadmissible Opinion (§ 800)	

Court Exhibit No.	Submitted by	Description	Legal Grounds for Objection	(CLERK'S ENTRIES)	
				Date Identified	Date Admitted
192.	Defendants				
193.	Defendants				
194.	Defendants				

GROUNDS FOR OBJECTION

1. No Objection; Admissibility Stipulated	6. Insufficient Foundation (§ 403) (Relevancy, Personal Knowledge, Authenticity) (§ 1400, Identity)
2. Irrelevant (§ 210)	7. Unduly Time Consuming, Prejudicial, Confusing, or Misleading (§ 352)
3. Hearsay (§1200)	8. Subsequent Repair (§ 1151)
4. Best Evidence (§ 1500)	9. Other (Specify)
5. Inadmissible Opinion (§ 800)	

Alan L. Geraci

16-20273

0398

From: Alan L. Geraci <alan@carelaw.net>
Sent: Monday, October 03, 2016 10:17 PM
To: 'Karnavas, Stephanie'; 'Barry, Timothy M'
Cc: 'Ray Lutz'
Subject: Witness List

FILED
 Clerk of the Superior Court

OCT -4 2016

By: J. CERDA

Here is the final Witness List. Day 1: Michael Vu, Ray Lutz, Marie Johnson. If we still have time, put Charles Wallis on notice for the late afternoon.

PLAINTIFF

NAME OF WITNESS	TYPE OF WITNESS(Expert/Percipient)
Michal Vu ✓	Party (Registrar of Voters)
Raymond Lutz -	Party
Phillip Stark	Expert
Charlie Wallis	Expert/Percipient
Erin Mayer	Expert/Percipient
Marie Johnson ✓	Percipient
Anita Simons	Percipient
Helen N. Robbins-Meyer	Party
Josephine Piarulli	Percipient
Jen Abreu	Percipient

Kindest Regards,

Alan L. Geraci, Esq.

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 San Marcos, CA 92078
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1 THOMAS E. MONTGOMERY, County Counsel
County of San Diego
2 By TIMOTHY M. BARRY, Chief Deputy (State Bar No. 89019)
STEPHANIE KARNAVAS, Senior Deputy (State Bar No. 255596)
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San Diego, CA 92101-2469
4 Telephone: (619) 531-6259
E-mail: timothy.barry@sdcountry.ca.gov
5 *Exempt From Filing Fees (Gov't Code § 6103)*

FILED
Clerk of the Superior Court

OCT -4 2016

By: J. CERDA

6 Attorneys for Defendants

7
8 **IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA**
9 **IN AND FOR THE COUNTY OF SAN DIEGO**
10 **CENTRAL DIVISION**

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, HELEN N. ROBBINS-MEYER, San)
16 Diego County Chief Administrative Officer,)
SAN DIEGO COUNTY, a public entity;)
17 DOES 1-10,)
18 Defendants.)

No. 37-2016-00020273-CL-MC-CTL
Action Filed: June 16, 2016

**MOTION FOR JUDGMENT OF
NONSUIT ON BEHALF OF
DEFENDANT HELEN ROBBINS-
MEYER**

IMAGED FILE

Trial Date: 10/4/2016
Time: 9:00 a.m.
Dept.: 73
ICJ: Hon. Joel Wohlfell

19
20 The Court should enter a judgment of nonsuit in favor of Helen Robbins-Meyer
21 (“Robbins-Meyer”), the Chief Administrative Officer (“CAO”) of the County of San Diego, who
22 has been named as defendant for the sole purpose of harassment. Other than identifying
23 Robbins-Meyer as the CAO, there is not a single factual allegation in plaintiffs’ Second
24 Amended Complaint (“SAC”) that pertains to her. Moreover, plaintiffs requested relief – a
25 declaration of the obligations of the Registrar with regard to the one-percent manual tally
26 required by Elections Code Section 15360 and a writ of mandate requiring the Registrar to
27 “fully comply” with that statute—has nothing to do with Robbins-Meyer. Plaintiffs simply
28 wants to keep her as a defendant in this action to harass her and draw further media attention to

1 a case which, at bottom, is about how the Registrar has interpreted his obligations under the law.
 2 Defendants' motion for nonsuit should be granted.

3 I.

4 **STANDARD ON A NON-SUIT MOTION**

5 A defendant may move for the court for a judgment of nonsuit after the plaintiff has
 6 completed his or her opening statement, or after the presentation of plaintiff's evidence in a trial
 7 by jury. Code of Civ. Proc. §581c (a). A motion for nonsuit tests the legal sufficiency of the
 8 evidence presented, in effect operating as a demurrer to plaintiff's evidence. *John Norton*
 9 *Farms, Inc. v. Todagco*, 124 Cal.App.3d 149, 160 (1981). The motion lies when the plaintiff's
 10 evidence, taken as true and construed in favor of plaintiff, is insufficient to entitle plaintiff to
 11 relief under any applicable theory. *O'Keefe v. South End Rowing Club*, 64 Cal.2d 729, 733
 12 (1966). In a proper case, the court has a duty to forestall the cost and delay of further
 13 proceedings by granting a motion for nonsuit. *Id.* at 746. In other words, a defendant is entitled
 14 to a nonsuit if the trial court determines that, as a matter of law, the evidence presented by
 15 plaintiff is insufficient to permit a jury to find in his favor.

16 II.

17 **PLAINTIFFS' REQUEST FOR DECLARATORY RELIEF HAS NOTHING TO DO**
 18 **WITH ROBBINS-MEYER**

19 In the operative Second Amended Complaint, plaintiffs allege the "Registrar is in
 20 violation of the clear intent of the law" and pray for the following declaratory relief: 1) that a
 21 larger sample of vote-by-mail ballots be included in the one percent manual tally; 2) that
 22 defendants be required to produce "data files" corresponding to the "report of votes cast" for
 23 batches in the vote-by-mail manual tally; 3) that the Court "require that the Registrar" to
 24 document procedures regarding vote-by-mail ballots in the one percent manual tally; and 4)
 25 "that the Court require that after procedures are documented, that unofficial results be published
 26 and provided to the public, and the one percent manual tally will be re-started for all [vote-by-
 27 mail] and provisional ballots, including a new random selection after the results have been fixed
 28 ballots in the one percent manual tally." SAC ¶ 36. Setting aside the fact that the above relief

1 does not appropriately request a declaration of rights, is unintelligible in some instances, and
2 requests relief that this Court has no legal authority to grant, for purposes of this motion, the
3 important point is that none of the above has anything to do with Robbins-Meyer. Plaintiffs
4 request no declaratory relief regarding the obligations or duties of, or their rights with respect to
5 Robbins-Meyer, and thus there is no legal basis for her to remain as a defendant in this action.

6 **III.**

7 **PLAINTIFFS DO NOT SEEK TO COMPEL ANY ACTION BY ROBBINS-MEYER BY**
8 **WRIT OF MANDATE**

9 To state a claim for a traditional writ of mandate, a petition must allege: 1) a clear,
10 present, and ministerial duty upon the part of a respondent, 2) the petitioner's clear, present and
11 beneficial right to performance of that duty, and 3) that there is no other plain, speedy, and
12 adequate remedy. *See Excelsior College v. Cal. Board of Registered Nursing*, 136 Cal. App. 4th
13 1218, 1237 (2006); *County of San Diego v. State of Calif.*, 164 Cal. App. 4th 580, 593 (2008).
14 "A ministerial duty is an obligation to perform a specific act in a manner prescribed by law
15 whenever a given state of facts exists, without regard to any personal judgment as to the
16 propriety of the act." *People v. Picklesimer*, 48 Cal.4th 330, 340 (2010); *see also County of San*
17 *Diego*, 164 Cal. App. 4th at 593. As respects a writ that seeks to compel acts of an individual,
18 "[a] writ of mandamus will issue only against a person, officer or inferior tribunal 'to compel the
19 performance of an act which the law specially enjoins' upon such individual or officer."
20 *Bandini Estate Co. v. Payne*, 10 Cal. App. 2d 623, 625 (1935).

21 Plaintiffs request for a writ of mandate is similarly aimed solely at the Registrar.
22 Plaintiffs seek a writ of mandate requiring defendants to "fully comply with the breadth [sic]
23 California Elections Code Section 15360." SAC ¶ 40. The manual tally procedure described in
24 Elections Code Section 15360 is solely within the purview of the "elections official" who, in the
25 County of San Diego is the Registrar of Voters, Michael Vu. Here, Plaintiffs have alleged no
26 legal basis for this court to "compel" Robbins-Meyer to do anything.

27 ///

28 ///

CONCLUSION

1
2 Plaintiffs have alleged no facts against Robbins-Meyer and they seek no relief as respects
3 Robbins-Meyer. She was clearly named as a defendant in this action for the sole purpose of
4 harassment. For the foregoing reasons, defendants respectfully request that this Court enter a
5 judgment of nonsuit in favor of Helen Robbins-Meyer.

6
7 DATED: October 4, 2016

THOMAS E. MONTGOMERY, County Counsel

8
9 By: s/Stephanie Karnavas
10 STEPHANIE KARNAVAS, Senior Deputy
Attorneys for Defendants
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SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO
CENTRAL

0403

MINUTE ORDER

DATE: 10/05/2016

TIME: 09:00:00 AM

DEPT: C-73

JUDICIAL OFFICER PRESIDING: Joel R. Wohlfeil

CLERK: Juanita Cerda

REPORTER/ERM: Kristy Montalban CSR# 13551

BAILIFF/COURT ATTENDANT: R. Camberos AM / T. Neal PM

CASE NO: **37-2016-00020273-CL-MC-CTL** CASE INIT.DATE: 06/16/2016

CASE TITLE: **Lutz vs Michael Vu [IMAGED]**

CASE CATEGORY: Civil - Limited CASE TYPE: Misc Complaints - Other

EVENT TYPE: Civil Court Trial

APPEARANCES

Alan L Geraci, counsel, present for Plaintiff(s).

Raymond Lutz, Plaintiff is present.

Timothy M Barry, counsel, present for Defendant(s).

Michael Vu, Defendant, present.

Stephanie Karnavas, counsel present for Defendant(s)

8:58 am This being the time previously set for further Court trial in the above entitled cause, having been continued from 10/4/16, all parties and counsel appear as noted above and court convenes.

Court and counsel discuss witness schedule.

9:00 am Raymond Lutz, previously sworn, resumes the stand for further cross examination by Attorney Barry on behalf of Defendant(s), County of San Diego, Michael Vu, Helen Robbins-Meyer.

The following Court's exhibit(s) are marked for identification and admitted on behalf of Defendant(s):

9. Correspondence COP - Vu dated 10/9/2014
10. Correspondence COP - Vu dated 10/14/2014
11. Correspondence COP - Vu dated 5/4/2016

The following Court's exhibit(s) is marked for identification on behalf of Defendant(s):

195. Email from Ray Lutz to voter.services dated 7/4/16

9:26 am unreported sidebar conference is held until 9:28 am, thereafter examination resumes.

DATE: 10/05/2016

MINUTE ORDER

DEPT: C-73

Page 1
Calendar No. 3

9:42 am Redirect examination of Raymond Lutz commences by Attorney Geraci on behalf of Plaintiff, Raymond Lutz.

The following Court's exhibit(s) is marked for identification and admitted on behalf of Plaintiff:

56. Unofficial Results of June 8, 2016, at 3:00 p.m. "Snapshot File" CD

9:54 am Recross examination of Raymond Lutz commences by Attorney Barry on behalf of Defendant(s), County of San Diego, Michael Vu, Helen Robbins-Meyer.

The witness is excused, subject to recall.

9:57 am Erin Mayer, called pursuant to Evidence Code 776, is sworn and examined by Attorney Geraci on behalf of Plaintiff Raymond Lutz.

10:20 am Redirect examination of Erin Mayer commences by Attorney Karnavas on behalf of Defendant(s), County of San Diego, Michael Vu, Helen Robbins-Meyer.

10:23 am Recross examination of Erin Mayer commences by Attorney Geraci on behalf of Plaintiff, Raymond Lutz.

10:27 am The witness is excused.

10:27 am Court is in recess.

10:40 am Court reconvenes with plaintiff(s), defendant(s) and counsel present as noted above.

10:40 am Deborah Seiler is sworn and examined by Attorney Barry on behalf of Defendant(s), County of San Diego, Michael Vu, Helen Robbins-Meyer.

The following Court's exhibit(s) are marked for identification and admitted on behalf of Defendant(s):

- 138. Deborah Seiler CV
- 100. Senate Bill No. 1235, as introduced, February 6, 2006
- 101. Senate Bill No. 1235, as amended, August 7, 2006
- 102. Senate Bill No. 1235, as amended, August 21, 2006
- 103. Senate Bill No. 1235, as chaptered, September 30, 2006
- 104. Senate Bill No. 2769 as chaptered, September 30, 2006
- 180. Assembly Bill No. 2769, as Amended, May 26, 2009
- 105. Senate Bill No. 46 as chaptered, June 22, 2010
- 106. Senate Bill No. 985 as chaptered, July 1, 2011

The following Court's exhibit(s) is marked for identification on behalf of Defendant(s):

- 110. Letter dated February 26, 2010 from San Diego ROV to Raymond Lutz

The following Court's exhibit(s), having been previously identified, is now admitted on behalf of Plaintiff:
109

11:40 am Unreported sidebar conference is held until 11:44 am, thereafter trial resumes.

0405

Objections to exhibit 110 are overruled. The Court will **receive into evidence** exhibits 110. Exhibit 62 is also **received into evidence** by the Court.

11:49 am Court is in recess.

1:21 pm Court reconvenes with plaintiff(s), defendant(s) and counsel present as noted above.

1:21 pm Deborah Seiler, previously sworn, resumes the stand for further cross examination by Attorney Geraci on behalf of Plaintiff, Raymond Lutz.

The following Court's exhibit(s) is marked for identification on behalf of Plaintiff:

59. Legislative History of 15360 (54 pages)

The Court informs counsel exhibit 59 will be **received into evidence** in its entirety

1:58 pm Redirect examination of Deborah Seiler commences by Attorney Barry on behalf of Defendant(s), County of San Diego, Michael Vu, Helen Robbins-Meyer.

2:03 pm Recross examination of Deborah Seiler commences by Attorney Geraci on behalf of Plaintiff, Raymond Lutz.

2:03 pm The witness is excused.

2:05 pm Charles Wallis, called pursuant to Evidence Code 776, is sworn and examined by Attorney Geraci on behalf of Plaintiff Raymond Lutz.

The following Court's exhibit(s) is marked for identification on behalf of Plaintiff:

66. Comparison of Snapshot Ballot Count with Manual Tally System Ballot Count

The Court sustains the objection and is inclined to exclude exhibit 66.

44. Report showing which precincts are in that "BATCH" or "Deck" and any other reports or documentation regarding "BATCH" or "Decks"

2:33 pm Redirect examination of Charles Wallis commences by Attorney Karnavas on behalf of Defendant(s), County of San Diego, Michael Vu, Helen Robbins-Meyer.

The following Court's exhibits are marked for demonstrative purposes only on behalf of Defendant(s):

- 155. Photos re: Server and Tabulation Room
- 154. Photos re: TSX Machine

~~0406~~

3:00 pm Court is in recess.

3:16 pm Court reconvenes with plaintiff(s), defendant(s) and counsel present as noted above.

3:16 pm Charles Wallis, previously sworn, resumes the stand for further redirect examination by Attorney Karnavas on behalf of Defendant(s), County of San Diego, Michael Vu, Helen Robbins-Meyer.

The following Court's exhibits are marked for demonstrative purposes only on behalf of Defendant(s)

- 152. Photos re: Poll Scanner and Memory Card
- 158. Demonstrative - Ender Card
- 190. Paper Tape
- 150. November 2016 Election Night Counting Floor Configuration

The Court's **receives into evidence** the following exhibits: 155, 154, 152, 158, 190, and 150

Court's exhibit 151 is played as demonstrative purposes only on behalf of Defendant(s)

- 151. ROV Video

The following Court's exhibit(s) are marked for identification on behalf of Defendant(s):

- 153. Photos re: Scanner to Central Tabulator
- 157. Demonstrative - Batch Start Card
- 159. Demonstrative - Calibration Card
- 175. Summary for 105000 Rancho Bernardo, All Races 15 Manual Tally - Polls Ballot

4:21 pm Recross examination of Charles Wallis commences by Attorney Geraci on behalf of Plaintiff, Raymond Lutz.

4:28 pm Responsive examination of Charles Wallis commences by Attorney Karnavas on behalf of Defendant(s), County of San Diego, Michael Vu, Helen Robbins-Meyer.

The following Court's exhibit(s) is marked for identification and admitted on behalf of Defendant(s):

149. SOS Uniform Vote Counting Standards

4:30 pm The witness is excused.

Court and counsel discuss witness scheduling.

4:36 pm Court is adjourned until 10/06/2016 at 09:00AM in Department 73.

Joel R. Wohlfeil

Judge Joel R. Wohlfeil

0407

FILED
Clerk of the Superior Court

OCT -5 2016

By: J. CERDA

ADDITIONAL EXHIBIT LIST

CASE NAME: Lutz vs Michael Vu

CASE NUMBER: 37-2016-00020273-CL-MC-CTL

NO.	P/D	DESCRIPTION	IDENTIFIED	RECEIVED
195	D	Email from Raymond Lutz to Voter Services dated 7/4/16	10/5/16	10/6/16
196	D	Deposition Excerpts of Julie Rodewald dated 9/23/16	10/6/16	
197	P	Counter Designation Excerpts of Julie Rodewald dated 9/23/16	10/6/16	
198	P	Deposition Excerpts of Julie Rodewald dated 9/23/16	10/6/16	
199	D	Sample Ballots for Upcoming Election	10/6/16	10-6-16
200	D	Report to the Legislature dated 3/1/2012	10/11/16	
201	D	California Secretary of State, Post-Election Risk-Limiting Audit Pilot Program 2011-2013	10/11/16	

WITNESS LIST

0408

CASE NAME:

WITNESS LIST

FILED
Clerk of the Superior Court

CASE NAME: Raymond Lutz vs. Michael Vu

OCT -5 2016

CASE NUMBER: 37-2016-00020273-CL-MC-CTL

By: J. CERDA

WITNESS	P/D	PERCP.	EXPERT	DATE
1. Deborah Seiler	D	X		10/5/16
2. Jill LaVine	D	X		10/6/16
3. Dean Logan	D	X		10/6/16
4. Julie Rodewald (deposition of 9/2/16)	D	X		10/6/16
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SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO
CENTRAL

0409

MINUTE ORDER

DATE: 10/06/2016

TIME: 09:00:00 AM

DEPT: C-73

JUDICIAL OFFICER PRESIDING: Joel R. Wohlfeil

CLERK: Juanita Cerda

REPORTER/ERM: Kristy Montalban CSR# 13551

BAILIFF/COURT ATTENDANT: R. Camberos

CASE NO: **37-2016-00020273-CL-MC-CTL** CASE INIT.DATE: 06/16/2016

CASE TITLE: **Lutz vs Michael Vu [IMAGED]**

CASE CATEGORY: Civil - Limited CASE TYPE: Misc Complaints - Other

EVENT TYPE: Civil Court Trial

APPEARANCES

Alan L Geraci, counsel, present for Plaintiff(s).

Raymond Lutz, Plaintiff is present.

Timothy M Barry, counsel, present for Defendant(s).

Michael Vu, Defendant, present.

Stephanie Karnavas, counsel, present for Defendant(s)

9:05 am This being the time previously set for further Court trial in the above entitled cause, having been continued from 10/5/16, all parties and counsel appear as noted above and court convenes.

Court and counsel discuss exhibit 59. Court directs counsel to meet and confer as to exhibit 59.

9:12 am Jill LaVine is sworn and examined by Attorney Barry on behalf of Defendant(s), County of San Diego, Michael Vu, Helen Robbins-Meyer.

The following Court's exhibit(s) is marked for identification on behalf of Defendant(s):

107. Letter dated September 15, 2016 from Alex Padilla, Secretary of State to County Registrars/Clerks

9:30 am Unreported sidebar conference is held until 9:35 am, thereafter trial resumes.

The following Court's exhibit(s), having been previously identified, is now ADMITTED on behalf of Defendant(s): 107

9:44 am Cross examination of Jill LaVine commences by Attorney Geraci on behalf of Plaintiff, Raymond Lutz.

The following Court's exhibit(s) are marked for identification and ADMITTED on behalf of Plaintiff:

- 68. **Memo County of Sacramento ROV 11/19/2014**
- 69. **Memo County of Sacramento ROV 06/30/2016**

10:04 am Redirect examination of Jill LaVine commences by Attorney Barry on behalf of Defendant(s), County of San Diego, Michael Vu, Helen Robbins-Meyer.

10:07 am Recross examination of Jill LaVine commences by Attorney Geraci on behalf of Plaintiff, Raymond Lutz.

10:09 am The witness is excused.

10:10 am Dean Logan is sworn and examined by Attorney Barry on behalf of Defendant(s), County of San Diego, Michael Vu, Helen Robbins-Meyer.

The following Court's exhibit(s) is marked for identification and ADMITTED on behalf of Defendant(s):

- 139. **Dean Logan CV**

10:30 am Court is in recess.

10:45 am Court reconvenes with plaintiff(s), defendant(s) and counsel present as noted above.

10:45 am Dean Logan, previously sworn, resumes the stand for further direct examination by Attorney Barry on behalf of Defendant(s), County of San Diego, Michael Vu, Helen Robbins-Meyer.

The following Court's exhibit(s), having been previously identified, is now ADMITTED on behalf of Defendant(s): 195

11:07 am Cross examination of Dean Logan commences by Attorney Geraci on behalf of Plaintiff, Raymond Lutz.

11:18 am Redirect examination of Dean Logan commences by Attorney Barry on behalf of Defendant(s), County of San Diego, Michael Vu, Helen Robbins-Meyer.

11:21 am Recross examination of Dean Logan commences by Attorney Geraci on behalf of Plaintiff, Raymond Lutz.

11:23 am The witness is excused.

Attorney Barry informs the Court he will be reading excerpts from the 9/23/16 deposition of Julie Rodewald. The Court marks the deposition excerpts as exhibit 196.

Attorney Geraci states he will also be reading counter designation excerpts of Julie Rodewald dated 9/23/16. The Court marks the counter designation excerpts as exhibit 197 and 198.

11:31 am Excerpts from the 9/23/16 deposition of Julie Rodewald are read by Attorney Barry and Attorney Karnavas. Counsel waive reporting.

11:49 am Counter designation excerpts of Julie Rodewald are read by Attorney Barry and Attorney Karnavas.

12:03 pm Court is in recess.

1:32 pm Court reconvenes with plaintiff(s), defendant(s) and counsel present as noted above.

1:32 pm Michael Vu, previously sworn, resumes the stand for further direct examination by Attorney Barry on behalf of Defendant(s), County of San Diego, Michael Vu, Helen Robbins-Meyer.

The following Court's exhibit(s) is marked for identification and ADMITTED on behalf of Defendant(s):

140. Michael Vu CV

Attorney Barry submits Sample Ballots for Upcoming Election which the Court marks as exhibit 199 (demonstrative purposes only).

The following Court's exhibit(s) is marked for identification on behalf of Defendant(s)

148. Provisional Ballot Result Report

The following Court's exhibit(s) are marked for identification and ADMITTED on behalf of Defendant(s):

146. Procedure for Processing VBM Ballots

177. Processing Mail Ballots Chart

171. Ballot Processing Chart

Attorney Barry shows exhibit 181 for demonstrative purposes only:

181. Pitney Bowes Video

The following Court's exhibit(s) are marked for identification and ADMITTED on behalf of Defendant(s):

147. Procedures for Processing Provisional Ballots

176. Provisional Ballot Envelope

The following Court's exhibit(s) is marked for identification on behalf of Defendant(s):

178. Provisional Ballot Processing

04/12

3:03 pm Court is in recess.

3:16 pm Court reconvenes with plaintiff(s), defendant(s) and counsel present as noted above.

3:16 pm Michael Vu, previously sworn, resumes the stand for further direct examination by Attorney Barry on behalf of Defendant(s), County of San Diego, Michael Vu, Helen Robbins-Meyer.

The following Court's exhibit(s), having been previously identified, is now ADMITTED on behalf of Defendant(s): 178

The following Court's exhibit(s) is marked for identification and ADMITTED on behalf of Defendant(s):

179. 1% Manual Tally Sheets

3:52 PM Cross examination of Michael Vu commences by Attorney Geraci on behalf of Plaintiff, Raymond Lutz.

4:13 pm Redirect examination of Michael Vu commences by Attorney Barry on behalf of Defendant(s), County of San Diego, Michael Vu, Helen Robbins-Meyer.

4:15 pm The witness is excused.

Court and counsel discuss witness scheduling and closing arguments.

4:20 pm Court is adjourned until 10/11/2016 at 09:00AM in Department 73.

Joel R. Wohlfeil

Judge Joel R. Wohlfeil

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO
CENTRAL

0413

MINUTE ORDER

DATE: 10/11/2016 TIME: 09:00:00 AM DEPT: C-73

JUDICIAL OFFICER PRESIDING: Joel R. Wohlfeil
CLERK: Juanita Cerda
REPORTER/ERM: Kristy Montalban CSR# 13551
BAILIFF/COURT ATTENDANT: R. Camberos

CASE NO: **37-2016-00020273-CL-MC-CTL** CASE INIT.DATE: 06/16/2016
CASE TITLE: **Lutz vs Michael Vu [IMAGED]**
CASE CATEGORY: Civil - Limited CASE TYPE: Misc Complaints - Other

EVENT TYPE: Civil Court Trial

APPEARANCES

Alan L Geraci, counsel, present for Plaintiff(s).
Raymond Lutz, Plaintiff is present.
Timothy M Barry, counsel, present for Defendant(s).
Michael Vu, Defendant, present.
Stephanie Karnavas, counsel, present for Defendant(s)

9:05 am This being the time previously set for further Court trial in the above entitled cause, having been continued from 10/6/16, all parties and counsel appear as noted above and court convenes.

Court and counsel discuss exhibit 1 and 59. Attorney Geraci informs the Court he has a correct version of the exhibit which he would like to replace. Attorney Barry has no objection. The Court will **receives into evidence** Exhibit 1.

As to exhibit 59, parties are directed to lodge exhibit 59 with the court.

Court and counsel also discuss closing arguments.

9:20 am Phillip Stark is sworn and examined by Attorney Geraci on behalf of Plaintiff, Raymond Lutz.

The following Court's exhibit(s) is marked for identification and admitted on behalf of Plaintiff:

53. Curricula Vitae Phillip Stark

9:48 am Unreported sidebar conference is held until 9:49 am, thereafter examination resumes.

10:08 am Cross examination of Phillip Stark commences by Attorney Karnavas on behalf of

Defendant(s), County of San Diego, Michael Vu, Helen Robbins-Meyer.

0414

10:30 am Court is in recess.

10:44 am Court reconvenes with plaintiff(s), defendant(s) and counsel present as noted above.

10:44 am Phillip Stark, previously sworn, resumes the stand for further cross examination by Attorney Karnavas on behalf of Defendant(s), County of San Diego, Michale Vu, Helen Robbins-Meyer.

The following Court's exhibit(s) are marked for identification on behalf of Defendant(s):

- 200. Report to the Legislature dated 3/1/2012
- 201. California Secretary of State, Post-Election Risk-Limiting Audit Pilot Program 2011-2013
- 130. Summary Report - 1% Manual Tally of Ballots and 100% Manual Tally of Early Voting Touchscreens, dated June 7, 2016
- 143. Letter dated July 19, 2007 from Los Angeles CO ROV Connie McCormick to David Jefferson
- 144. Letter dated April 6, 2009 from San Diego CO ROV Deborah Seiler to Office of Administrative Law

12:00 pm Court is in recess.

1:30 pm Court reconvenes with plaintiff(s), defendant(s) and counsel present as noted above.

1:30 pm Phillip Stark, previously sworn, resumes the stand for further Cross examination by Attorney Karnavas on behalf of Defendant(s), County of San Diego, Michael Vu, Helen Robbins-Meyer.

1:38 pm Redirect examination of Phillip Stark commences by Attorney Geraci on behalf of Plaintiff, Raymond Lutz.

1:42 pm Recross examination of Phillip Stark commences by Attorney Karnavas on behalf of Defendant(s), County of San Diego, Michael Vu, Helen Robbins-Meyer.

1:43 pm The witness is excused.

Court and counsel go over the exhibit list of all exhibits that have been admitted. Upon the Court's inquiry, Attorney Geraci and Attorney Barry move no further exhibits.

Court inquires of counsel as to closing arguments and time estimates.

Counsel would like to file written closing briefs. The Court directs counsel to file and serve their 15-page written briefs on or before 10/21/16. No courtesy copies need to be filed.

1:51 pm Attorney Geraci presents closing argument on behalf of Plaintiff.

2:10 pm Attorney Barry presents closing argument on behalf of Defendant(s).

2:46 pm Attorney Geraci presents rebuttal argument on behalf of Plaintiff.

The Court instructs counsel to provide the Court and clerk with a complete and correct set of exhibits.

0415

2:55 pm Court is adjourned in this matter.

Joel R. Wohlfeil

Judge Joel R. Wohlfeil

1 THOMAS E. MONTGOMERY, County Counsel
County of San Diego
2 By TIMOTHY M. BARRY, Chief Deputy (State Bar No. 89019)
STEPHANIE KARNAVAS, Senior Deputy (State Bar No. 255596)
3 1600 Pacific Highway, Room 355
San Diego, CA 92101-2469
4 Telephone: (619) 531-6259
E-mail: timothy.barry@sdcounty.ca.gov
5 **Exempt From Filing Fees (Gov't Code § 6103)**

6 Attorneys for Defendants

7
8 **IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA**
9 **IN AND FOR THE COUNTY OF SAN DIEGO**
10 **CENTRAL DIVISION**

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, HELEN N. ROBBINS-MEYER, San
16 Diego County Chief Administrative Officer,
SAN DIEGO COUNTY, a public entity;
17 DOES 1-10,

18 Defendants.

No. 37-2016-00020273-CL-MC-CTL
Action Filed: June 16, 2016

DEFENDANTS' CLOSING BRIEF

IMAGED FILE

Trial Date: October 4, 2016
Time: 9:00 a.m.
Dept.: 73
ICJ: Hon. Joel Wohlfell

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1 Michael Vu, sued in his official capacity as the Registrar of Voters for the County of San
 2 Diego ("Vu"), and the County of San Diego ("County") respectfully submit the following
 3 Closing Brief in opposition to plaintiffs' action for declaratory relief and petition for writ of
 4 mandate.

5 INTRODUCTION

6 The primary issue to be decided by this court is whether the Registrar of Voters properly
 7 performed the statutorily mandated 1 percent manual tally during the official canvass of the June
 8 Presidential Primary and whether the Registrar should be required to change how it performs the
 9 1 percent manual tally in the upcoming November Presidential General Election.

10 I.

11 THE POST ELECTION MANUAL TALLY

12 "During the official canvass" elections officials are required to conduct a "public manual
 13 tally of the ballots tabulated by [the vote tabulating system], including vote by mail ballots"
 14 using one of two approved methods. Elections Code¹ Section 15360. Section 15360(a)(1)
 15 permits elections officials to: complete a "manual tally of the ballots, including vote-by-mail
 16 ballots, cast at 1 percent of the precincts chosen at random" (Section 15360(a)(1)(A)); and for
 17 each race not included in the initial group of precincts, to select and count one additional
 18 precinct. Section 15360(a)(1)(B)(i). Section 15360(a)(1)(B)(ii) also provides that additional
 19 precincts may be selected at the discretion of the elections official.

20 Alternatively, elections officials may opt to conduct a two part manual tally that includes
 21 the ballots cast in 1 percent of the precincts on election-day, excluding vote by mail ("VBM")
 22 ballots, and 1 percent of the VBM ballots cast in the election in batches randomly selected by
 23 the elections official. Section 15360(a)(2).

24 Because the Registrar performed the manual tally utilizing the method set forth in Section
 25 15360(a)(1), defendants will limit its discussion below to the Registrar's implementation of the
 26 1 percent manual tally utilizing this method.

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¹ Unless otherwise noted all references are to the Elections Code.

II.

**THE REGISTRAR PROPERLY EXERCISED HIS DISCRETION IN CONDUCTING
THE 1 PERCENT MANUAL TALLY AND IT WOULD BE IMPROPER FOR THE
COURT TO ISSUE A WRIT INTERFERING WITH THE EXERCISE OF HIS
DISCRETION**

Section 15360 provides that a 1 percent manual tally “shall” be conducted using one of the methodologies described in that section. But the use of the term “shall” does not eliminate a public official’s discretion in carrying out his or her statutory duty. See *California Public Records Research, Inc. v. County of Stanislaus*, 246 Cal.App.4th 1432, 1453–54 (2016). Unless the statute requires a particular action, the official retains discretion. *Id.* In other words, an action is ministerial only if the public officer “is required to perform in a prescribed manner” and “without regard to his or her own judgment or opinion concerning the propriety of such act.” *Ridgecrest Charter School v. Sierra Sands Unified School District*, 130 Cal.App.4th 986, 1002 (2005) (citations omitted). In the context of elections, courts have repeatedly recognized that local elections officials exercise discretion in fulfilling their statutory duties relating to the processing and counting of ballots. See *Clark v. McCann*, 243 Cal.App.4th 910, 918 and 920 (2015); *Escalante v. City of Hermosa Beach*, 195 Cal.App.3d 1009, 1024–25 (1987); *Mapstead v. Anchundo*, 63 Cal.App.4th 246, 268 (1968). Likewise, local elections officials exercise discretion in fulfilling their statutory duty to conduct a 1 percent manual tally.

As relevant here, the Registrar has discretion regarding the timing of the manual tally. Section 15360 requires a manual tally “during the official canvas” that extends 31 days past the election.² § 15360 (a) (capitalization omitted) (emphasis added). But the precise timing of the manual tally within this 31 day period is left to the discretion of local elections officials. While some smaller counties may conduct the manual tally after most or all ballots are processed, larger counties like Los Angeles, San Diego and Sacramento that are faced with a much greater number of VBM and provisional ballots may conduct the manual tally before all of these ballots are processed. This practice reflects the inherent and practical problems that delaying the

² Presidential Election Returns must be canvassed and sent to the Secretary of State within 28 days after the election. Section 15375(d).

1 manual tally would pose to completing the official canvass in a timely manner. As
2 demonstrated by the evidence and testimony, not only is the processing and counting of VBM
3 and provisional ballots extremely complicated and labor intensive, the Registrar must now
4 accept VBM ballots for up to three days after the election (Section 3020(b) and voters now have
5 up to eight days after the election to sign their VBM envelope (Section 3019(f)).

6 The Registrar's exercise of discretion may result in less than all VBM ballots being
7 included in the manual tally, but the manual tally is *not* a recount. The manual tally is a *test* to
8 verify that voting machines *correctly recorded* the ballots that were counted by those particular
9 machines. See *Nguyen v. Nguyen*, 158 Cal.App.4th 1636, 1643 (2008). ("1 percent manual
10 tally' is a procedure used in California to test whether there are any discrepancies between the
11 electronic record generated by a voting machine and what is essentially a manual audit of that
12 electronic record.")

13 As demonstrated by the evidence and testimony, VBM and provisional ballots are paper
14 ballots, just as are the ballots cast at the polls, and are tabulated using the same vote tabulating
15 system used to tabulate ballots cast at the polls. Also, as demonstrated at trial, the vote
16 tabulating system is constantly tested both before and during the official canvass to ensure that
17 the vote tabulating system has not been tampered with. If the manual tally verifies that the
18 voting machines are correctly recording all ballots, including VBM ballots, these machines will
19 correctly record all VBM and provisional ballots processed after the manual tally is complete.

20 While a court may issue a writ of mandate to compel a public officer to perform a
21 ministerial, mandatory duty (see *Code Civ. Proc.*, § 1085; *City of Dinuba v. County of Tulare*,
22 41 Cal.4th 859, 868 (2007)), a writ will not lie to control the discretion conferred upon a public
23 officer absent an abuse of discretion. *Ellena v. Department of Insurance*, 230 Cal.App.4th 198,
24 205-06 (2014). No abuse of discretion has been shown here. Likewise, no entitlement to
25 declaratory relief is shown. It is also a cardinal rule of statutory construction that courts will not
26 insert words into a statute in the guise of interpretation. See *Boy Scouts of America Nat.*
27 *Foundation v. Superior Court*, 206 Cal.App.4th 428, 446 (2012). Here, Section 15360 requires

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1 that the Registrar conduct a 1 percent manual tally "during the official canvass;" it does not
2 require that the tally be conducted at a particular time (such as after all ballots are counted).

3 **III.**

4 **PLAINTIFFS' INTERPRETATION OF SECTION 15360 IS NOT SUPPORTED BY THE**
5 **LEGISLATIVE HISTORY OF SECTION 15360**

6 At trial, defendants presented testimony and evidence regarding the origin of the 1
7 percent manual tally from its inception through the current version of the law. Defendants will
8 not again delve into the lengthy history of what is now Section 15360 but rather will focus on
9 the legislative amendments to Section 15360 that were enacted in 2006 and became effective
10 January 1, 2007.

11 In 2006 two competing bills worked their way through the legislative process. SB 1235
12 was introduced by then State Senator Debra Bowen. As indicated in the legislative history, SB
13 1235 was the result of anecdotal reports that some counties were not including any absentee
14 (now referred to as vote by mail) or provisional ballots in their manual tally. (Exh. 59, p. 100.)³
15 As introduced, SB 1235 proposed to amend Section 15360 to expressly provide as follows:

16 During the official canvass of every election in which a voting system is
17 used, the official conducting the election shall conduct a public manual tally of the
18 ballots tabulated by those devices *including absent voter's [sic] ballots, provisional ballots and ballots cast in satellite locations*, cast in 1 percent of the
precincts chosen at random by the elections official. (Emphasis added.)

19 In addition, SB 1235 proposed to add language requiring election officials to use either a
20 random number generator or other method specified in regulations to be adopted by the
21 Secretary of State to randomly choose the initial precincts to be included in the manual tally.

22 As introduced, AB 2769 focused on the timing and notice requirements for the manual
23 tally; the reporting requirements for reporting the results of the manual tally to the Secretary of
24 State; and the establishment of uniform procedures for the manual tally by the Secretary of

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26 ³ Each election official who testified at trial indicated that before the 2006 amendments to
27 Section 15360 they conducted the 1% manual tally based on the semifinal official canvass, i.e. election
28 night results. Each election official also testified that their practice did not change after the
amendments. In addition, there is nothing in the text of Section 15360 or in the legislative history for
Section 15360 that would indicate that the amendments enacted in 2006 were in any way intended to
address that practice or required elections officials to change the practice of basing their 1% manual tally
on the semifinal official canvass.

1 State's office. As introduced, AB 2769 also provided that: "[t]he manual tally shall include all
2 ballots cast by voters in each of the precincts selected, including absentee, provisional, and
3 special absentee ballots." (Emphasis added.)

4 AB 2769 was amended on May 26, 2006, and the provision relating to "all ballots cast by
5 voters in each of the precincts selected, including absentee, provisional, and special absentee
6 ballots." was deleted. Similarly, on August 7, 2006, SB 1235 was amended expressly deleting
7 the reference to "*provisional ballots, and ballots cast at satellite locations*". As amended,
8 proposed Section 15360(a) read:

9 During the official canvass of every election in which a voting system is
10 used, the official conducting the election shall conduct a public manual tally of the
11 ballots tabulated by those devices *including absent voter's* [sic] ballots,
~~*provisional ballots and ballots cast in satellite locations*~~, cast in 1 percent of the
precincts chosen at random by the elections official." (Emphasis added.)

12 During the legislative process the two bills were further amended so that each bill
13 substantially mirrored the other. The Governor subsequently signed both bills into law but
14 because AB 2769 (Stats 2006, ch. 894) was chaptered after SB 1235 (Stats 2006, ch. 893) AB
15 2769 "chaptered out" SB 1235, and became the operative amendment going forward. As
16 enacted by AB 2769 Section 15360 provided that:

17 During the official canvass of every election in which a voting system is
18 used, the official conducting the election shall conduct a public manual tally of the
19 ballots tabulated by those devices including absent voters' ballots, cast in 1
percent of the precincts chosen at random by the elections official.

20 "When the Legislature chooses to omit a provision from the final version of a statute
21 which was included in an earlier version, this is strong evidence that the act as adopted should
22 not be construed to incorporate the original provision." [citation]" *UFCW & Employers Benefit*
23 *Trust v. Sutter Health* 241 Cal.App.4th 909, 927 (2015), citing *People v. Delgado* 214
24 Cal.App.4th 914, 918 (2013). See also, *Berry v. American Exp. Publishing, Inc.* 147
25 Cal.App.4th 224, 231 (2007) – "courts must not interpret a statute to include terms the
26 Legislature deleted from earlier drafts." As such, it is clear that the Legislature considered but
27 rejected the idea that provisional ballots and "all" vote by mail ballots were to be included in the
28 manual tally.

1 In support of its argument, defendants urge the court to also consider the following
2 documents contained in Exhibit 59:

- 3 p. 30 Amendments to Senate Bill No. 1235;
4 p. 39 – 44 Governor’s Office of Planning & Research dated 9/7/2006;
5 p. 48 Letter from Sen. Bowen to Governor;
6 p. 60 – 61 Department of Finance-Enrolled Bill Report dated August 21, 2006;
7 p. 119 – 120 Assembly Committee on Appropriations, Hearing date August 9, 2006;
8 p. 123 – 135 Senate Third Reading, As Amended August 21, 2006;
9 p. 126 – 130 Senate Rule Committee – Unfinished Business, dated August 26, 2006; and
10 p. 155 – 156 Department of Finance Bill Analysis dated August 8, 2006.

11 Defendants also note that pages 3 through 14 of Exhibit 59 expressly relate to another
12 bill, AB 707, which was never enacted by the Legislature and therefore never became law.
13 Defendants question the relevance of these documents to the issues before the court.

14 IV.

15 **PLAINTIFFS’ INTERPRETATION OF SECTION 15360 IS NOT SUPPORTED BY THE** 16 **EXPRESS LANGUAGE OF THE STATUTE**

17 The interpretation of Section 15360 urged by plaintiffs would require the court to reinsert
18 the words “provisional” and “all” back into the text of Section 15360. Such an interpretation
19 would be contrary to the rules of statutory interpretation and should not be adopted by the court.
20 When interpreting a statute the court is “to ascertain and declare what is in terms or in substance
21 contained therein not to insert what has been omitted.” CCP § 1858.

22 In this case, the Legislature clearly considered and rejected the inclusion of provisional
23 ballots in the 1 percent manual tally. It would therefore be error for the court to read the word
24 “provisional” into the text of Section 15360.

25 It would also be error for the court to insert the word “all” into the text of Section 15360
26 with reference to VBM ballots when that word does not actually appear in that context. On the
27 other hand, when the Legislature intended to include the word “all” in Section 15360, the

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1 Legislature did. Section 15360(b) which pertains to ballots cast on direct recording electronic
2 (“DRE”) voting systems provides that:

3 ...the official conducting the election shall either include those ballots in the
4 manual tally conducted pursuant to paragraph (1) or (2) of subdivision (a) or
5 conduct a public manual tally of those ballots cast on no fewer than 1 percent of
6 all the [DRE] voting machines used in that election chosen at random by the
7 elections official.” (Emphasis added.)⁴

8 Where drafters of a statute have used a term in one place in a statute and omitted it from
9 another place in the same statute, the term should not be inferred where it has been omitted.
10 *Robertson v. Rodriguez*, 36 Cal.App.4th 347, 361 (1995).

11 V.

12 **PLAINTIFFS’ INTERPRETATION OF SECTION 15360 IS CONTRARY TO THE
13 INTENT AND PURPOSE OF SECTION 15360**

14 The stated purpose of the manual tally is “to verify the accuracy of the automated count.”
15 Section 336.5. Ms. Seiler, in her testimony, reaffirmed that the purpose of the manual tally is to
16 detect whether there are any coding errors in the vote tabulating system. And, as expressly
17 stated in Section 15360, the manual tally is to occur “[d]uring the official canvass”
18 simultaneously with the processing and tabulation of VBM and provisional ballots. In
19 determining the intent and purpose of Section 15360, the court must also consider the overall
20 statutory scheme in which Section 15360 appears. “A statute is not to be read in isolation; it
21 must be construed with related statutes and considered in the context of the statutory
22 framework.” *Hicks v. E.T. Legg & Associates*, 89 Cal.App.4th 496, 505 (2001).

23 Plaintiffs argued, without any factual support, that the real utility of Section 15360 is to
24 detect whether the voting system has been hacked by a corrupt election worker or an outside
25 third party with the assistance of a corrupt election worker. Plaintiffs went so far as to assert
26 that the manual tally is the only tool available to voters to detect whether the voting system has
27 been hacked. Plaintiffs argued that the random selection of precincts for the manual tally must
28 occur after all VBM and provisional ballots have been processed and counted in order to deter

⁴ As testified to by Mr. Vu, the Registrar’s office, exercising the discretion granted pursuant to
Section 15360(a)(1)(B)(ii) remakes 100% of the ballots cast on DRE voting machines and includes
100% of those ballots in the 1% manual tally.

1 “fraudsters” from hacking into the voting system and changing the results of an election contest.
2 Plaintiffs further claim that if *all* of the ballots are not included in the random selection for the
3 manual tally, then the results of the election are unreliable.

4 On the other hand, defendants presented detailed evidence and testimony demonstrating
5 that the 1 percent manual tally is but one small component of the official canvass. Defendants
6 demonstrated that the official canvass is both complex and extremely labor intensive, and that
7 the entire canvass period is needed to complete all of the tasks that are required by the official
8 canvass. In addition, defendants presented unrefuted evidence of the extensive security
9 measures the Registrar has in place to protect the integrity of the election process. Moreover,
10 plaintiffs’ own expert, Dr. Stark, admitted that the 1 percent manual tally is wholly ineffective
11 and inefficient at confirming election results—and if that was the intended purpose of the tally, it
12 does a poor job of doing so.

13 While plaintiffs may believe that the real purpose of Section 15360 is to detect fraud, that
14 is not its function. Plaintiffs’ interpretation of Section 15360 would require the court to ignore
15 the stated purpose of Section 15360; ignore the overarching language of Section 15360(a) that
16 the manual tally is to occur during the official canvass; and ignore the statutory scheme in which
17 Section 15360 is contained. Such interpretation should be rejected outright by the court.

18 VI.

19 **PLAINTIFFS FAILED TO PRESENT EVIDENCE THAT WOULD ENTITLE** 20 **THEM TO RELIEF**

21 While plaintiffs argue that the manner in which the Registrar has conducted the 1 percent
22 manual tally is erroneous, they have not clearly identified what it is exactly they are asking the
23 court to do about it. In their Second Amended Complaint (“SAC”) plaintiffs ask the court to
24 issue an order on their declaratory relief claim requiring the Registrar to:

- 25 • include a “larger sample of VBM ballots...in the manual tally process”
- 26 • “produce data files corresponding to the ‘report of the votes cast’ for batches in
27 the VBM manual tally;

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- 1 • “document their procedures regarding VBM ballots in the one percent manual
- 2 tally” which procedures must conform to the conditions dictated by plaintiffs; and
- 3 • restart the manual tally “for all VBM and provisional ballots, including a new
- 4 random selection after the results have been fixed”.

5 As an initial matter, in requesting the above relief, plaintiffs misapprehend the purpose of an
6 action for declaratory relief, which is “to be used in the interests of preventive justice, to declare
7 rights rather than execute them.” *County of San Diego v. State of California*, 164 Cal.App.4th
8 580, 607-608 (2008)(citations omitted.) Second, plaintiffs can point to no law or other authority
9 that would require the Registrar to do these things. There is certainly nothing in Section 15360,
10 for instance, that requires the Registrar to produce data files or document its procedures. Third,
11 while the interpretation of a statute may be proper matter for declaratory relief, plaintiffs are
12 asking this court to interfere with the Registrar’s exercise of discretion, implicit in the statute, in
13 determining the appropriate specific process for conducting the manual tally. This is improper.
14 *See Hagopian v. State of California*, 223 Cal.App.4th 349, 375 (2014) (citing *Common Cause v.*
15 *Board of Supervisors*, 49 Cal.3d 432, 445 (1989) for the proposition that a “public entity may
16 not be compelled to exercise discretion in a particular manner.”).

17 As respects the interpretation of Section 15360 and plaintiffs’ request that this court issue
18 a writ mandating the Registrar “fully comply” with the statute, it is again, unclear what plaintiffs
19 want. In seeking a writ of mandate, it is plaintiffs’ burden to demonstrate that the Registrar has
20 failed to perform a clear, present, and ministerial duty. *See Excelsior College v. Cal. Board of*
21 *Registered Nursing*, 136 Cal. App. 4th 1218, 1237 (2006); *Cty. of San Diego v. State of Calif.*,
22 164 Cal. App. 4th 580, 593 (2008). “A ministerial duty is an obligation to perform a specific act
23 in a manner prescribed by law whenever a given state of facts exists, without regard to any
24 personal judgment as to the propriety of the act.” *People v. Picklesimer*, 48 Cal. 4th 330, 340
25 (2010); *see also Cty. of San Diego*, 164 Cal.App.4th at 593.

26 In the SAC, plaintiffs assert “. . . a larger sample of VBM ballots must be included in
27 the manual tally process”. (SAC p. 10, l. 18-19). In Plaintiffs’ Reply Memorandum of Points
28 and Authorities in Support of Injunctive Relief, however, plaintiffs concede they “are not

1 suggesting that the Registrar wait until all of the vote-by-mail ballots have been processed and
2 included in the official canvass.” (Plaintiff’s Reply, p. 11, l. 28 – p. 12, l-2.); In an email sent to
3 elections officials all around the state during the course of this litigation, plaintiff Lutz stated:–
4 “We believe that the provisionals SHOULD be included” Exhibit 195.

5 In short, while plaintiffs contend the Registrar’s method of conducting the manual tally
6 does not comply with Section 15360, they have not clearly articulated what they contend would
7 constitute “compliance” with the law—much less demonstrated convincing legal authority that
8 would support the issuance of a writ instructing the Registrar to perform the tally in a different
9 manner. In contrast, at trial, defendants put on clear and unrefuted evidence that the manner in
10 which the Registrar has chosen to comply with his duty to conduct the manual tally fully
11 satisfies the intent and purpose of Section 15360 under a reasonable interpretation of the law.
12 Accordingly, the court should decline to issue a writ of mandate that would interfere with the
13 Registrar’s implicit discretion to conduct the manual tally in a manner that he has determined is
14 appropriate for the County of San Diego.

15 Finally, to the extent plaintiffs seek a writ requiring the Registrar to go back and redo the
16 manual tally for the June Presidential Primary—the results of which election have long been
17 certified—plaintiffs cite no legal authority for why such a request is not moot, and they offered
18 no evidence at trial of any benefit that would result from a “do over.” In other words, plaintiffs
19 have not met their burden to establish a “beneficial interest” that would compel such an idle act.

20 CONCLUSION

21 Plaintiffs believe that Section 15360 is to be used as a tool in detecting nefarious conduct
22 by “fraudsters”. That is not the function of the manual tally. As stated by the Legislature, the
23 purpose of Section 15360 is to verify the accuracy of the automated vote tabulating system. The
24 manner in which the Registrar conducts the manual tally satisfies both the intent and purpose of
25 Section 15360. In contrast, plaintiffs urge the court to adopt an interpretation of Section 15360

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1 that is not supported by the express language of the statute, the legislative history, or the facts
2 and which would run contrary to the intended purpose of the manual tally. For the reasons
3 stated above, defendants respectfully request the court to deny the relief requested by plaintiffs.

4 DATED: October 21, 2016

THOMAS E. MONTGOMERY, County Counsel

5
6 By: /s/Timothy M. Barry
7 TIMOTHY M. BARRY, Chief Deputy
8 Attorneys for Defendants
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Citizens Oversight, Inc., et al, v. Michael Vu, et al;
San Diego Superior Court Case No. 37-2016-00020273-CL-MC-CTL

DECLARATION OF SERVICE

I, the undersigned, declare under penalty of perjury that I am over the age of eighteen years and not a party to the case; I am employed in the County of San Diego, California. My business address is 1600 Pacific Highway, Room 355, San Diego, California, 92101.

On October 21, 2016, I served the following documents:

1. DEFENDANTS' CLOSING BRIEF.

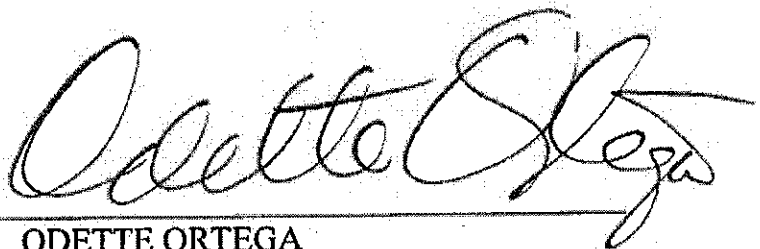
In the following manner:

- (BY MAIL)** By causing a true copy thereof, enclosed in a sealed envelope, with postage fully prepaid, for each addressee named below and depositing each in the U. S. Mail at San Diego, California.

Alan L. Geraci, Esq.
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Executed on October 21, 2016, at San Diego, California.

By:


ODETTE ORTEGA

ELECTRONICALLY FILED

Superior Court of California,
County of San Diego

10/24/2016 at 08:00:00 AM

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9 **SUPERIOR COURT OF CALIFORNIA**
10 **COUNTY OF SAN DIEGO—CENTRAL DIVISION**

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

14 Plaintiffs,)

15 vs.)

16 MICHAEL VU, San Diego Registrar of)
17 Voters; HELEN N. ROBBINS-MEYER,)
18 San Diego County Chief Administrative)
19 Officer; COUNTY OF SAN DIEGO, a)
20 public entity; DOES 1-10,)

21 Defendants.)

CASE NO: 37-2016-00020273-CL-MC-CTL

PLAINTIFFS' CLOSING BRIEF

Hon. Joel R. Wohlfeil, Judge

Complaint filed: June 16, 2016

Trial Date: October 4, 2016

Hearing Time: 9:00 a.m.

Dept: C-73

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1 Plaintiffs submit the following Closing Brief for consideration of issues which were
2 presented during trial.

3 **I.**

4 **INTRODUCTION**

5 The evidentiary trial for this matter concluded on October 11, 2011. The Court invited
6 additional closing by brief to address the evidence and the interpretation of Elections Code
7 Section 15360 at-issue in this case.

8 **II.**

9 **SUMMARY OF CASE**

10 Plaintiff Raymond Lutz filed this action for Declaratory Relief on June 16, 2016 shortly
11 after the June 7, 2016, Presidential Primary Election, when the San Diego Registrar of Voters
12 declined to follow the audit process as it is set forth and mandated under California law.
13 California Elections Code Section 15360 requires each county registrar of voters to conduct a
14 1% manual tally of ballots cast at the precinct voting locations and vote-by-mail ballots during
15 the post-election canvass prior to certification of the election. On June 23, 2016, Plaintiffs'
16 counsel appeared and filed a First Amended Complaint adding Citizens Oversight, Inc. (a public
17 interest organization focusing on election integrity, among other issues) as a Plaintiff in this
18 case, and adding a cause of action for injunctive relief.

19 The Court ordered an expedited hearing on the request for a preliminary injunction
20 recognizing that the San Diego Registrar would certify the results on or before July 7, 2016. On
21 July 6, 2016, the parties presented a case for preliminary injunctive relief and submitted the
22 matter to the Court.

23 In its Minute Order entered on July 25, 2016, the Court issued a ruling on Plaintiffs'
24 Motion for Preliminary Injunction. The Court took judicial notice that the Secretary of State had
25 already certified the election results for the State of California by July 15, 2016, rendering an
26 injunction moot. The Court further provided guidance by stating that it "is cognizant of the
27 importance and exigent circumstances in this action, thereby necessitating an expedited ruling in
28 this matter." (Minute Order, July 25, 2016, page 1) The Court found that "Plaintiffs provide

1 evidence that Defendants are not complying with the elections code by failing to include all
 2 ballots cast in 1 percent of the precincts chosen at random. Specifically, Plaintiffs demonstrate
 3 Defendants are in violation of the statute by 1) not including any provisional ballots in the manual
 4 tally, and 2) by not including all vote by mail ballots." (*Id.* at page 2) The Court concluded that
 5 "in reviewing the legislative intent and explicit text of section 15360, there is a reasonable
 6 probability Plaintiffs will prevail. Section 15360 requires election officials to include
 7 Vote-by-Mail ballots cast and provisional ballots when conducting the one percent manual tally."
 8 (*Id.*)

9 Plaintiffs filed (with the stipulation of the defendants) a Second Amended Complaint on
 10 August 8, 2016. The Second Amended Complaint added a cause of action for Mandamus and is
 11 the operative pleading for the case. The Court scheduled an expedited trial for the matter so that
 12 the matter could be submitted and decided before the November 2016 General Election.

13 III.

14 SUMMARY OF ARGUMENTS

15 Although this case presents a simple case of statutory interpretation, the larger issue that
 16 evolved during trial is to identify and effectuate the primary purpose of the statute. Plaintiff
 17 argues that the purpose of a post-election audit is to serve as a basic and effective means of
 18 promoting and ensuring public confidence in the verifiable accuracy and integrity of elections.
 19 In fact, there are a number of goals that a post-election audit may serve, and by emphasizing one
 20 purely technical goal to the exclusion of all the larger policy goals, the San Diego Registrar of
 21 Voters makes it impossible to fulfill that fundamental objective. All of these goals are inherent
 22 in Elections Code Section 336.5 which indicates that the function and purpose of the 1% manual
 23 tally are ". . . to verify the accuracy of the automated count."¹ (Emphasis added.) Among the
 24 goals an audit can fulfill are:

26 ¹ "One percent manual tally" is the public process of manually tallying votes in 1 percent
 27 of the precincts, selected at random by the elections official, and in one precinct for each race not
 28 included in the randomly selected precincts. This procedure is conducted during the official
 canvass to verify the accuracy of the automated count. Elections Code § 336.5

- 1 • creating an appropriate level of public confidence in the results of an election;
- 2 • deterring fraud against the voting system;
- 3 • detecting and providing information about large-scale, systemic errors;
- 4 • providing feedback that will allow for the improvement of voting technology and
- 5 election administration in future years;
- 6 • providing additional incentives and benchmarks for elections staff to reach higher
- 7 standards of accuracy; and
- 8 • confirming, to a high level of confidence, that a complete manual recount would
- 9 not change the outcome of the race.

10 Because this is a statutory interpretation matter requiring mandamus and declaratory
11 relief, it was never Plaintiffs' objective to prove that any one of the statutory preventive goals
12 were indeed occurring or had occurred, but simply to outline the prophylactic purposes of the
13 statute itself and why it is important that the Registrar of Voters comply with the full intent of
14 the statute.

15 IV.

16 SUMMARY OF THE JUNE 7, 2016, 17 PRESIDENTIAL PRIMARY ELECTION

18 The last statewide California election was on June 7, 2016. This election included a
19 Presidential Primary Election for the major political parties. The data from this election in
20 evidence is undisputed (Exhibit 19; Testimony of Michael Vu). It may be summarized as
21 follows:

22 There are 1.52 million registered voters in San Diego County. There were 775,930
23 ballots cast in 184 contests involving 468 candidates and 52 state and local propositions. Of the
24 ballots cast, approximately 490,000 were mail ballots (referred to herein as "Vote-By-Mail" or
25 "VBM"). This represented 62% of the total ballots cast. Approximately 256,000 VBM ballots
26 were included in the 1% Manual Tally done by the San Diego County Registrar thereby leaving
27 out the remaining 234,000 VBM ballots entirely. There were 75,386 provisional ballots cast at
28 the 1522 county precincts, of which 68,653 were ultimately verified and counted in the Official

1 Canvass but were not included in the 1% Manual Tally. (Testimony of Michael Vu)

2 Thus, by the numbers, 234,000 VBM plus 68,653 provisional ballots cast at the precincts
3 (a combined 302,653 ballots) — more than 39% of the 775,930 total votes cast — were omitted
4 entirely from the 1% Manual Tally conducted by defendants.

5 V.

6 **THE EVIDENCE CONCLUSIVELY SHOWS THAT THE**
7 **SAN DIEGO COUNTY REGISTRAR OF VOTERS VIOLATED**
8 **AND WILL CONTINUE TO VIOLATE ELECTIONS CODE SECTION 15360**

9 The undisputed evidence at trial showed that it is the policy and procedure of the San
10 Diego Registrar to include only non provisional ballots cast by the close of the precinct polling
11 places and the corresponding VBM ballots received and fully tabulated by the end of election
12 night in the manual tally of the selected 1% of all precincts. The testimony was that this is
13 referred to as the "semifinal unofficial result" or "semifinal official canvass".² (Elections Code
14 Section 353.5; Testimonies of Vu, Wallis, Lutz and Stark). Thus, it remains undisputed that the
15 Registrar of Voters violated Elections Code Section 15360 for the June 7, 2016 election and will
16 continue to do so without judicial intervention by mandamus and/or declaratory relief. There is
17 no dispute in the evidence about what the San Diego Registrar of Voters has been doing and
18 intends to continue doing procedurally, only a dispute about what the statute requires the
19 Registrar to do pursuant to the required 1% Manual Tally.

20 VI.

21 **THE LEGISLATURE UNEQUIVOCALLY INTENDED**
22 **THAT ALL BALLOTS CAST BE INCLUDED**
23 **IN THE 1% MANUAL TALLY**

24 Election Code Section 15360 may be analyzed intrinsically by the plain meaning of the
25 statute or extrinsically by the legislative intent of the statute.

26
27 ² The "semifinal official canvass" is the public process of collecting, processing, and
28 tallying ballots and, for state or statewide elections, reporting results to the Secretary of State on
election night. The semifinal official canvass may include some or all of the vote by mail and
provisional vote totals. Elections Code Section 353.5

1 **A. Intrinsic analysis of the statute: The plain meaning of the statute requires**
 2 **that all ballots be the subject of the 1% manual tally.**

3 Election Code section 15360 prescribes the 1% manual tally audit procedure. Section
 4 15360(a) begins as follows:

5 15360(a) During the official canvass of every election in
 6 which a voting system is used, the official conducting the
 7 election shall conduct a public manual tally of the ballots
 8 tabulated by those devices, including vote by mail ballots,
 9 using either of the following methods:

10 (1) (A) A public manual tally of the ballots, including vote by mail ballots,
 11 cast in 1 percent of the precincts chosen at random by the elections
 12 official. If 1 percent of the precincts is less than one whole precinct, the
 13 tally shall be conducted in one precinct chosen at random by the elections
 14 official.

15 Furthermore, Section 15360 unambiguously states that "not less than 1 percent of the
 16 VBM ballots cast" must be included in the 1% manual tally. Section 15360(a)(2)(B)(I). This
 17 quantity must be calculated based on the total number of VBM ballots cast, not the number of
 18 VBM ballots counted by the end of election night. 1% of the total number of VBM ballots
 19 counted by the end of election night is, as was shown in trial, substantially less than 1% of the
 20 total number of VBM ballots cast, which includes those ultimately to be counted after that point
 21 and then added to the election night subtotal. Thus, including a mere 1% of the total number of
 22 VBM ballots counted by election night is in direct violation of the statutory requirement that "not
 23 less than 1% of the VBM ballots cast in the election" be counted. Section 15360(a)(2)(B)(I)
 24 (emphasis added). The explicit purpose of the 1% tally – "to verify the accuracy of the
 25 automated count," both requires and reinforces this conclusion. Elections Code Section 336.5.

26 **B. Extrinsic Analysis: The legislative history and intent corroborate the plain**
 27 **meaning of the statute.**

28 Plaintiffs' Exhibit 59 presents the Secretary of State Archive for SB1235 and AB2769
 which were the legislative steps leading up to the robust changes to Elections Code §15360 and
 provide insight into the legislative history and intent. Following is a summary of Exhibit 59:

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Page	Date	Title	Description
1	2/6/2006	SB1235	Initial version says: "This bill would provide that the tallied ballots include the absent voter's ballots, provisional ballots, and ballots cast at satellite locations."
4	2/14/2006	AB707 (Forerunner of SB1235 and first to broach the issue of VBM ballots to be excluded from the 1% manual tally)	"The votes on absentee ballots are no less valid or important than the votes cast at the polling place, and the potential for the vote to be incorrectly tabulated on an absentee ballot is just as likely as a vote cast in a traditional polling booth. Therefore, it makes no sense to exclude absentee ballots, provisional ballots and ballots cast at satellite locations from the 1% manual tally. By excluding them from the manual tally, there is no way to verify that the votes cast on them are being recorded accurately. Moreover, in the event that counties are authorized to conduct an all-mail election, this provision would ensure that the manual tally is still conducted in those counties."
11	2/14/2006	Senate Committee on Elections, Reapportionment and Constitutional Amendments (ER&C)	"This bill would clarify for all elections, not just the June 6, 2006 primary election, that the manually tallied ballots include absent voter's ballots, provisional ballots, and ballots cast at satellite locations for the randomly chosen precincts."
15		California Secretary of State Bruce McPherson "One Percent Manual Tally Uniform Procedure"	"This proposal also requires a county election official to include all ballots cast in a precinct in the one percent manual tally. This means that a county will need to include any ballots cast at the polls, via absentee ballot, provisional voters, and any ballots cast on direct recording electronic (DRE) voting machines."
17		CASOS Proposal for Legislation -1% Manual Tally Procedure	"The manual tally shall include all ballots cast by voters in each of the precincts selected, including absentee, provisional, and special absentee ballots."
19	2/24/2006	AB2769 (Benoit)	"(e) The manual tally shall include all ballots cast by voters in each of the precincts selected, including absentee, provisional, and special absentee ballots."
20	2/24/2006	Assembly Republican Bill Analysis, Elections and	"5. Requires the manual tally to include all ballots cast by voters in each of the precincts selected, including absentee, provisional, and special absentee ballots."

1	22	4/19/2006	Senate ER&C	"SB 1235 clarifies that the 1% manual recount of automated election results must not only include votes cast at the polls, but also absentee ballots, provisional ballots, and ballots cast at any early voting sites."
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3				
4	23	5/24/2006	Letter from SOS McPherson to Bowden, Chair of the Senate ER&C Re: SB1235 (Bowen) 1% manual tally	The CASOS proposed additional clarification, mostly to expand the scope of 15360. They wanted: <ul style="list-style-type: none"> • Public process • Verifiably random • Greater uniformity and transparency • wanted the 1% manual tally report included in the certification, including any variances • wanted to expand the scope of 15360 to specify the entire process of the 1% manual tally instead of only addressing the manner in which precincts are selected.
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12	25, 26	6/13/2006	California Association of Clerks and Election Officials (CACEO) letter to Debra Bowen regarding SB1235	"The committee has voted to support his bill if amended" "The CACEO supports the concept of your bill to include the Absentee and Provisional ballot[sic] in the 1% manual recount. However, it needs to be amended to provide that the SOS amend the voting system use procedures to address inclusion of absentee and provisional ballots in the manual tally of votes cast for each election in order to verify the accuracy of the votes tabulated by electronic or mechanical voting systems. This would better speak to the issue of verifying vote tabulations with the time constraint in the current law."
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19	28	6/27/2006	Assembly Committee on Elections and Redistricting	3. Elections officials concerns. "... The time it takes to process absentee and provisional ballots could delay the start of the one percent manual tally by up to two weeks and "force the registrars to be out of compliance with state law on the 28 day canvass period."CACEO requests the bill to be amended to require the SOS to amend the voting system use procedures to address the inclusion of absentee ballots and provisional ballots in the manual tally of votes case for each election in order to verify the accuracy of the votes tabulated by electronic or mechanical voting systems."
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1	30	7/20/2006	Amendments to SB1235	Amendment 2: On page 2, lines 6 & 7, strike out "provisional ballots and ballots cast at satellite locations" Amendment 3: On page 2, between lines 17 and 18, insert: "If absentee ballots are cast on a DRE voting system at the office of an election official or at a satellite location..."
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6	31	8/21/2006	Hand-marked copy of "Third Reading" document	Changes made to the bill seemed to reflect the crossed-out opposition. This appears to be a language clean-up as provisional are cast at polling locations, and with the satellite locations issue expanded, it was not necessary to explicitly state that provisional ballots could not be included.
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10	35	8/21/2006	Assembly Republican Bill Analysis- Elections and Redistricting Committee SB1235	"1. The California Assn of Clerks and Elections Officials states that the time it takes to process absentee and provisional ballots could delay the state of the one-percent manual tally by up to two weeks and force the Registrars to be out of compliance with state law on the 28 day canvass period."
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15	37, 38	9/7/2006	Enrolled Bill Memorandum to Governor SB1235, Senate 38-0, Assembly 79-0	"Summary: This bill establishes a uniform procedure for elections officials to conduct the 1% manual tally of the ballots including (1) the requirement that absentee ballots, provisional ballots, and ballots cast at satellite locations be included in the tally of ballots..." Page 38 "This bill stems from anecdotal reports that some counties routinely exclude absent voter and provisional ballots from the one percent manual tally process." Page 38 "The use of provisional ballots has also increased in recent years. Excluding these ballots from the manual tally severely lessens the value and the accuracy of this post-election audit."
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23	41-43	9/7/2006	Governor's Office of Planning and Research	"This bill would expand the provisions for conducting the 1% manual tally by: 1. clarifying that the 1% manual tally must not only include votes cast at the polls, but also absentee ballots, ballots cast at the registrar's office, and ballots cast at early voting sites." "Support/Opposition" This bill is supported by the California Association of Clerks and Elections Officials (support if amended) and the California Election Protection Network. The California Association of Clerks and
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1			Election s Officials states that it supports the concept in this bill to include absentee ballots in the 1% manual tally, but believes the approach taken in this bill is not the best way to go about implementing it and would create too many logistical problems.”
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5	45	8/30/2006	Letter from SOS McPherson to Governor Schwarzenegger Re: SB1235 (Bowen) 1% manual tally
6			“I respectfully request your signature on Senate Bill 1235, which amends the current procedure for the 1% manual tally to specifically include absentee, provisional, and early vote ballots, and to specify a procedure for selection of precincts to be included in the 1% manual tally”
7			
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9	48	9/11/2006	Letter from Sen Bowen, Chair of Senate ER&C
10			“SB1235 clarifies that the 1% manual recount of automated election results must not only include votes cast at polls, but also absentee and ballots cast at any early voting sites.” “Some counties have been accused of routinely excluding absentee and provisional ballots from this process and “cherry picking” precincts in order to avoid discrepancies.”
11			
12			
13	49	9/30/2006	Final Version SB1235
14			
15	51	9/30/2006	Final Version AB2769
16			
17	53	6/29/2011	Final Version AB985
18			Addressing the concern of Election Officials (See Page 35) allowing the 1% manual tally of vote-by-mail ballots to be done by “batches” rather than by precinct
19			

20 The foregoing legislative history makes it readily apparent that throughout the process of
21 formulating the legislation, there was a consistent understanding among the drafters that all
22 provisional ballots and VBM ballots (previously called "absentee ballots") were to be included in
23 the population of ballots from which random sampling for the 1% manual tally was to be taken.
24 The logic of this view of the legislative intent is reinforced by trending evidence that more voters
25 are voting by mail every election and that provisional ballots will also naturally increase because
26 most provisional ballots are caused by voters not surrendering mail ballots when appearing at the
27 precinct polling places on election day. (Testimony of Michael Vu) Would defendants contend
28 that at some future time when a substantial majority of voters might have opted to vote by mail, a

1 small minority of ballots cast would be sufficient from which to draw a 1% sample to reliably
 2 verify the absence of inaccuracies, errors, or fraud?

3 An exhaustive review of the legislative history of SB1235 as provided by the Secretary of
 4 State Archives reveals that throughout the history of consideration of the legislation, there
 5 appears no explicit opposition to the inclusion of provisional ballots in the scope of the 1%
 6 manual tally. The revision of August 7, 2006, moved and expanded treatment of how ballots at
 7 satellite locations should be treated. The words "provisional ballots" were stricken simply in
 8 order to remove redundancy from the sentence. Provisional ballots are ballots cast at precincts
 9 and once they are validated, are equivalent to any non provisional ballot cast at the precinct.

10 VII.

11 EXPERT STATISTICAL ANALYSIS

12 SUPPORTS THE BASIS FOR ELECTION CODE SECTION 15360

13 Plaintiffs offered additional evidence at trial to support intrinsic and extrinsic
 14 statutory interpretation through the testimony of Phillip Stark, Ph.D., Professor of Statistics from
 15 the University of California at Berkeley.³ Professor Stark is a highly competent and renowned
 16 legislative expert in the area of election integrity.⁴ He invented and has evaluated the "Risk
 17 Limiting Audit Program" to continue to improve the auditing process beyond the 1% manual
 18 tally which the law now requires.⁵ Saliently, Professor Stark testified:

19
 20
 21 ³ Exhibit 53 represents Professor Stark's Curricula Vitae.

22 ⁴ Professor Stark participated in the Post-Election Audit Standards Working Group in
 23 order to look at how the audits were conducted in California and elsewhere, and tried to figure
 out what were best practices.

24 ⁵ "... the basic idea is what an audit should accomplish is to give you confidence when it
 25 is done that the outcome of the contest that are under audit are correct. So if going in, there is a
 26 contest with an incorrect result, coming out of the audit that should have been corrected.
 27 Generally by law, the only way to correct an incorrect result is by a complete hand count. So
 28 risk-limiting audits have some chance of leading to a full hand count to set the record straight. If
 the results were inaccurate in the sense that the wrong people, the wrong individuals or positions
 were deemed to have won, you can think of a risk-limiting audit as an intelligent incremental
 recount that stops the recount as soon as it comes very clear that it's pointless, because the
 recount will just confirm the winners that were already named."

1 **Q. What errors can be detected during the 1 percent manual tally process?**

2 A. A variety of kinds of errors can be detected ranging from problems with the chain of
3 custody, for instance, if the electronic record doesn't include some batch of ballots that
4 should have been included, or conversely, you know, if the paper can't be found, the
5 correspondence to some electronic results, mechanical issues, mispicks, misfeeds,
6 double picks, things like that, in the scanners, if it's a scanner-based system. Some
7 kinds of ballot programming errors or ballot definition errors, for instance, if accidentally
8 when the equipment was configured two candidate names or contests were swapped,
9 calibration errors in the scanners, problems with the scanners picking up paper that's
10 not the length that's expected, various kinds of voter errors, voters mismarking ballots or
11 in a way that the equipment can't pick up reliably, that can be as odd as voters marking
12 ballots using gel pens which have a kind of ink that scanners don't pick up or didn't pick
13 up historically. It can pick up some kinds of hacking. It can pick up -- basically, if the
14 audit trail itself is reliable, if there is good -- if there has been good physical chain of
15 custody, it can pick up anything that would have affected the outcome. The chance that
16 it picks it up depends on how widespread the problem is, whether it's concentrated to
17 some subset of ballots and not limited, spread out throughout all the ballots of the
18 election.

19 **Q. How about misfeasance or malfeasance of employees?**

20 A. Some kinds, yes, for instance, hacking, whether that's inside or outside or hacking of
21 the tabulation system or the voting machines themselves.

22 **Q. Or a general compromise to the central tabulating system?**

23 A. Yes.

24 Ultimately, the laws of statistics find their proper place in the proper use of a 1% manual
25 tally to verify the automated count. Elections Code Section 336.5 Professor Stark explains the
26 statistical law of "frame bias" by doing the 1% manual tally in the manner in which the San
27 Diego Registrar of Voters chooses to do it:
28

1 **Q. When is it important to conduct the random selection?**

2 A. Oh, you shouldn't draw the random sample from any collection of results that are not
3 final but for the audit. So there should basically be an all but certified statement of votes
4 counted for. I should be careful with that, it's a term of art. But sort of tally for the
5 batches from which the sample is to be drawn. So if the results are going to be drawn in
6 a precinct-based way, then the results need to be final for every precinct before you
7 draw the sample. If you are drawing separate samples from vote by mail and ballots
8 cast in person, you could, for example, start to draw the sample of the vote-by-mail
9 ballots before the ballots cast in person have been completely tabulated provided the
10 vote-by-mail ballots have been completely tabulated.

11 **Q. From a statistical standpoint, is it proper to conduct the 1 percent manual tally**
12 **before you verified and included the verified provisional ballots in the pool or**
13 **sample?**

14 A. To omit any ballots that are contributing – that ultimately will contribute to the
15 outcome of the contest from scrutiny impairs the ability of the 1 percent manual tally to
16 find problems. An analogy would be it's like performing a final safety inspection on an
17 automobile before the rear brakes have been installed. You can do it, but you're leaving
18 something out.

19 **Q. That would be the same case if you've left out some part of the vote-by-mail**
20 **ballots?**

21 A. Yes, sir, would not be a check of the election, it would be a check of part of the
22 election.

23 **VIII.**

24 **PLAINTIFFS HAVE MADE THEIR CASE**

25 **AND EXCEEDED THEIR BURDEN OF PROOF**

26 Plaintiffs have pleaded two causes of action: Declaratory Relief (Code of Civil
27 Procedure Section 1060) and Mandamus (Code of Civil Procedure Section 1085).

28

1 **A. Declaratory Relief:**

2 The Court's statutory interpretation of the existing 1% manual tally law will guide future
3 electoral processes. Declaratory Relief is the appropriate remedy. It was said in *Babb v.*
4 *Superior Court* (1971) 3 Cal. 3d 841, 848 that "(t)he purpose of a judicial declaration of rights in
5 advance of an actual tortious incident is to enable the parties to shape their conduct so as to
6 avoid a breach. '[D]eclaratory procedure operates prospectively, and not merely for the redress of
7 past wrongs. It serves to set controversies at rest before they lead to repudiation of obligations,
8 invasion of rights or commission of wrongs; in short, the remedy is to be used in the interests of
9 preventive justice, to declare rights rather than to execute them.' (*Travers v. Loudon* (1967) 254
10 Cal. App. 2d 926, 931; *Bachis v. State Farm Mutual Auto. Ins. Co.* (1968) 265 Cal. App. 2d 722,
11 727-728. . . ."

12 **B. Mandamus:**

13 Plaintiffs' request for a writ of mandate finding that the San Diego County Registrar of
14 Voters canvassed and certified the past election without having first performed a proper 1%
15 manual tally should be granted, and the Court should enjoin the Registrar from repeating such
16 unlawful conduct in the future performance of his duties. (Elections Code Section 13314)

17 The purpose of a traditional writ of mandate under CCP §1085 is "to compel a clear,
18 present, and usually ministerial duty on the part of the respondent." (CEB, California Civil Writ
19 Practice, §2.5) "A ministerial duty is one that is required to be performed in a prescribed
20 manner under the mandate of legal authority without the exercise of discretion or judgment."
21 *County of San Diego v. State of California* (2008) 164 Cal.App.4th 580, 593.

22 Conversely, a discretionary act involves the use of judgment in deciding what action to
23 take, and the exercise of discretion is not susceptible to mandate, except for a refusal to exercise
24 the discretion. (CEB, California Civil Writ Practice, §2.5)

25 Mandamus will lie to compel a public official to perform an official act required by law.
26 (Code Civ. Proc., §1085.) While mandamus will not lie to control an exercise of discretion, i.e.
27 to compel an official to exercise discretion in a particular manner, mandamus may on the other
28

1 hand issue to compel an official both to exercise his or her discretion (if he or she is required by
2 law to do so) and to exercise it under a proper interpretation of the applicable law. *California*
3 *Hosp. Assn. v. Ivfaxwell-Jolly* (2010) 188 Cal.App.4th 559, 569-570; *Common Cause v. Board of*
4 *Supervisors* (1989) 49 Cal.3d 432, 442; *California Assn. for Health Services at Home v. State*
5 *Dept. of Health Care Services* (2012) 204 Cal.App.4th 676, 683.

6 Defendants' assertion that Plaintiffs fail the second prong of California Elections Code
7 Section 13314(a)(1), i.e. that the issuance of a writ of mandate will not substantially interfere
8 with the conduct of the election, is specious. First, although the Court can mandate compliance
9 with the statute, the Court cannot mandate how that is to occur. The evidence shows that
10 although the San Diego County Registrar of Voters is not the only registrar in California
11 violating Elections Code Section 15360, there are other registrars who completely comply with
12 the statute and conduct the 1% manual tally from the entire population of ballots and not a
13 reduced population. If the San Diego Registrar needs additional resources to comply with the
14 law, his office, or the controlling Board of Supervisors for the County of San Diego, should
15 allocate sufficient resources in order to comply with the law. The Court is not the place to
16 complain about lack of budgetary resources. If the San Diego Registrar believes complying with
17 the law is logistically too difficult to accomplish within the statutory time frame, rather than
18 bending the rules or inventing alternate procedures to suit his own convenience, he should seek a
19 lawful solution by addressing his concerns to the legislature.

20 **IX.**

21 **CONCLUSION**

22 The statutory interpretation of Election Code Section 15360 is unambiguous. The
23 intrinsic meaning of the statute is consistent with the extrinsic, historic purpose of the statute.
24 Corroborating that legal analysis is the sound statistical methodology of conducting a random
25 sample of a population that has been mandated by the legislature in Section 15360. To allow the
26 Registrar of Voters to wantonly disregard a citizens' valid objections to his blatant violation of
27 the law would be to condone injustice and to permit the registrar's continued disregard for the
28

1 rights of the voters of San Diego County to be assured that their votes will be counted and the
2 results of elections can be trusted.

3 Counting every vote and election integrity require that the automated process be verified.
4 Verification requires that all the ballots — not just a portion — be subject to random hand
5 counting. Omitting 39% of the total votes cast from such scrutiny, contrary to the law,
6 encourages the public to suspect that something might have gone wrong. If the practice were to
7 be allowed to continue in future elections, it is not unreasonable to predict that something
8 eventually will go wrong.

9 The importance of maintaining the confidence of the voting public in the election process
10 requires the Registrar of Voters to fully and faithfully comply with the laws of the State of
11 California.

12 The Court should unequivocally make those principles clear to all concerned by forthwith
13 issuing its writ of mandate.

14
15 Respectfully Submitted,

CARE Law Group PC

16
17 Dated: October 21, 2016

/s/ Alan L. Geraci
By: _____
Alan L. Geraci, Esq., Attorneys for Plaintiffs
Citizens Oversight Inc. and Raymond Lutz

ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NO: NAME: Alan L. Geraci SBN108324 FIRM NAME: CARE Law Group PC STREET ADDRESS: 817 W. San Marcos Blvd. CITY: STATE: ZIP CODE: TELEPHONE NO.: 619-261-2048 FAX NO.: 760-650-3484 E-MAIL ADDRESS: alan@carelaw.net ATTORNEY FOR (name): Plaintiff Citizens Oversight Inc., Ray Lutz	0450 FOR COURT USE ONLY ELECTRONICALLY FILED Superior Court of California, County of San Diego 10/24/2016 at 08:00:00 AM Clerk of the Superior Court By Lee McAlister, Deputy Clerk
SUPERIOR COURT OF CALIFORNIA, COUNTY OF San Diego STREET ADDRESS: 330 W. Broadway MAILING ADDRESS: CITY AND ZIP CODE: San Diego, CA 92101 BRANCH NAME: Central	CASE NUMBER: 37-2016-00020273
Plaintiff/Petitioner: Citizens Oversight Inc. and Raymond Lutz Defendant/Respondent: Michael Vu, San Diego Registrar of Voters, et al	JUDICIAL OFFICER: 73
<p style="text-align: center;">PROOF OF ELECTRONIC SERVICE</p>	DEPARTMENT: Hon. Joel R. Wohlfeil

1. I am at least 18 years old.
 - a. My residence or business address is (specify): 817 W. San Marcos Blvd, San Marcos, CA 92078
 - b. My electronic service address is (specify): alan@carelaw.net

2. I electronically served the following documents (exact titles): Plaintiffs' Closing Brief

The documents served are listed in an attachment (Form POS-050(D)/EFS-050(D) may be used for this purpose.)

3. I electronically served the documents listed in 2 as follows:
 - a. Name of person served: Timothy Barry, Chief Deputy County Counsel, Stephanie Karnavas, Deputy County Registrar of Voters; Helen N. Robbins-Meyer, San Diego County Chief Administrative Officer; County of San Diego, a public entity
 On behalf of (name or names of parties represented, if person served is an attorney): Michael Vu, San Diego County Registrar of Voters; Helen N. Robbins-Meyer, San Diego County Chief Administrative Officer; County of San Diego, a public entity
 - b. Electronic service address of person served: Timothy.Barry@sdcounty.ca.gov; Stephanie.Karnavas@sdcounty.ca.gov
 - c. On (date): 10/21/2016
 - d. At (time): 10:38 p.m.

The documents listed in item 2 were served electronically on the persons and in the manner described in an attachment. (Form POS-050(P)/EFS-050(P) may be used for this purpose.)

Date: 10/21/2016

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Alan L. Geraci
 (TYPE OR PRINT NAME OF DECLARANT)

/s/ Alan L. Geraci
 (SIGNATURE OF DECLARANT)

ELECTRONICALLY FILED
Superior Court of California,
County of San Diego
10/24/2016 at 09:15:00 AM
Clerk of the Superior Court
By E-Filing, Deputy Clerk

1 Alan L. Geraci, Esq. SBN108324
2 **CARE Law Group PC**
3 817 W. San Marcos Blvd.
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8 Attorney for Plaintiffs, Citizens Oversight Inc. and Raymond Lutz

9 **SUPERIOR COURT OF CALIFORNIA**
10 **COUNTY OF SAN DIEGO—CENTRAL DIVISION**

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

14 Plaintiffs,

15 vs.

16 MICHAEL VU, San Diego Registrar of)
17 Voters; HELEN N. ROBBINS-MEYER,)
18 San Diego County Chief Administrative)
19 Officer; COUNTY OF SAN DIEGO, a)
20 public entity; DOES 1-10,)

21 Defendants.

CASE NO: 37-2016-00020273-CL-MC-CTL

**DECLARATION OF ALAN L. GERACI
REGARDING EXHIBIT 59 LEGISLATIVE
HISTORY**

Hon. Joel R. Wohlfeil, Judge

Complaint filed: June 16, 2016

Trial Date: October 4, 2016

Hearing Time: 9:00 a.m.

Dept: C-73

I, Alan L. Geraci, declare as follows:

1. I am an attorney licensed to practice law in the State of California. I am attorney of record for the Plaintiffs, Raymond Lutz and Citizens' Oversight Inc. in the above-stated matter.
2. I have personal knowledge of the matters stated herein unless stated under information and belief in which case I believe said matter to be true. If called upon to testify, I would testify consistent with the matters herein.
3. Exhibit 59 is a Plaintiffs' Exhibit which details the legislative history of the statutes SB1235 and AB2769, among others, as the legislation made its way to the Governor's

1 desk and became law and codified as the subject Elections Code Section 15360.

2 4. At the conclusion of trial for this matter, County Counsel objected to the form of the
3 Exhibit as containing "markings and notations" from Plaintiff. The Court resolved that
4 objection by allowing Plaintiffs to reorder the set from the Secretary of State Archive's
5 Division and thereby replace the existing Exhibit 59 with the new Exhibit 59. That task
6 has been completed.

7 5. When the documents were received from the Secretary of State (with Certification) they
8 were in a substantially different order than the original Exhibit 59 which was paginated
9 and often referred to by page number during trial and closing arguments. So as to not
10 disrupt that organization and record, I have organized the new documents with the same
11 pagination as the old Exhibit 59 so that the previously referenced pages are intact. For
12 the sake of full transparency, I have also paginated the documents received from the
13 Secretary of State Archive's Division in the exact state as they were received. Thus,
14 there are two sets of paginated records. The pagination on the lower right corner is the
15 original pagination and is consistent with the record. The second set is the records in
16 the exact form I received them from the Secretary of State. Those documents are
17 paginated on the upper right corner.

18 6. The Court will note that any "markings or notations" on the records exist on the records
19 themselves and are part of the archived history of the legislation. There are no stray
20 "markings or notations" from any other source.

21 I declare under penalty of perjury that the foregoing is true and correct.

22
23 Dated: October 24, 2016

By: 

Alan L. Geraci, Esq. of CARE Law
Group PC Attorney for Plaintiffs
Citizens Oversight Inc. and Raymond Lutz

ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NO: NAME: Alan L. Geraci SBN108324 FIRM NAME: CARE Law Group PC STREET ADDRESS: 817 W. San Marcos Blvd. CITY: STATE: ZIP CODE: TELEPHONE NO.: 619-261-2048 FAX NO.: 760-650-3484 E-MAIL ADDRESS: alan@carelaw.net ATTORNEY FOR (name): Plaintiff Citizens Oversight Inc., Ray Lutz	0453 FOR COURT USE ONLY ELECTRONICALLY FILED Superior Court of California, County of San Diego 10/24/2016 at 09:15:00 AM Clerk of the Superior Court By E-Filing, Deputy Clerk
SUPERIOR COURT OF CALIFORNIA, COUNTY OF San Diego STREET ADDRESS: 330 W. Broadway MAILING ADDRESS: CITY AND ZIP CODE: San Diego, CA 92101 BRANCH NAME: Central	
Plaintiff/Petitioner: Citizens Oversight Inc. and Raymond Lutz Defendant/Respondent: Michael Vu, San Diego Registrar of Voters, et al	CASE NUMBER: 37-2016-00020273 JUDICIAL OFFICER: 73 DEPARTMENT: Hon. Joel R. Wohlfeil
PROOF OF ELECTRONIC SERVICE	

1. I am at least 18 years old.
 - a. My residence or business address is (specify): 817 W. San Marcos Blvd, San Marcos, CA 92078
 - b. My electronic service address is (specify): alan@carelaw.net

2. I electronically served the following documents (exact titles): Declaration of Alan L. Geraci regarding Exhibit 59 Legislative History

The documents served are listed in an attachment (Form POS-050(D)/EFS-050(D) may be used for this purpose.)

3. I electronically served the documents listed in 2 as follows:
 - a. Name of person served: Timothy Barry, Chief Deputy County Counsel, Stephanie Karnavas, Deputy Count
 On behalf of (name or names of parties represented, if person served is an attorney): Michael Vu, San Diego County Registrar of Voters; Helen N. Robbins-Meyer, San Diego County Chief Administrative Officer; County of San Diego, a public entity
 - b. Electronic service address of person served: Timothy.Barry@sdcounty.ca.gov; Stephanie.Karnavas@sdcounty.ca.gov
 - c. On (date): 10/24/2016
 - d. At (time): 9:15 a.m.

The documents listed in item 2 were served electronically on the persons and in the manner described in an attachment. (Form POS-050(P)/EFS-050(P) may be used for this purpose.)

Date: 10/24/2016

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Alan L. Geraci
 (TYPE OR PRINT NAME OF DECLARANT)

/s/ Alan L. Geraci
 (SIGNATURE OF DECLARANT)

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO
CENTRAL

0454

MINUTE ORDER

DATE: 10/26/2016

TIME: 03:07:00 PM

DEPT: C-73

JUDICIAL OFFICER PRESIDING: Joel R. Wohlfeil

CLERK: Juanita Cerda

REPORTER/ERM: Not Reported

BAILIFF/COURT ATTENDANT:

CASE NO: 37-2016-00020273-CL-MC-CTL CASE INIT.DATE: 06/16/2016

CASE TITLE: Lutz vs Michael Vu [IMAGED]

CASE CATEGORY: Civil - Limited CASE TYPE: Misc Complaints - Other

APPEARANCES

See copy of Statement of Intended Decision attached.

The Status Conference (Civil) is scheduled for 12/01/2016 at 03:00PM before Judge Joel R. Wohlfeil.

OCT 26 2016

By: J. CERDA

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN DIEGO

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

Plaintiffs,

v.

MICHAEL VU, San Diego Registrar of Voters; HELEN N. ROBBINS-MEYER, San Diego County Chief Administrative Officer; SAN DIEGO COUNTY, a public entity; DOES 1-10,

Defendants.

Case No. 37-2016-00020273-CL-MC-CTL

STATEMENT OF INTENDED DECISION

Judge: Hon. Joel R. Wohlfeil
Dept.: 73

This case came on regularly for trial on October 4 – 6 and 11, 2016 before the Honorable Joel R. Wohlfeil, Judge presiding. Plaintiffs CITIZENS OVERSIGHT INC. (“COI”) and RAYMOND LUTZ (“Plaintiff” or “Lutz”) (collectively “Plaintiffs”) were represented by Alan L. Geraci of CARE Law Group PC; Defendants MICHAEL VU (“Defendant” or “Vu”), HELEN N. ROBBINS-MEYER (“ROBBINS-MEYER”) and COUNTY OF SAN DIEGO (“County”) (collectively “Defendants”) were represented by TIMOTHY M. BARRY and STEPHANIE KARNAVAS of the County Counsel for the County of San Diego. The Court, after hearing testimony of witnesses (Vu, Lutz, Erin Mayer, Deborah Seiler, Charlie Wallis, Jill LaVine, Dean Logan, Julie Rodewald (through her deposition taken on September 23, 2016 – Exh’s “196, 197”) and Phillip Stark), receiving exhibits into evidence including the materials that the Court took judicial notice of (Exhibits “1, 4, 9 – 14, 19, 49 – 53, 56, 58, 59, 62, 68, 69, 100 – 107, 109, 110, 138 – 140, 146, 147, 149, 150, 152, 154, 155, 158, 171, 175 – 180, 195, 199”), reading pre-trial

1 briefs (ROA # 92, 93), hearing arguments of counsel, reading post-trial closing briefs (ROA # 116,
2 118,), and good cause appearing therefore, hereby issues this Statement of Intended Decision
3 (“SOID”).
4

5 Introduction

6

7 No other country in the world works as hard as the United States to preserve its election
8 integrity, a bedrock of its democratic principles.

9 Plaintiffs allege that Defendants have not done enough; that Defendants have, in effect, cut
10 corners; that Defendants have not conducted the post-election 1% manual tally of "all" votes cast,
11 one risk of which is that Defendants have compromised the security of the County's voting system;
12 to wit, “a nefarious insider or a "hacker" could alter the results and the alterations would be
13 invisible to this audit procedure thereby making the audit procedure useless.” ROA # 92, page 3.

14 Defendants respond that the 1% manual tally statute is ambiguous and susceptible to more
15 than one interpretation; that Defendants have complied with the most reasonable of the competing
16 interpretations; and that to direct Defendants to do more would place an undue burden on
17 Defendants’ resources, one risk of which is that Defendants would be unable to “complete the
18 official canvass and certify election results to the Secretary of State’s office no later than 30 days
19 after an election.” Elections Code Section 15372.2. ROA # 93, page 1.

20 Simply stated, Plaintiffs argue breadth and Defendants respond with burden, the
21 reconciliation of which is, from the Court's perspective, not easy.
22

23 Operative Pleadings

24

25 In their verified Second Amended Complaint (“SAC” - ROA # 79), Plaintiffs allege causes
26 of action for declaratory relief and mandamus under CCP 1085, the focus of which is California
27 Election Code Section 15360.
28

1 In their verified Answer (ROA # 81) to the SAC, Defendants, at par. 11, "generally and
2 specifically deny that the Registrar does not fully comply with the requirements of Section 15360"
3 and assert as an affirmative defense that the SAC "fails to set forth facts sufficient to constitute a
4 cause of action or right of relief against defendants, or any of them."
5

6 The Court's July 25, 2016 Minute Order (ROA # 70)
7

8 The Court's previous order states, in pertinent part:

9 "The Application of Plaintiffs Citizens Oversight Inc. and Raymond Lutz ("Plaintiffs") for
10 a Preliminary Injunction to direct Defendants MICHAEL VU, San Diego Registrar of Voters,
11 HELEN N. ROBBINS-MEYER, San Diego County Chief Administrative Officer, and COUNTY
12 OF SAN DIEGO ("Defendants") to comply with California Election Code Section 15360, in
13 certifying the Primary Election results of June 7, 2016, is DENIED AS MOOT, without prejudice,
14 as reflected below.

15 First, the Court takes judicial notice of the July 15, 2016 press release from the California
16 Secretary of State certifying California's June statewide primary results. Evid. Code 452(c).
17 (<http://www.sos.ca.gov/administration/news-releases-and-advisories/2016-news-releases-and->
18 [advisories /secretary-state-padilla-certifies-election-results/](http://www.sos.ca.gov/administration/news-releases-and-advisories/2016-news-releases-and-advisories/secretary-state-padilla-certifies-election-results/)). The Court infers that the state
19 certification also entails the certification of the San Diego County primary results. As a result, the
20 Application for preliminary injunction is MOOT as to Plaintiff's request for injunctive relief for
21 the certification of the June 7, 2016 election. "In dismissing the appeal as moot...reversal of the
22 judgment could not afford the plaintiffs relief because the issuance of an injunction restraining the
23 defendant from doing that which he has already done, would be an idle and frivolous act, since
24 such decision would have no binding authority and would not affect the legal rights of the parties."
25 *Finnie v. Town of Tiburon* (1988) 199 Cal. App. 3d 581, 586. "... [A]lthough a case may originally
26 present an existing controversy, if before decision it has, through act of the parties or other cause,
27 occurring after the commencement of the action, lost that essential character it becomes a moot
28

///

1 case or question which will not be considered by the court." *Wilson v. Los Angeles County Civil*
 2 *Service Commission* (1952) 112 Cal. App. 2d 450, 453.

3 However, the Court is cognizant of the importance and exigent circumstances in this
 4 action, thereby necessitating an expedited ruling in this matter. Although moot to the Primary
 5 Election results of June 7, 2016, when an issue of broad public interest is posed, the Court may
 6 exercise its inherent discretion to resolve the issue. *Johnson v. Hamilton* (1975) 15 Cal. 3d 461,
 7 465.

8 Liberally construing the first cause of action for declaratory relief in Plaintiff's First
 9 Amended Complaint (FAC"), Plaintiff appears to seek a declaration regarding all future elections,
 10 which may recur as imminently as the upcoming November election. Therefore, the first cause of
 11 action is not moot.

12 The "1 percent manual tally is a procedure used in California to test whether there are any
 13 discrepancies between the electronic record generated by a voting machine and what is essentially
 14 a manual audit of that electronic record." *Nguyen v. Nguyen* (2008) 158 Cal. App. 4th 1636, 1643.
 15 In accordance with California law, the official canvas must include a manual tally as a means of
 16 verifying the accuracy of the system count. Elec. Code 15360. "This procedure is conducted
 17 during the official canvass to verify the accuracy of the automated count." Elec. Code 336.5.

18 Section 15360 provides two alternative methods to conduct this manual tally, using section
 19 15360(a) (1) or 15360(a) (2). Initially, Defendants opted to conduct the 1 percent manual tally
 20 under section 15360(a) (2). A public notice was subsequently posted on the San Diego County
 21 Registrar's website. Thereafter, Defendants' chose to conduct the 1 percent manual tally utilizing
 22 section 15360(a) (1). Declaration of Vu, pg. 6, 1-2.

23 California Elections Code 15360(a) (1), reads in relevant part: (a) During the official
 24 canvass ... the official conducting the election shall conduct a public manual tally of the ballots
 25 tabulated by those devices, including vote by mail ballots, using either of the following methods:

26 (1) (A) A public manual tally of the ballots, including vote by mail ballots, cast in 1 percent of the

27 ///

28 ///

1 precincts chosen at random by the elections official. If 1 percent of the precincts is less than 1
2 whole precinct, the tally shall be conducted in 1 precinct chosen at random by the elections
3 official.

4 Plaintiffs provide evidence that Defendants are not complying with the elections code by
5 failing to include all ballots cast in 1 percent of the precincts chosen at random. Specifically,
6 Plaintiffs demonstrate Defendants are in violation of the statute by 1) not including any provisional
7 ballots in the manual tally, and 2) by not including all vote by mail ballots.

8 The legislative history of California Elections Code 15360, amended in 2006, provides
9 insight: SB 1235 stems from anecdotal reports that some counties routinely exclude absent voter
10 and provisional ballots from the 1% manual tally process and may not be choosing the relevant
11 precincts in a truly "random manner." California Bill Analysis, S.B. 1235 Sen., 4/19/2006.

12 The comments addressing auditing for accuracy provides: "Requiring all of the ballots –
13 not just those cast at the polling place on Election Day – in a given precinct to be a part of the 1
14 percent audit should increase the thoroughness and the reliability of the audit. Absent a complete
15 count of all of the ballots in a precinct that's subject to the 1% audit, it's difficult to see how
16 elections officials can argue they've complied with the audit requirements under the law."
17 California Bill Analysis, S.B. 1235 Sen., 4/19/2006.

18 Therefore, in reviewing the legislative intent and explicit text of section 15360, there is a
19 reasonable probability Plaintiffs will prevail. Section 15360 requires election officials to include
20 Vote-by-Mail ballots cast and provisional ballots when conducting the one percent manual tally.
21 Defendants did not do this.

22 Defendants demonstrate that complying with section 15360 will require additional "man
23 hours" and additional costs in excess of \$100,000. Vu Dec. (ROA # 35), par's 21, 30, 36.
24 Defendants also argue completing the manual tally process as soon as possible is a "prudent
25 business practice." Opposition, p. 12, par's 15-16. County elections officials have approximately
26 one month to complete their extensive tallying, auditing, and certification work so they can timely
27 send a report to the California Secretary of State.

28 ///

1 Plaintiffs' argue they 1) will be deprived of the verification required by law and 2) the
2 integrity of the election results will be compromised if Defendants are not in compliance with
3 section 15360. Section 15360 was enacted to serve as a check on the election process by means of
4 a manual audit. Notwithstanding the fact that San Diego County Registrar does not include
5 provisional ballots in their manual tally procedure, a practice consistent with other counties (ROA
6 #s 36 – 42), it does not follow that Defendants are therefore in compliance with section 15360.
7 The San Diego County Registrar of Voters has a legal obligation to comply with section 15360. It
8 is imperative that auditing requirements are followed completely in order to ensure the continued
9 public confidence of election results. The San Diego County Registrar of Voters is obligated to
10 allocate its resources appropriately in order to comply with the law. If Defendants are unable to do
11 so, they must seek redress with the legislative or executive branches of government, not the
12 Court.”

13
14 **Joint Trial Readiness Conference Report (“TRC”) / Advance Trial Review Order (“ATRO”)**

15
16 In their TRC (ROA # 91), Plaintiff and Defendants described the nature of the case as
17 follows:

18 “This is a Declaratory Relief and Mandamus action filed by Plaintiffs Raymond Lutz and
19 Citizens Oversight, Inc. against the County of San Diego, Michael Vu in his capacity of the
20 Registrar of Voters, and Helen Robbins-Meyer in her capacity as Chief Administrative Officer of
21 the County of San Diego. Plaintiffs contend that the manner in which the County conducts the one
22 percent manual tally, as defined by Elections Code 336.5, does not meet the requirements of
23 Elections Code Section 15360.”

24 The parties identified the legal issues which are not in dispute as follows:

25 “1. Elections Code Sections 336.5 and 15360 are the operative provisions of the Elections
26 Code that define and govern the one percent manual tally.

27 2. Provisional voters are defined in Election Code Section 14310 - 14313.

28 3. Vote-by-mail voters are defined in Election Code Section 300.

1 4. The one percent manual tally must be conducted and completed during the official
2 canvass.

3 5. The purpose of the manual tally is to verify the accuracy of the automated count.”

4 The parties identified the legal issues which are in dispute as follows:

5 “1. The requirements imposed on elections officials by Elections Code Sections 336.5 and
6 15360.

7 2. Plaintiffs contend the above includes whether verifying the accuracy of the automated
8 count should include the review, supervision and oversight of ballots on which white out or ballots
9 were remade. Defendants contend this is not a "legal issue" to be addressed in this action.”

10 After the parties filed the TRC Report, the Court entered the ATRO. ROA # 90.

11
12 **Non-Jury Trial**

13
14 The parties are not entitled to a jury trial in view of the nature of the relief at issue.

15
16 **Motion for Non-Suit to Dismiss Defendant HELEN N. ROBBINS-MEYER (“ROBBINS-
17 MEYER”)**

18
19 After the opening statement of Plaintiff’s counsel, Defendant ROBBINS-MEYER made a
20 Motion for non-suit. The Court, after hearing arguments of counsel, GRANTED the Motion and
21 dismissed ROBBINS-MEYER from this lawsuit.

22
23 **Witnesses and Exhibits at Trial**

24
25 Vu, Plaintiff, Mayer, Seiler, Wallis, LaVine, Logan and Rodewald testified to his / her
26 recollection of events which took place years ago. The recollection of these witnesses have been
27 influenced by their bias, prejudice or personal relationship with the parties involved in this case. If
28 for no reason other than the passage of time, much less the absence of reliable corroboration, the

1 Court questions the capacity of the witnesses to accurately recollect and communicate his / her
2 perception of the events. The witnesses have “testified untruthfully about some things but told the
3 truth about others” and, accordingly, the Court has accepted the part it perceives to be true and has
4 ignored the rest. CACI 107, 212.

5 Michal Vu: He is the County’s Registrar of Voters (“ROV”). He is responsible for overall
6 direction and conduct of SD elections. He is responsible for “the implementation of law.” He was
7 chief election official for the County of Cuyahoga in Ohio during the 2004 presidential election.
8 He resigned from his position in Ohio though not because he was asked to do so following a
9 controversy involving two staff. The two staff were prosecuted following the controversy. His
10 current duties include application of his interpretation of the law. He is familiar with Election
11 Code 15360. He described his options on how to conduct the 1% manual tally. Exh. “4” is the
12 County’s policy manual – 1% manual tally. He admits that Exh. “4” does not reflect the
13 “batching” method to conduct the 1% manual tally. The policy manual does not reflect the
14 County’s practice of conducting the 1% manual tally by batching method. The County is in the
15 process of updating the policy to reflect its practice of the batching method. Exh. “19” is the
16 official results of County’s June 7, 2016 election. There were 775,930 ballots cast. There were
17 1,523,251 registered voters. There were 285,000 ballots yet to be processed as of the end of
18 election day. Provisional ballots are cast at polling places. There were 68,000 validated
19 provisional ballots processed. There were 75,000 provisional ballots received. There were
20 490,000 votes by mail (“VBM”) ballots received, the majority of which were received before the
21 election. There were non-party partisan ballots placed in provisional ballots. The County’s
22 practice is to not include provisional ballots in the 1% manual tally. The County appears to
23 include in the “semifinal official” count, VBM ballots received on or before the election. The
24 County received 489,610 VBM ballots, of which 256,685 were included in the 1% manual tally.
25 The combination of the excluded VBM ballots and the provisional ballots numbered
26 approximately 37% of the total votes cast which were not subject to the 1% manual tally. He
27 excluded from the 1% manual tally VBM ballots received after the election and provisional ballots
28 cast at polling places. The County uses “white out tape” on ballots, one purpose of which is to

1 identify an ineligible voter. The County created a non-partisan democratic ballot. The County
2 does not have written procedures for the use of white out tape. The County does not keep records
3 of the white out tape on ballots. The County does not maintain the white out tape on ballots for
4 inspection. He was employed for less than a year before the election controversy occurred in
5 Ohio. Exh. "140" is his CV. He described his duties as the County's ROV. He's been the
6 County's ROV since 2012. The County has 1,650,000 registered voters. 62% of the registered
7 voters vote by mail. 775,000 persons voted in the June election. He expects 1,200,000 persons to
8 vote in the November election, with 1,500 precincts and 623 ballot types. He described the
9 voluminous types of contests on the November ballot. Exh. "199" is a demonstrative sample
10 ballot for the November election. He described the challenges with a two card ballot. He
11 described the operational issues to manage the 7,000 to 8,000 poll workers to be hired for the
12 November election. He described the process of issuing VBM ballots to voters. A VBM voter can
13 only vote provisionally at the polling place after receiving a VBM ballot. 490,000 persons cast
14 VBM ballots in the June election. He estimated that 675,000 to 725,000 persons will cast VBM
15 ballots in the November election. Exh. "148" is the report of the provisional ballots cast in the
16 June election. The County counted 68.2% of the provisional ballots. Exh. "148" also reflects
17 persons who voted both by mail and a provisional ballot. The County partially counted 17,226
18 provisional ballots. The County did not count 6,773 provisional ballots. When a voter voted both
19 by mail and with a provisional ballot, the County counted the VBM ballot instead of a voter's
20 provisional ballot. The ROV employs 65 staff, and intends to hire 800 to 900 temporary workers.
21 He expects to recruit 7,400 to 8,000 poll workers for the November election. The County received
22 256,000 VBM ballots, of which 233,000 were included in the official canvas for the June election.
23 Exh. "146" is the County's procedures for processing VBM ballots. The County trains the staff
24 who process VBM ballots. Exh. "177" is a snap shot of the steps to process VBM ballots. The
25 County expended 10,000 or more staff hours to process VBM ballots in the June election. He
26 estimates the County will mail more than 900,000 VBM ballots to voters prior to the November
27 election. He described the process by which the County receives and counts the VBM ballots.

28 ///

1 The Pitney Bowes "sorter" sorts batches of no more than 400 VBM envelopes as a form of
2 quality assurance. The bar code on the envelopes are read and encoded into a memory card which
3 is imported into the County's voting system. Every single VBM ballot is counted manually. The
4 County evaluates the signatures on VBM ballots but liberally construes the signatures in favor of
5 counting the votes. The County begins to count VBM ballots 10 business days before the election.
6 He emphasized that the County counts every ballot cast by every eligible voter. He described the
7 process by which the County re-makes a ballot. He explained why the County uses "white out
8 tape." He explained the County's activities during the official canvass. He explained the
9 "reconciliation of the voting precincts." He explained the steps to avoid the risk of "double
10 voting" by voters. He referred to section 15302 to describe the steps the County takes to complete
11 the official canvass. The County has 35 days "to certify the election." The County can count VBM
12 ballots post marked no later than election day and received by the ROV within 3 days after the
13 election. Exh. "171" is a diagram of how paper ballots and touch screen votes are counted. The
14 County manually transfers touch screen votes to paper ballots. The provisional ballots are
15 processed after the election. Exh. "181" is a demonstrative video of ballots being processed by the
16 Pitney Bowes sorter in batches of 400 envelopes. The sorter outstacks or suspends ballots with a
17 perceived defect. The sorter sorts the envelopes at the rate of 24,000 envelopes per hour. After
18 election night, the County expends 10,000 or more hours to process VBM ballots. He expects the
19 volume of VBM ballots to be processed in November to be greater than the 235,000 VBM ballots
20 processed in the June election. Exh. "147" is the County's procedures for processing the
21 provisional ballots. Exh. "178" is a summary of the County's steps to process provisional ballots,
22 the purpose of which is to insure that the County counts every provisional ballot. Exh. "176" is a
23 provisional ballot envelope. The County uses 100 staff to process provisional ballots, most of
24 whom are temporary staff. The County conducts a background check of temporary staff. The
25 County completes the process of counting provisional ballots by the time the results are certified.
26 The County's processes are intended to balance the integrity of the voting system with the ROV's
27 ability to count the votes. The volume of the VBM ballots are larger than provisional ballots;
28 however, it takes more time to process the provisional ballots. He described the purpose and

1 process of the 1% manual tally. The 1% manual tally must start as soon as possible after the
2 election in order to timely certify the results. Exh. "179" is the 1% manual tally sheets for the June
3 election. The County expends thousands of staff hours to complete the 1% manual tally. The 1%
4 manual tally counted 7,800 ballots. The 1% manual tally counted ballots from randomly selected
5 precincts as well as additional precincts. The 1% manual tally did not reveal any "issues." The
6 County does not include VBM ballots not processed by election night in the 1% manual tally. The
7 County does not include provisional ballots in the 1% manual tally. His first presidential election
8 as the County's ROV was 2008. He described the severe impact on the County's ability to certify
9 the November election results if the County included VBM ballots and provisional ballots in the
10 1% manual tally. He questioned the impact on the County's ability to complete an accurate count
11 of the vote if required to include VBM and provisional ballots in the 1% manual tally. The County
12 counts every vote, regardless of the type of ballot cast. The County reserves white space on the
13 ballots to provide for additional languages as necessary, pursuant to the 1965 voting rights act.
14 There were 490,000 VBM ballots cast in the June election. He agreed with the trend that more
15 voters are voting by mail. 75,000 provisional ballots were cast in the June election. 256,000 of the
16 VBM ballots were processed as part of the semi-final unofficial canvas. The 1% manual tally did
17 not include 37 % of the total votes cast in the June election. The ballots of non-registered
18 democratic voters cast for a democratic candidate in the June election were cast as provisional
19 ballots which was not included in the semi-final unofficial canvas. He decided that the 1% manual
20 tally would be changed from the batching method to the precinct method, after he received
21 Plaintiffs' lawsuit. The County's procedures did not include processing the 1% manual tally of
22 VBM ballots by batch. He expects to hire more than 7,000 poll workers for the November
23 election.

24 Raymond Lutz: He is a citizen and registered voter in SD County. COI is a 501c3 non-
25 profit organization, the purpose of which is to encourage citizen oversight of SD County elections.
26 His education includes a master's degree in electronics. His work experience includes document
27 imaging technology. Exh. "58" is his CV. He knows Vu. His participation in overseeing SD
28 County elections dates back a number of years to 2008. He has developed a cooperative working

1 relationship with Vu. He discovered in or about 2010 the County's practice of conducting the 1%
2 manual tally, although the practice was not entirely clear to him. He video recorded the County's
3 selection of the ballots which were the subject of the 1% manual tally for the June 2016 election.
4 The County has 1,522 precincts. "Batches" are mixed precincts which are chosen from 32 areas.
5 Batches must have a report of all the precincts from which the ballots are counted in the 1%
6 manual tally. Vu's practice is to choose only 8 precincts, instead of 32 precincts, to develop the
7 batches. He objected to Vu's practice. Exh's "12 - 14." He photographed a list of the batches
8 chosen by Vu to conduct the 1% manual tally, although he did not receive a "batch mode report."
9 He filed this lawsuit when he discovered that Wu decided not to conduct a 1% manual tally of all
10 of the mail and provisional ballots cast in the June 2016 election. He considers himself to be a
11 citizen advocate. He studied the election process used by the County in 2008 by evaluating votes
12 cast in a sampling of 5 of the 85 precincts. He prepared a report of the 1% manual tally from the
13 2008 election. He concluded from his review that he needed the "snap shot file" from the County.
14 He conducted another review of the 2014 election in "all counties in California" and, once again,
15 realized he needed the "snap shot file." In 2014, he made a request from the registrar of voters in
16 all counties. In his opinion, the County conducts a 1% manual tally without including VBM
17 ballots. The ROV conducts a selection meeting the day after the election, selects the precincts and
18 the batches. The ROV receives boxes of ballots from the polling places. Exh. "64" demonstrates
19 the start and stop dates and times of the County's teams conducting the 1% manual tally of the
20 selected precincts, the source of which is data created by the County. Exh's "49 - 52." The
21 County's 1% manual tally did not start until June 27 with multiple stretches over the 30 day period
22 in which the County did no work. In his opinion, the County could have conducted the 1% manual
23 tally more efficiently and started the tally earlier than June 27. He conducted a roster review of the
24 County's teams who participated in the 1% manual tally as well as a review of the votes cast from
25 a sampling of 5 precincts. He reviewed and compared the 1% manual tally results with the snap
26 shot file, which did not match. In his opinion, the 1% manual tally detects simple tabulator errors
27 which could result in a shift of as many as 10,000 votes from one candidate to another. He
28 requested the legislative history for the senate bill culminating in section 15360, from the secretary

1 of state's office. Exh. "59." His question is whether the legislature intended to include VBM and
2 provisional ballots in the 1% manual tally. He has never been a poll worker or an election official.
3 He votes by mail at this time. The last time he voted at a poll was 2014. He has owned and
4 operated multiple businesses, including Creative Minds Inc. He started COI in or about 2006,
5 which is connected to the east county democratic party. He is the only officer and director and of
6 COI. COI has due paying members. He is the sole operating manager of COI. An audit is "an
7 historical review of something that happened." He is not familiar with the regulations adopted
8 outside of the election code. He did not participate in the legislative process to amend Section
9 15360. He corresponded with Vu and other registrars of voters throughout California on the
10 subject of the 1% manual tally. Exh's "9 - 11." He understood that not all ballots would be
11 included in the "subset" of the votes for the 1% manual tally. In 2016, he again requested a
12 snapshot of the "subset" of the votes for the 1% manual tally. Exh. "11." The County provided
13 him with a snapshot of the "subset" of the votes for 1% manual tally of the June 7, 2016 election.
14 He described his understanding of the process by which the County receives and records VBM
15 ballots. His description appears to be reasonable and informed, although critical, in part, of the
16 County's process. The County processes provisional ballots last, after first having processed VBM
17 ballots. In his opinion, the ROV is required to include all of the provisional ballots. "Batch" is
18 defined in section 15360. Section 15360(a) (B)(ii) states: "'batch' means a set of ballots
19 tabulated by the voting system devices, for which the voting system can produce a report of the
20 votes cast." He admits section 15360 does not refer to "all," "audit" or "'provisional ballots." He
21 described his understanding of "hashing" as part of the County's security system. He believes that
22 an outside hacker can hack into the County's security system. He has not witnessed any election
23 fraud in the County. He considers the County's failure to follow his interpretation of the law to be
24 a form of election fraud. He is not aware of anyone hacking into the County's "vote tabulation
25 system." In the SAC, at par. 36, Plaintiffs allege that the County should include all VBM and
26 provisional ballots in the 1% manual tally. A "snap shot file" is a snap shot of all votes the County
27 counted. It was a big file ... 200 megabytes. One purpose of the snap shot was to evaluate
28 whether an "internal hacker" had manipulated the election results. Exh. "56" is the snap shot he

1 received from the County of the election results tabulated as of June 8, 2016 at 3:00 pm. He
2 received Exh. "56" just before the County conducted the "random draw." There are counties
3 which conduct the "random draw" as much as two months before the election which alerts
4 potential hackers of the precincts not to manipulate, to avoid detection. The County conducts the
5 1% manual tally after the random draw takes place.

6 **Erin Mayer:** She is chief departmental officer in charge of the 1% manual tally. She
7 supervises Diane Elsheikh. She has occupied her current position for 2 ½ years. She described the
8 procedure she has followed to conduct the 1% manual tally. The procedure changed from batching
9 to precincts after the County received a demand from Lutz. The precincts consisted of the
10 precincts randomly polled. She participated in a lot of discussions with Lutz during the random
11 draw. She referred to Exh's "49 – 52," the subject of which is the County's 1% manual tally after
12 the June 7, 2016 election. On June 13, her team started the process of counting the poll ballots.
13 On June 21, her team started the process of counting the touch screen ballots. On June 27, her
14 team started the process of counting the VBM from the precincts chosen in the random draw. The
15 1% manual tally did not include VBM ballots from precincts not selected in the random draw. The
16 1% manual tally did not include VBM ballots received by the County after the June election.
17 Exh."50" is the tally of the votes received from the precincts. Exh. "52" is the tally of the touch
18 screen votes. The County includes 100% of the touch screen ballots in the 1% manual tally. The
19 County tabulates the paper ballots followed by the VBM ballots. She denies any "problems" with
20 the "paper trail" of the votes in the June election. She agrees that the County is required to possess
21 a paper trail of the touch screen ballots. She described the "back end" of the processing of the
22 ballots which takes place before the beginning of the 1% manual tally. She described the technical
23 services necessary to process the ballots. The County can re-make a paper trail to memorialize the
24 touch screen ballots. The County started the 1% manual tally by batch before switching to
25 precincts.

26 **Deborah Seiler:** She is retired from the County. Previously, she was the ROV for the
27 County. She described her elections experience as reflected in her CV. Exh. "138." She
28 contributed to the development of elections legislation in California. She has acted as an election

1 observer in other countries like, for example, the former Soviet Union. Her credentials/
2 qualifications are impressive. She described her duties as ROV for the County. She described her
3 understanding of the post-election 1% manual tally which has been in effect since 1965. The
4 initial purpose of the 1% manual tally was to verify the accuracy of the "coding process." There
5 have been multiple amendments to the 1% manual tally legislation. She encouraged the expansion
6 of the 1% manual tally legislation. She participated in drafting the 1986 legislation amendment.
7 She proposed a re-structuring of the "whole elections code." She proposed that the 1% manual
8 tally be re-located into the "canvass procedures." The 1% manual tally was not contemplated to be
9 a part of the re-count procedures. She referred to Elections Code section 336.5 which defines the
10 "1% manual tally," the drafting of which she participated in. She described her understanding of
11 "verify" in context of the 1% manual tally. A manual tally is required to be performed during the
12 official canvass. Exh's "100 - 103" are the 2006 proposed amendments known as Senate Bill 1235.
13 In her opinion, the absence of provisional ballots from the ultimate legislation is significant. She
14 denies that the word "all" does not appear in section 15360. A reference to "all" and "provisional
15 ballots" were stricken from the proposed amendments. Exh's "104, 180." The 2008 election was
16 the first election she presided over as the County's ROV after AB 2769 was enacted. She included
17 some, but not all, of the VBM ballots in the 1% manual tally. She made minor changes to the
18 procedures for the 1% manual tally after the enactment of AB 2769. She was familiar with the
19 enactment of section 15360.5, as urgency legislation, in 2010. Exh. "105." In her opinion, the
20 application of section 15360.5 was limited to 4 specific counties. She described her understanding
21 of the options available to counties to conduct the 1% manual tally. Exh. "106" is the 2011
22 proposed amendment to section 15360 which extended section 15360.5 to all counties. The 2011
23 amendment was financially important to, and was supported by, the County. The County based
24 the 1% manual tally on the unofficial canvass. The inclusion of "all ballots" including VBM and
25 provisional ballots in the 1% manual tally would have worked a financial and administrative
26 hardship on the County. She characterized the Secretary of State's proposal (Exh. "109") as "an
27 underground regulation" which the County successfully challenged. The County devoted 100
28 hours or more to respond to the accusations asserted by Lutz in 2010. Exh's "62, 110." She

1 expressed her opinion of the remedies available to a citizen who challenges the integrity of the
 2 election results. She is not aware of any evidence that anyone has hacked into the County's voting
 3 system. She described the purpose of placing the "source codes" in escrow. The computer vote
 4 count program is deposited with the Secretary of State's office. Within 5 days after the election
 5 results are certified, any voter may demand a re-count at the challenger's expense; however, if the
 6 re-count is successful, the expense is reimbursed to the challenger. Any voter may file an election
 7 contest in Court. In 2006, Senator Debra Bowen was the sponsor of SB 1235. The Court takes
 8 judicial notice of the legislative history of section 15360. Exh. "59." The history indicates support
 9 to include absentee and provisional ballots in the 1% manual tally. She considers the reference to
 10 include absentee and provisional ballots to be an error. Provisional ballots are cast at the polls.

11 Charlie Wallis: He has been the principal IT analyst with the County for 26 years. He
 12 manages information technology for the ROV. He is responsible for supplying the information to
 13 the team who conduct the 1% manual tally. He supervised the information services for the June 7,
 14 2106 election. He pulled the batches of ballots cast at the polling place and by mail. He is not
 15 aware of any issue with the voter verified paper trail. He first pulled the boxes for the polling
 16 place ballots. He next pulled the VBM ballots. He described the process to pull the precinct
 17 boxes. He delivered the precinct boxes to the 1% manual tally. The reference to "deck" and
 18 "batch" are synonymous. The boxes are secured in the ROV's office. He retrieved the VBM
 19 ballots from the chosen precincts, which took 40 staff working a full week to complete. He is
 20 familiar with the unofficial results of the June election. Exh. "56." He posted the unofficial results
 21 on the internet. He agrees that the unofficial results should match the computer reports. Exh. "44"
 22 is a report which "identifies how many cards for a particular precinct are in a deck." There is a
 23 comparable report for the VBM ballots. The County has a short period of time to certify the
 24 election. There were more provisional ballots in the June election than he expected. The County
 25 received more than 70,000 provisional ballots. He has noted an increase in VBM voting. He
 26 described the responsibilities he is performing to prepare for the upcoming November election.
 27 The County changes the precincts from one election to the next. He has been working 6 to 7 days
 28 per week, 12 hours per day, to prepare for the November election. He described the voter

1 registration system. He described the election management system. He described the vote
2 tabulation system. He described the global election management system ("GEM"). The County's
3 election systems must be certified by the Secretary of State. The Secretary of State and the Federal
4 Election Commission ("FEC") has certified the County's use of GEM. The Secretary of State
5 provides the County with use procedures, including security, for GEM. He disagreed with Lutz
6 that the security procedures for GEM are not available to the public. He described the hardware
7 components for GEM. Exh. "155." The server of the County's GEM is not connected to the
8 internet. He described the County's security for GEM. Since 2008, security for GEM has been
9 "hardened." The security contemplates protection if the server is stolen. He described the
10 County's touch screens. Exh. "154." Touch screens are available for voters with special needs.
11 He described the County's security for the touch screens. The touch screens contain a memory
12 card. 1,000 or fewer voters cast ballots using the touch screen in the June election. He described
13 the function of voting on the touch screens. He described the paper trail generated by voting on
14 the touch screens. He described the optical scan device to scan ballots and upload results to the
15 County's central tabulator. Exh. "152." The County sets up approximately 160 optical scan
16 devices on election night. He described the function of the optical scan device. He described the
17 purpose of the memory card for the optical scan device. The optical scan device generates a paper
18 trail. He described the "ender card" which is run through the scanner. Exh. "158." Exh. "190"
19 demonstrates the paper tape generated by the scanner operator. He explained examples of why
20 some ballots cannot be scanned. Exh. "150" is a diagram of the County's election night central
21 count floor. He described the roles performed by the staff depicted in the diagram. He estimates
22 that the process for the upcoming election will take longer than usual. Exh. "151" is a video which
23 reflects the County's "ballot inspection" during a past election. He described the function of the
24 "serial digy box" and "os device" depicted in Exh. "153." He described the function of the "start
25 card," referring to Exh. "157" for demonstrative purposes only. Each ballot is coded to a precinct.
26 The os and tsx units are tested for use prior to the election. Exh. "159" is a test card to make sure
27 the units are functioning before the election. After running the hardware tests, the County
28 performs a full logic and accuracy test on the system, all of which takes place under his

1 supervision. He described the series of tests he supervises to test the 623 ballot types. The County
2 conducted approximately 20,000 tests prior to the June election. The test data is transmitted to
3 GEM. He successfully completed logic and accuracy testing prior to the June election. The pre
4 June election tests took approximately 10 days. The tests are conducted prior to every election.
5 He recognizes Lutz but does not believe Lutz has taken advantage of the opportunity available to
6 the public to observe the testing. Exh. "175" is the results bulletin for the 1% manual tally of polls
7 ballots for the June election. The County's GEM generated Exh. "175." The County generates
8 different reports for poll ballots and VBM ballots. The June election generated 600 to 700 decks.
9 He described the process to produce a report for each deck. The County used GEM to process a
10 re-count challenge within the last 12 years. The County's count was upheld. He described the
11 process by which the integrity of the ballot tabulations is preserved. He described how the hash
12 value of the GEM would change if the security system were breached. He is not aware of any
13 manipulation of the County's GEM. In his opinion, it would be difficult, if not impossible, to hack
14 into the County's GEM, alter data and manipulate election results. He is involved in the quality
15 control process of re-making ballots. He described the County's use of "white out tape." He
16 described the "uniform counting standards" which the County applies, if necessary, to use "white
17 out tape." Exh. "149." The County submits the provisional ballots to a verification process.
18 "VVPPT" stands for voter verified paper trail. The County is required to retain the paper trail
19 under the Elections Code.

20 Jill LaVine: She has been the ROV for Sacramento County for 13 years. She described
21 her duties as ROV. Her elections career dates back to 1987. "CACEO" stands for California
22 Association of Clerks and Elections Officials. Sacramento has 900,000 eligible voters and
23 733,000 registered voters. Sacramento employs 34 staff and 2,800 poll workers. Sacramento will
24 add up to 200 temporary staff for the upcoming election. She is familiar with the 1% manual tally.
25 Sacramento conducts a random selection of precincts for the 1% manual tally. The January 1,
26 2007 amendment to section 15360 added VBM ballots. Exh. "109" is a directive to county clerk
27 registrar of voters ("ccrov") throughout California on the subject of the post-election manual tally.
28 The 2010 option to four counties was to choose between conducting the 1% manual tally by either

1 batch or precinct process. Sacramento continued to conduct the 1% manual tally by the precinct
2 process. Sacramento's procedures are consistent with the conclusion in Exh. "107" not to include
3 VBM ballots or provisional ballots in the 1% manual tally. She described the process by which
4 Sacramento counts VBM ballots and provisional ballots. Sacramento counts the provisional
5 ballots at or near the end. To include all VBM ballots would create a logistical problem for
6 Sacramento. She is not aware that Sacramento's voting system has been hacked. 340,000 persons
7 voted in Sacramento's June election. 67% of Sacramento's voters voted by mail. Sacramento has
8 not used the batching method to conduct the 1% manual tally. It is administratively more
9 convenient for Sacramento to use the precinct method. Exh. "68" is Sacramento's 2014 report of
10 the results of the 1% manual tally. The report reflects errors that did not match the computer count
11 on election night. Exh. "69" is Sacramento's June 2016 report of the results of the 1% manual
12 tally. The report reflects errors that did not match the computer count on election night. In both
13 instances, Sacramento made the corrections in the official certified results. She described how
14 Sacramento could conduct the 1% manual tally by including VBM ballots and provisional ballots.
15 Sacramento would need to add staff and incur additional resources to include VBM ballots and
16 provisional ballots. She denied that the batching method would assist Sacramento to conduct the
17 1% manual tally with the inclusion of VBM ballots and provisional ballots. Sacramento had not
18 yet counted 136,000 ballots as of election night, none of which were subject to the 1% manual
19 tally. Sacramento starts to count VBM ballots as early as 10 days before the election. Sacramento
20 strives to include as many VBM ballots as possible into the 1% manual tally. Sacramento included
21 200,000 VBM ballots in the 1% manual tally. She explained the reasons for the discrepancy in the
22 official certified results from the semi-final official results after the 1% manual tally. As reflected
23 in Exh. "69", the discrepancy also arose from a break down in the scanning operation during the
24 June election.

25 Dean Logan: He is the L.A. County ROV county clerk. Exh. "139" is his CV which
26 reflects 25 years of elections experience. He described his duties as L.A.'s ROV. L.A. has
27 5,042,000 registered voters, of which 2,026,000 voted in the June election. 772,000 persons voted
28 by mail. 271,000 persons cast provisional ballots. He described the reasons why persons cast

1 provisional ballots. He expects L.A. to receive more VBM ballots in the November election. L.A.
2 employs 841 staff in the ROV office, all of whom participate in the election process (although
3 L.A. will add another 500 temporary staff for the November election). L.A. will use 22,000 poll
4 workers for the November election. L.A. included 387,000 VBM ballots in the semi-final results.
5 334,000 VBM ballots were not included in the 1% manual tally. L.A. assigns 150 staff to count
6 VBM ballots. He described the process by which L.A. counts VBM ballots, which he also
7 characterized as "labor intensive." He described the training L.A. provides to the staff to count
8 VBM ballots and the provisional ballots. L.A. staff devoted 57,000 hours to count VBM ballots as
9 of the June election. L.A. devoted an additional 12,000 staff hours to count VBM ballots received
10 after the June election. The official results included 236,788 of the total 271,000 provisional
11 ballots in the official results. L.A. starts to process provisional ballots the day after the election.
12 He described the process by which L.A. counts the provisional ballots. 150 to 400 staff counted
13 the provisional ballots cast in the June election. The processing of provisional ballots are more
14 labor intensive than the processing of VBM ballots. L.A. staff devoted 61,000 hours to process the
15 provisional ballots. He described his understanding of the 1% manual tally, a process which starts
16 the day after the election. In his opinion, the inclusion of VBM ballots and provisional ballots in
17 the 1% manual tally would delay the certification of the official results. He described the process
18 by which the 1% manual tally takes place after notice is provided to the public. L.A. devoted 55
19 staff to complete the 1% manual tally and 7,500 staff hours to count 20,217 ballots in the June
20 election. The 20,217 represents 1% of the total 2,026,068 ballots cast in the June election. L.A.
21 uses the precinct method to conduct the 1% manual tally. L.A. did not include VBM ballots that
22 were processed after the election, and did not include provisional ballots, in the 1% manual tally.
23 He's been employed with L.A. ROV office since 2006. Prior to 2007, L.A. did not include VBM
24 ballots in the random draw. L.A. has not included the provisional ballots in the 1% manual tally.
25 He described the reasons why L.A. has not included provisional ballots in the 1% manual tally.
26 The 2012 amendment allowed counties to choose between the batch or precinct method to conduct
27 the 1% manual tally. L.A. continues to not include all VBM ballots in the 1% manual tally. The
28 recent amendment to section 15360 allows VBM ballots received up to 3 days after the election to

1 be counted in the election results. He described the additional delay and costs to include all ballots
2 cast in the 1% manual tally, and still be able to certify the official results. He received multiple
3 emails from Lutz on the subject of the 1% manual tally for the June election. Exh. "195."
4 12,000,000 persons reside in L.A. county. He is not aware of any person hacking into L.A.'s
5 voting system. His departmental budget is more than \$178,000,000 per year. L.A. has 5,000,000
6 eligible voters. 722,000 persons voted by mail. 271,000 provisional ballots were validated and
7 included in the certified returns. 387,000 of the 722,000 VBM ballots were included in the semi-
8 final official results. L.A. sorts VBM ballots by precinct prior to tabulation. He described the
9 process by which L.A. secures the ballots. L.A. conducts the 1% random draw the day after the
10 election. The actual 1% manual tally starts 2 or 3 days after the election. L.A. only includes VBM
11 ballots which were both received and counted as of the election, in the 1% manual tally. L.A.
12 takes 8 – 10 days to conduct the 1% manual tally. He described the process by which L.A. would
13 conduct the 1% manual tally if all ballots cast were included; however, he questions whether L.A.
14 could achieve the 1% manual tally within the statutorily required time frame, to certify the official
15 results. He described L.A.'s vote tabulation system, components of which are the Inka vote and
16 Inka vote plus. The Secretary of State certifies L.A.'s voting system. L.A.'s voting system is
17 capable of processing VBM ballots by batch. He described his understanding of the batching
18 methodology and, agreed that, arguably, a precinct is a batch.

19 Julie Rodewald (through her deposition taken on September 23, 2016 – Exh's "196,
20 197"): She retired in 2014 as the county clerk recorder for San Luis Obispo County after 20 years.
21 She described her duties to include "conducting elections." She also served as the ROV for San
22 Luis Obispo. She was a member of CACEO. She described her understanding of the purpose of
23 the 1% manual tally, and the process by which San Luis Obispo conducts the 1% manual tally.
24 She described her understanding of the amendments to section 15360. San Luis Obispo does not
25 include VBM ballots not counted as of the election or provisional ballots in the 1% manual tally.
26 In her opinion, the law did not require San Luis Obispo to include provisional ballots in the 1%
27 manual tally. San Luis Obispo was one of the four counties which were the subject of section
28 15360.5. The purpose of the 1% manual tally is "to verify the automated count ... to finish the

1 official canvas within the 28 days.” The 2011 amendment permitted all counties to tally VBM
 2 ballots by batch. San Luis Obispo did not change its practice to include, or not include, VBM
 3 ballots in the 1% manual tally. She is not aware that San Luis Obispo’s voting system has been
 4 hacked. San Luis Obispo started the 1% manual tally one week after the election. San Luis
 5 Obispo included VBM ballots which had been received and processed as of the election in the 1%
 6 manual tally. San Luis Obispo has 145 polling precincts. 12 precincts were selected for the 1%
 7 manual tally. 60,228 persons cast VBM ballots in the November 2014 election, and approximately
 8 90 - 95% were processed before San Luis Obispo started the 1% manual tally. San Luis Obispo
 9 could have included the provisional ballots, like VBM ballots, in the 1% manual tally. She
 10 observed that the volume of VBM ballots and provisional ballots cast continued to increase. The
 11 provisional ballots were the last ballots to be counted before the results were certified.

12 Phillip Stark: He is a professor of statistics at UC Berkley, and has been since 1988. His
 13 education includes a Ph.D. in earth science from UCSD. Exh. “53” is his CV. His qualifications
 14 are adequate, if not superior. He identified the materials he reviewed to form and express his
 15 opinions. He is familiar with Election Code 15360 including AB 985 effective January 1, 2012.
 16 He has reviewed the legislative history of SB 1235 effective January 1, 2007. Secretary of State
 17 Deborah Bowen appointed him to a committee to review post-election audit standards of the
 18 State’s voting systems. He has spoken to 10 to 15 ROV’s throughout the State. The foundation on
 19 which he based his opinions are adequate. He is familiar with the 1% manual tally which he
 20 characterized as a “quality control check” on election results. He has participated in a “risk
 21 limiting audit,” the purpose of which is to confirm the confidence in the election result. The
 22 framework of the audit is based on a statistical model which confirms that the “outcome is
 23 correct.” The risk of the audit varies depending upon the degree of confidence that the outcome is
 24 correct. He emphasized that a “robust chain of custody” is imperative to the reliability of the
 25 result. He identified the counties, including Orange, in the State which have utilized his audit. His
 26 bias, if any, is to promote election integrity, which is why he has chosen to testify without
 27 compensation. He identified the types of errors which the 1% manual tally can detect which
 28 includes whether the central tabulating system has been compromised. He described his

1 understanding of the batching method and the precinct method to conduct the 1% manual tally. In
2 his opinion, the batching method provides a higher statistical advantage to detect errors in the
3 election result. In his opinion, it's important that all votes cast have been counted before the
4 random selection / 1% manual tally occurs. In his opinion, the 1% manual tally conducted on a
5 sampling of ballots instead of all votes cast, undermines, from a statistical perspective, the
6 "accuracy of the voting system results." In his opinion, the County's random selection is, from a
7 statistical perspective, flawed. He described his understanding of provisional ballots. In his
8 opinion, the omission of ballots cast, including provisional ballots and VBM ballots, impairs the
9 ability of the 1% manual tally to detect errors. In his opinion, the manner in which the County
10 conducts the 1% manual tally creates a "frame bias." He has reviewed Plaintiff's SAC in this case
11 as well as pertinent legislation connected to section 15360. He has not reviewed the County's
12 procedures for processing VBM and provisional ballots. He has not participated in an audit of the
13 County's 1% manual tally. He is not familiar with the County's GEM to process voting results.
14 He performed election calculations relating to *Bush v. Gore*. He agreed that the official canvas
15 includes elements other than the 1% manual tally. He agreed that he is not familiar with all of the
16 requirements of the official canvas. His focus is limited to the completion of the 1% manual tally.
17 He agreed that a risk limiting audit is different than the 1% manual tally, which have very different
18 goals. The goal of a risk limiting audit is to confirm the accuracy of the election results. He
19 disagreed that a risk limiting audit is similar to a recount procedure, though he characterized the
20 1% manual tally to be "like an intelligent incremental recount." He generally agreed that the
21 "broad" goals of both a risk limiting audit and the 1% manual tally is to check that the election
22 results are correct. He agreed that the 1% manual tally is not a recount. He agreed that the ROV is
23 required to report discrepancies detected from the 1% manual tally to the Secretary of State. L.A.
24 and San Francisco are developing their own vote tabulating systems. The Elections Code does not
25 require that jurisdictions perform a risk limiting audit. In his opinion, the 1% manual tally is an
26 ineffective and inefficient means to confirm election results. In his opinion, the 1% manual tally
27 has a small chance of detecting errors in the election results. In his opinion, a risk limiting audit
28 has up to a 90% chance of detecting errors in the election results. He agreed that the 1% manual

1 tally measures, although ineffectively and inefficiently, the accuracy of the election count. The
2 pilot program he participated in conducted risk limiting audits in elections in eleven counties in
3 2011 – 2012. The audits used a software program other than the counties' existing voting system
4 software program. The most common tabulation error is, in his experience, the misinterpretation
5 of voter ballots, or voter intent. He is not familiar with the voter guidelines promulgated by the
6 Secretary of State. He is not familiar with the County's procedures to test whether ballots are
7 scanned properly. He agreed that a quality control system should reduce errors in the ballots
8 counted. He has not reviewed the County's 1% manual tally results for the June 2016 election. In
9 reviewing Exh. "51," he identified discrepancies in the scanned count and the 1% manual tally in
10 the June election. In his opinion, the entire election audit system needs an overhaul. He agreed
11 that the current voting system does not require a risk limiting audit. He is not familiar with the
12 term "semi-final official" canvas as reflected in the Elections Code. David Jefferson was the
13 chairperson of the post-election audit standards working group. He recognized Dean Logan to be
14 L.A. County's ROV. He identified the existing elements of the official canvas. In his opinion, the
15 existing elements of the official canvas, including the 1% manual tally, are "not enough." In his
16 opinion, the 1% manual tally as a "double check" is not as good as a risk limiting audit. He
17 assumed that the County, like other counties, has a quality control system in tabulating votes. He
18 described his understanding of the manner in which the County conducts its "random draw." He
19 has no opinion on the accuracy of the results of the County's June election. To be a reliable
20 accuracy indicator, the random draw should occur after the results of the election are known. He
21 expects that the risk limiting audit will be the next generation of audits in the State's election
22 procedures.

23
24 **Plaintiffs' FIRST CAUSE OF ACTION for DECLARATORY RELIEF**

25
26 Declaratory relief is a proper remedy. The purpose of a declaratory judgment is to serve
27 some practical end in "quieting or stabilizing an uncertain or disputed jural relation." *In re*
28 *Claudia E.* (2008) 163 Cal. App. 4th 627, 633 (declaration that Department of Social Services not

1 complying with statutory time requirements for juvenile removal proceedings). Another purpose
 2 is to liquidate doubts with respect to uncertainties or controversies which might otherwise result in
 3 subsequent litigation. *Id.* "The proper interpretation of a statute is a particularly appropriate
 4 subject for judicial resolution." *Id.* Judicial economy strongly supports the use of declaratory
 5 relief to avoid duplicative actions to challenge an agency's statutory interpretation or alleged
 6 policies. *Id.* The remedy of declarative relief is cumulative and does not restrict any other remedy
 7 such that it is wrong for a court to decline a declaration on the ground that another remedy is
 8 available. *Id.* at 633-634.

9 In their trial brief (ROA #92), at pages 4 – 6, Plaintiffs assert:

10 "Election Code section 15360 describes the 1% manual tally audit procedure. This
 11 provision begins as follows:

12 15360(a) During the official canvass of every election in which a voting system is used, the
 13 official conducting the election shall conduct a public manual tally of the ballots tabulated by those
 14 devices, including vote by mail ballots, using either of the following methods:

15 (1) (A) A public manual tally of the ballots, including vote by mail ballots, cast in 1 percent of the
 16 precincts chosen at random by the elections official. If 1 percent of the precincts is less than one
 17 whole precinct, the tally shall be conducted in one precinct chosen at random by the elections
 18 official.

19 Section 15360(a) requires that "[d]uring the official canvass of every election in which a
 20 voting system is used, the official conducting the election shall conduct a public manual tally of
 21 the ballots tabulated by those devices, including VBM ballots." This process is called the 1%
 22 manual tally. The purpose of the 1% manual tally is "to verify the accuracy of the automated
 23 count." Section 336.5.

24 Section 15360 clearly states that "not less than 1 percent of the VBM ballots cast" must be
 25 included in the 1% manual tally. Section 15360(a)(2)(B)(i). This quantity must be calculated
 26 based on the total number of vote by mail ballots cast, not the number of vote by mail ballots
 27 counted to date. 1% of the total number of ballots counted at that point is less than 1% of the total
 28 number of ballots cast and ultimately counted after that point. Thus, including a mere 1% of the

1 total number of ballots counted to date is in direct violation of the requirement that "not less than
2 1% of the VBM ballots cast in the election" be counted. Section 215360(a)(2)(B)(i).

3 The stated purpose of the 1% tally, "to verify the accuracy of the automated count,"
4 supports this conclusion. Section 336.5. The legislative history of Section 15360 also supports this
5 conclusion. "In 2006, Elections Code 15360 was amended to require that all vote by mail ballots
6 be included in the 1% manual tally by precinct. This requirement resulted in over 540 additional
7 staff hours to complete the manual tally process and approximately 12,000 in additional costs for
8 each election...." 06/03/11 - Senate Elections and Constitutional Amendments, 2011 Cal Stat. Ch.
9 52. Clearly, all vote by mail ballots have to be counted. The onerous nature of this requirement
10 led the legislators to add the option to manually tally VBM ballots separately, in batches, to
11 ensure, that all of them could be counted efficiently. Id. The proponents of AB707 state the intent
12 clearly: "The votes on absentee ballots are no less valid or important than the votes cast at the
13 polling place, and the potential for the vote to be incorrectly tabulated on an absentee ballot is just
14 as likely as a vote cast in a traditional polling booth. Therefore, it makes no sense to exclude
15 absentee ballots, provisional ballots and ballots cast at satellite locations from the 1% manual tally.
16 By excluding them from the manual tally, there is no way to verify that the votes cast on them are
17 being recorded accurately. Moreover, in the event that counties are authorized to conduct an all-
18 mail election, this provision would ensure that the manual tally is still conducted in those
19 counties." (Exhibit 54, page 3) Further support was provided by the then-serving Secretary of
20 State Bruce McPherson (served from March 2005 - December 2006): "This proposal also requires
21 a county election official to include all ballots cast in a precinct in the 1% manual tally. This
22 means that a county will need to include any ballots cast at the polls, via absentee ballot,
23 provisional voters, and any ballots cast on direct recording electronic (DRE) voting machines."
24 (Exhibit 54, page 15). In the final recommendation to Governor Schwarzenegger: "Summary:
25 This bill establishes a uniform procedure for elections' officials to conduct the 1% manual tally of
26 the ballots including (1) the requirement that absentee ballots, provisional ballots, and ballots cast
27 at satellite locations be included in the tally of ballots... " (Exhibit 54, page 37.)

28 ///

1 Precedent furthers the support for this conclusion. "Section 15360 appears on its face to be
2 concerned solely with assuring the accuracy of the vote, not with limiting unnecessary vote
3 tallying. Indeed, the explicit intent of section 15360, as expressed in a companion statute, is "to
4 verify the accuracy of the automated count." *County of San Diego v. Bowen* 166 Cal. App. 4th
5 501, 511-12 (Cal. Ct. App. 2008)."

6 In their trial brief (ROA # 93), Defendants assert, at pages 15 - 17:

7 When conducting the random sample selected for the manual tally by the Registrar
8 includes all ballots included in the semifinal official canvass the day after the election, including
9 VBM ballots. The County does not include VBM ballots that have yet to be processed and added
10 into the official canvass results. Similarly, the Registrar does not include any provisional ballots in
11 the manual tally. The practice followed by the Registrar is consistent with the intent and purpose
12 of the manual tally and satisfies the requirements of Section 15360.

13 **A. Section 15360 does not Require Provisional Ballots to be Included in the Manual**
14 **Tally**

15 The Registrar does not include provisional ballots in the manual tally. This practice is
16 consistent with the practices of other counties and the opinion of the Secretary of State. It is also
17 consistent with the original intent of the Legislature in conducting the 1% manual tally and does
18 not run afoul of the requirements of Section 15360.

19 As detailed above, prior to 2006, Section 15360 did not expressly require VBM or
20 provisional ballots to be included in the manual tally. In 2006, the Legislature enacted AB 2769
21 (Stats. 2006, c. 893, § 1) and AB 2769 (Stats. 2006, ch. 894) amending Section 15360 to read, in
22 relevant part as follows: "... the official conducting the election shall conduct a public manual
23 tally of the ballots tabulated by those devices, including absent voters' ballots, cast in 1 percent of
24 the precincts"

25 When introduced, SB 1235 proposed that Section 15360 be amended to also include
26 "provisional ballots, and ballots cast at satellite locations, cast in 1 percent of the precincts" But,
27 the reference to "provisional ballots, and ballots cast at satellite locations" was deleted before the
28 second reading of the bill in committee. Similarly, AB 2769 when introduced also proposed to

1 include VBM and provisional ballots in the manual tally, but also like SB 1235, once amended all
2 references to provisional ballots were deleted. “When the Legislature chooses to omit a provision
3 from the final version of a statute which was included in an earlier version, this is strong evidence
4 that the act as adopted should not be construed to incorporate the original provision.’ [citation]”
5 *UFCW & Employers Benefit Trust v. Sutter Health* 241 Cal. App. 4th 909, 927 (2015), citing
6 *People v. Delgado* 214 Cal. App. 4th 914, 918 (2013). As such, it is clear that the Legislature
7 considered but rejected the idea that provisional ballots were to be included in the manual tally.

8 **B. The Registrar Properly Includes Vote by Mail Ballots in the 1 Percent Manual**
9 **Tally**

10 VBM ballots are received at different times by different means of delivery. The VBM
11 ballots associated with a particular precinct are by the very nature of the process sprinkled
12 throughout all of the VBM ballots included in the semifinal official canvass. Prior to 2012, after
13 the precincts to be included in the manual tally were selected, elections officials were required to
14 locate the VBM ballots associated with the randomly selected precincts and integrate those ballots
15 into the ballots cast at the precincts. This process had to be initiated within several days of the
16 election in order to complete the manual tally “during the official canvass” and of course could not
17 include VBM ballots that have not yet been processed and counted.

18 In 2011, in an effort to streamline the process and reduce the costs of completing the
19 manual tally, the Legislature enacted AB 985 amending Section 15360. As amended by AB 985,
20 Section 15360 election officials now have an option for conducting the manual tally. Election
21 officials can now conduct the manual tally by precinct as provided under 15360(a)(1)) or,
22 alternatively may conduct a two part manual tally that allows elections officials to manually tally
23 randomly selected batches of VBM ballots, thereby avoiding the cost and time of having to
24 integrate the VBM ballots into the randomly selected precincts (see § 15360(a)(2)).

25 The intended purpose of AB 985 was to streamline the process and make it easier, more
26 efficient and less costly to conduct the manual tally. If the court now interprets AB 985 to require
27 the Registrar to include all VBM in the manual tally, that interpretation would make the process

28 ///

1 more difficult, less efficient and more costly, all of which are contrary to the stated purpose of the
2 amendment.

3 Both before and after the enactment of AB 985, the Registrar has only included VBM
4 ballots included in the semifinal official canvass in the manual tally. This practice is consistent
5 with the intent and purpose of the statute as amended and is also consistent with the practices of
6 other counties. The practice also reflects the practical necessity of having to complete the official
7 canvass of the election and certify the results within the statutorily mandated period after the
8 election.

9 Another reason for not waiting to conduct the manual tally until all of the VBM ballots are
10 included in the official canvass is that if the Registrar waited and then determined that the vote
11 tabulating devices were not recording the votes accurately, there would be no time left to correct
12 the error and rerun all of the ballots previously included in the official canvass. It is in the public's
13 interest and it is a prudent business practice to begin and complete the manual tally as soon as
14 possible. Waiting until all of the VBM ballots have been processed and included in the official
15 canvass would inarguably substantially delay that process."

16 In resolving the controversy over the scope of the "1 percent manual tally" in Section
17 15360, the Court accepts the issues the parties do not dispute: 1. Elections Code Sections 336.5
18 and 15360 are the operative provisions of the Elections Code that define and govern the one
19 percent manual tally (to wit, **"One percent manual tally"** is the public process of manually
20 tallying votes in 1 percent of the precincts, selected at random by the elections official, and in one
21 precinct for each race not included in the randomly selected precincts."); 2. Provisional voters are
22 defined in Election Code Section 14310 – 14313 (to wit, "... a voter claiming to be properly
23 registered, but whose qualification or entitlement to vote cannot be immediately established upon
24 examination of the index of registration for the precinct or upon examination of the records on file
25 with the county elections official, shall be entitled to vote a **provisional ballot ...**"); 3. Vote-by-
26 mail voters are defined in Election Code Section 300 (to wit, **"Vote by mail voter"** means any
27 voter casting a ballot in any way other than at the polling place."); 4. The one percent manual tally
28 must be conducted and completed during the official canvass; 5. The purpose of the manual tally is

1 to verify the accuracy of the automated count. (emphasis added by the Court)

2 The Court is disinclined to read any more into the term "1% manual tally" than is necessary
3 to reasonably construe or interpret its scope.

4 Though the subject of much discussion throughout its history (see, for example,
5 Defendants' trial brief, pages 2 – 4), the legislature chose not to include "provisional ballots" in
6 Section 15360. There appears to be good reason to conclude that this omission was not
7 inadvertent.

8 As Defendants argue, at pages 8 – 9 of their trial brief:

9 "Voters may be required to vote provisionally on the day of the election for a number of
10 reasons. One reason that a voter may be asked to vote provisionally is because the voter is
11 registered as a VBM voter and has been issued a mail ballot, but wants to vote at the poll. The
12 purpose of having a voter registered as a VBM voter vote provisionally is to provide a safeguard
13 against the possibility that the VBM voter has already returned his or her VBM ballot and had his
14 or her VBM ballot counted. In the June Presidential Primary more than one-half of the 75,386
15 voters who voted provisionally were VBM voters who appeared at the polls on election-day but
16 who could not surrender their VBM ballot. And, in fact, during the canvass, the Registrar
17 determined that 521 voters voted both their VBM ballot and a provisional ballot.

18 Another reason for requiring a voter to vote provisionally is because the voter does not
19 appear on the roster of voters at the precinct where they appear to vote. For example, if a non-
20 VBM voter is registered to vote in a precinct in Poway but the voter appears at a poll in Chula
21 Vista, that voter would be given a provisional envelope in which the voter would place his voted
22 ballot, which is then returned to the Registrar's office unopened for final determination. After
23 voting, the voter is instructed to complete all of the information required on the outside of the
24 provisional ballot envelope, including, among other things, the voter's current residence address.
25 The voter is also required to sign and seal the envelope, and return the envelope to the poll worker
26 for deposit into the ballot box. In the June Presidential Primary more than 12,000 voters appeared
27 at a poll other than where they were registered and voted provisionally.

28 ///

1 Another reason for requiring a voter to vote provisionally is unique to “semi-open primary”
2 elections like the June Presidential Primary. The Republican, Green, and Peace and Freedom party
3 primaries were “closed elections” meaning that only voters registered with one of those particular
4 parties were allowed to vote for that party’s presidential candidates. In contrast, the Democratic,
5 American Independent, and Libertarian party primaries were “open primaries” meaning that voters
6 who had registered “No Party Preference” (“NPP”) were allowed to vote for any one of those
7 parties’ presidential candidates. In no instance could a voter registered with a particular party vote
8 for the presidential candidates of another political party. These rules are established by the parties,
9 not the State and not by local election officials.”

10 Vu’s trial testimony – which the Court perceived to be credible – is consistent with
11 Defendants’ trial brief explanation of the circumstances under which provisional ballots are cast.
12 The Court finds the initial explanation (a provisional voter may be a voter who is “registered as a
13 VBM voter and has been issued a mail ballot, but wants to vote at the poll”) to be significant. The
14 Court infers from this explanation that provisional ballots may be nothing more than duplicate
15 ballots of VBM ballots cast by the same voters. Indeed, according to Defendants “In the June
16 Presidential Primary, more than one-half of the 75,386 voters who voted provisionally were VBM
17 voters who appeared at the polls on election-day but who could not surrender their VBM ballot.
18 And, in fact, during the canvass, the Registrar determined that 521 voters voted both their VBM
19 ballot and a provisional ballot.” If the Court were to accept Plaintiffs’ argument that Section
20 15360’s 1% manual tally audit procedure includes “all ballots cast” including provisional ballots
21 (Plaintiffs’ trial brief at pages 4 – 7), Plaintiffs are, in effect, advocating that Defendants assume
22 the risk of including more than 100% of the ballots cast in the 1% manual tally. Not only does
23 this interpretation strike the Court as unreasonable but it has the inevitable consequences of adding
24 burden to the County’s ROV, whose resources are already stretched far too thin.

25 Accordingly, the Court rejects Plaintiff’s interpretation that the 1% manual tally include
26 provisional ballots.

27 On the other hand, Plaintiffs’ interpretation that all VBM ballots should be included in the
28 1% manual tally strikes the Court as more reasonable than Defendants’ rejection of the need to do

1 so. First, Section 15360 specifically dictates that the 1% manual tally include VBM ballots.
2 Second, the statute's legislative history supports the inclusion of VBM ballots. Third, the
3 inclusion of all VBM ballots strikes the Court as more conducive to a "uniform procedure for
4 elections' officials to conduct the 1% manual tally of the ballots" (Plaintiffs' trial brief, at pages 5
5 - 6) and toward accomplishing the goal of verifying "the accuracy of the automated count." Based
6 on the trial evidence, the ROVs appear to include as many, or as few, VBM ballots as have been
7 received and processed in the 1% manual tally. For example, according to Rodewald, San Luis
8 Obispo does not include VBM ballots not counted as of the election day in the 1% manual tally;
9 according to Logan, L.A. only includes VBM ballots which were both received and counted as of
10 the election day in the 1% manual tally; according to LaVine, Sacramento strives to include as
11 many VBM ballots as possible into the 1% manual tally; according to Vu, San Diego does not
12 include VBM ballots not processed by election night in the 1% manual tally. The disparity of the
13 ROVs practices throughout the State strikes the Court as more a reflection upon the limited
14 resources within which the ROVs are expected to discharge their statutory duties than compliance
15 with a reasonable interpretation of Section 15360. The Secretary of State's contrary opinion (Exh.
16 "107") is rejected.

17 Accordingly, the Court accepts Plaintiff's interpretation that the 1% manual tally include
18 all VBM ballots. In doing so, the Court emphasizes that its intention is not to call into question the
19 credibility of the ROVs who testified at trial. It's apparent that the ROVs are experienced, skillful
20 and devoted public servants who are tasked with the challenge of overseeing an extraordinarily
21 complex voting system.

22
23 **Plaintiffs' SECOND CAUSE OF ACTION for MANDAMUS - CCP 1085**

24
25 A writ of mandate compelling the County Registrar of Voters Office to comply with the
26 California Elections Code is a proper remedy. The Court will issue a writ of mandate "to any
27 inferior tribunal, corporation, board, or person, to compel the performance of an act which the law
28 specifically enjoins, ... or to compel the admission of a party to the use and enjoyment of a right or

1 office to which the party is entitled, and from which the party is unlawfully precluded by such
 2 inferior tribunal, corporation, board, or person.” Code Civ. Proc. 1085(a). “Mandamus is the
 3 correct remedy for compelling an officer to conduct an election according to law.... It is also an
 4 appropriate vehicle for challenging the constitutionality of statutes and official acts.” *Hoffman v.*
 5 *State Bar of California* (2003) 113 Cal. App. 4th 630, 639 (internal citations omitted).

6 In *People v. Karriker* (2007) 149 Cal. App. 4th 763, 774, the Court stated:

7
 8 ... Mandamus will lie, however, “to compel a public official to
 9 perform an official act required by law.” (*Ibid.*) “Code of Civil
 10 Procedure section 1085, providing for writs of mandate, permits
 11 challenges to ministerial acts by local officials. To obtain such a
 12 writ, the petitioner must show (1) a clear, present, ministerial duty on
 13 the part of the respondent and (2) a correlative clear, present, and
 14 beneficial right in the petitioner to the performance of that duty.
 [Citations.] A ministerial duty is an act that a public officer is
 15 obligated to perform in a prescribed manner required by law when a
 16 given state of facts exists. [Citations.]

17 The Court finds that Defendants are “obligated” to include all VBM ballots in the 1%
 18 manual tally, in performance of the requirements imposed on elections officials by Elections Code
 19 Sections 336.5 and 15360. To this extent, the Court grants the relief sought by Plaintiffs to require
 20 Defendants to “to fully comply with the breadth of California Elections Code Section 15360.”
 21 SAC, page 12.

22 On the other hand, the Court defers, without prejudice, from ruling on the relief sought by
 23 Plaintiffs that Defendants be “stayed from certifying any future election.” SAC, page 12. The
 24 Court is not satisfied that the parties have adequately briefed the issue of a stay much less the
 25 consequences that may flow from the issuance of a stay of the upcoming November election. The
 26 Court will entertain further discussion regarding a hearing and briefing schedule at the Status
 27 Conference.

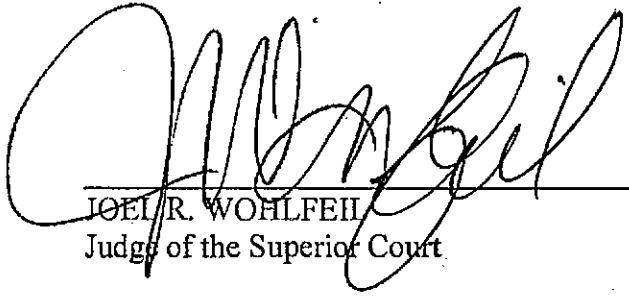
28 Conclusion

The Court finds, as set forth above, in favor of Plaintiffs and against Defendants

1 MICHAEL VU and COUNTY OF SAN DIEGO, and in favor of Defendant HELEN N.
2 ROBBINS-MEYER and against Plaintiffs, on Plaintiffs' claims against Defendants. The parties
3 are directed to serve their objections, if any, to the Court's SOID within the time required by law.
4 The Court sets a Status Conference on December 1, 2016 at 3:00 pm for the purpose of hearing the
5 objections, if any, to the Court's SOID.

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IT IS SO ORDERED.

Dated: 10-26-16 
JOEL R. WOHLFEIL
Judge of the Superior Court

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO <input type="checkbox"/> COUNTY COURTHOUSE, 220 W. BROADWAY, SAN DIEGO, CA 92101-3814 <input checked="" type="checkbox"/> HALL OF JUSTICE, 330 W. BROADWAY, SAN DIEGO, CA 92101-3827 <input type="checkbox"/> FAMILY COURT, 1555 6TH AVE, SAN DIEGO, CA 92101-3294 <input type="checkbox"/> MADGE BRADLEY BLDG., 1409 4TH AVE., SAN DIEGO, CA 92101-3105 <input type="checkbox"/> KEARNY MESA BRANCH, 8950 CLAIREMONT MESA BLVD., SAN DIEGO, CA 92123-1187 <input type="checkbox"/> NORTH COUNTY DIVISION, 325 S. MELROSE DR., VISTA, CA 92083-6643 <input type="checkbox"/> EAST COUNTY DIVISION, 250 E. MAIN ST., EL CAJON, CA 92020-3941 <input type="checkbox"/> RAMONA BRANCH, 1428 MONTECITO RD., RAMONA, CA 92065-5200 <input type="checkbox"/> SOUTH COUNTY DIVISION, 500 3RD AVE., CHULA VISTA, CA 91910-5649 <input type="checkbox"/> JUVENILE COURT, 2851 MEADOW LARK DR., SAN DIEGO, CA 92123-2792 <input type="checkbox"/> JUVENILE COURT, 325 S. MELROSE DR., VISTA, CA 92083-6634	<p style="text-align: right;"><i>FOR COURT USE ONLY</i></p> <p style="text-align: right;">0489</p> <p style="text-align: center;">F I L E D Clerk of the Superior Court</p> <p style="text-align: center;">OCT 26 2016</p> <p style="text-align: center;">By: J. CERDA</p>
PLAINTIFF(S)/PETITIONER(S) LUTZ	
DEFENDANT(S)/RESPONDENT(S) MICHAEL VU	JUDGE: Joel R. Wohlfell DEPT: 73
CLERK'S CERTIFICATE OF SERVICE BY MAIL (CCP 1013a(4))	CASE NUMBER 37-2016-00020273-CL-MC-CTL

I, certify that: I am not a party to the above-entitled case; that on the date shown below, I served the following document(s): Minute Order dated 10/26/16 with Statement of Intended Decision attached.

on the parties shown below by placing a true copy in a separate envelope, addressed as shown below; each envelope was then sealed and, with postage thereon fully prepaid, deposited in the United States Postal Service at: San Diego Vista El Cajon Chula Vista Ramona, California.

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NAME & ADDRESS

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CLERK OF THE SUPERIOR COURT

Date: October 26, 2016

by 151 Deputy
J. Cerda

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5 Attorney for Plaintiffs, Citizens Oversight Inc. and Raymond Lutz

8 **SUPERIOR COURT OF CALIFORNIA**
9 **COUNTY OF SAN DIEGO—CENTRAL DIVISION**

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

13 Plaintiffs,

14 vs.

15 MICHAEL VU, San Diego Registrar of
16 Voters; HELEN N. ROBBINS-MEYER,
17 San Diego County Chief Administrative
18 Officer; COUNTY OF SAN DIEGO, a
19 public entity; DOES 1-10,

18 Defendants.

CASE NO: 37-2016-00020273-CL-MC-CTL

**PLAINTIFFS' OBJECTIONS TO COURT'S
STATEMENT OF INTENDED DECISION**

Hon. Joel R. Wohlfeil, Judge

Complaint filed: June 16, 2016

Trial Date: October 4-6, 11, 2016

Status Conference: December 1, 2016

Time: 3:00 p.m.

Department: C-73

20 Plaintiffs submit the objection to the Court's Statement of Intended Decision ("SOID")
21 pursuant to California Rules of Court Rule 3.1590(g):

22 The Court issued a Statement of Intended Decision on October 26, 2016, with service
23 on the parties by first class mail. The first twenty four pages are the Court's recitation,
24 observations and comments concerning the Minute Order of July 25, 2016 (ROA #70), Joint
25 Trial Readiness Conference Report ("TRC") (ROA #91)/Advance Trial Review Order
26 ("ATRO") (ROA #90), Trial Exhibits and Trial Witnesses. Plaintiffs understand the Court's
27 desire to have a thorough record concerning these events and comments and has no objection
28 to the form thereof. Plaintiffs note that in the Court's attempt to recite portions of Plaintiffs

1 trial brief, the references to "Exhibit 54" should be replaced with "Exhibit 59" which actually
2 was the Legislative History exhibit introduced at trial

3 Page 26, Line 19: Strike "Exhibit 54", Replace "Exhibit 59"

4 Page 26, Line 24: Strike "Exhibit 54", Replace "Exhibit 59"

5 Page 26, Line 27: Strike "Exhibit 54", Replace Exhibit 59"

6 **Objections:**

7 1. Page 1 lines 7-8 -- "no country in the world works as hard as the United States to
8 preserve its election integrity, a bedrock of its democratic principles."

9 This statement is not supported by any evidence in the proceeding. Actually, many
10 countries do as much or more than the United States to insure election integrity. Such a
11 conclusion would require an exhaustive comparison of all other countries to determine who
12 works harder. It also implies that these Defendants are already working harder than all other
13 countries on earth and thus implies that Plaintiffs' Second Amended Complaint overly
14 burdensome. Plaintiffs' role is part of the "hard work" needed to preserve election integrity and
15 without it, our integrity as a nation is diminished. We can accept "the United States works hard to
16 preserve election integrity, a bedrock of its democratic principles."

17 2. Page 3, lines 25-27

18 Although the Court is reciting *Finnie v. Town of Tiburon* (1988) 199 Cal. App. 3d 581,
19 586 ("Finnie") from its preliminary ruling dated July 25, 2016, concerning Plaintiffs' Motion for
20 Preliminary Injunction, the basis for that decision which deemed Plaintiffs' motion as moot, is
21 inaccurate. Finnie is distinguishable. In Finnie, was a decision on a project that was put before
22 the voters. After losing the vote, Finnie filed a law suit. Unlike here, their case was moot due to
23 legitimate election results. Again, there was no dispute that the actions of elections officials were
24 improper, but that the outcome of the election was not desirable to the plaintiffs. The instant
25 case is far different in that the issue is regarding the action of the election official in his capacity
26 and whether California law was followed, not whether some other issue can be decided due to an
27 election. Plaintiffs' Complaint is not a contest of the election results.

28 The Secretary of State's certification, as mentioned on page 3, lines 15-18 was based on

1 and predicated upon, *inter alia*, the certification of the results from San Diego. Thus, certification
2 by the Secretary of State, which relies upon the certification of San Diego County, and all
3 California county results, does not mean that the 1% manual tally, which is the subject of this
4 case, was conducted according to the law, nor does it mean that Plaintiffs should have no
5 recourse regarding the improper conduct of the Registrar of Voters in that election. As clearly
6 demonstrated by facts not in dispute in this case, 39% of legitimate valid ballots were omitted
7 from the scrutiny of the audit, and they also conducted themselves suspiciously in that they
8 operated outside their own written procedures and changed the method of the 1% manual tally
9 from batch-based to precinct-based for the VBM ballots that were included, resulting in 40
10 people spending a week rifling through boxes of ballots to find those that would correctly match
11 reports of the selected precincts. This conduct was so far from what is required, that the court can
12 and should rule that the 1% manual tally be redone in the Presidential Primary just to set the
13 record straight and ensure there was a correct audit and certification reported to the Secretary of
14 State.

15 3. Page 3, line 25 through Page 4, line 2. The court further cites *Wilson v. Los Angeles*
16 *County Civil Service Commission* (1952) 112 Cal. App. 2d 450, 453 (“Wilson”) to
17 support its initial ruling that the Plaintiffs’ Motion for Injunction is moot.

18 Wilson is also a distinguishable case. In Wilson, they considered whether a list of
19 appointees could or could not be extended in time by the authorities involved. In that case, they
20 apparently had the right to take that action under the law. Here, Defendants did not fulfill their
21 obligations under the law to perform the final audit of the election and performed the audit in
22 such a way to raise suspicions as to their motives. It is undisputed that the Registrar certified the
23 election results without full compliance with Elections Code Section 15360, omitting
24 approximately 285,000 ballots from review. Some of the races in that election were within
25 16,000 votes and could be compromised. A complete audit could unveil acts, nefarious or not,
26 such that results of the election would likely need to be nullified. Plaintiffs assert that Plaintiff’s
27 Motion for Injunction was not to be mooted. Instead, the Court should require the election
28 officials conduct the audit, even if after certification is complete, to underwrite the integrity of

1 the certification.

2 4. Page 4, lines 16-17 presents the definition of the 1% manual tally, stating that it "is
3 conducted during the official canvass..."

4 If the manual tally is not completed according to the law, the official canvass cannot
5 certified. By way of analogy, if a service provider was required to perform a test on their work
6 prior to completing the contract and being paid for their work, and they did not complete 39% of
7 the testing phase specified by the contract, the issue does not become moot simply because the
8 contractor says the contract is complete. Testing of the product can be done at any time to
9 validate the work done. 42 USCS § 1974 provides that every officer of election shall retain and
10 preserve, for a period of 22 months from the date of any general, special, or primary election . . .
11 all records and papers which come into his or her possession relating to any application,
12 registration, payment of poll tax, or other act requisite to voting in such election.

13 5. Page 10, line 3: "very single VBM ballot is counted manually." This misstates testimony.
14 VBM ballots are validated manually but processed with optical scan machinery.

15 6. page 10, lines 14-15 "The provisional ballots are processed after the election." -- This
16 misstates testimony. The evidence is that provisional ballots are processed after election
17 day but before the end of the official canvass period. Lines 24-25 correctly states the
18 evidence: "The County completes the process of counting provisional ballots by the time
19 the results are certified."

20 7. Page 11, line 15: "75,000 provisional ballots were cast in the June election." This should
21 read "75,000 ballots were cast provisionally in the June election, and about 68,000 were
22 ultimately validated and officially cast."

23 8. Page 12, lines 6-7: "Vu's practice is to choose only 8 precincts, instead of 32 precincts, to
24 develop the batches." This misstates testimony. The testimony is: "In addition to the 16
25 precincts chosen for the ballots cast at polling places to be manually tallied, Vu's practice
26 was to choose only 8 batches, instead of 16 batches, to develop the set of VBM batches to
27 be manually tallied."

28 9. Page 12, lines 12-13 "He prepared a report of the 1% manual tally from the 2008

- 1 election." This misstates testimony. The sentence should read: "He prepared a report of
2 election procedures including the 1% manual tally from the 2008 election."
- 3 10. Page 12, lines 16-17 "In his opinion, the County conducts a 1% manual tally without
4 including VBM ballots." This misstates testimony. The sentence should read: "In his
5 opinion, the County conducts a 1% manual tally without including all VBM ballots."
- 6 11. Page 12, lines 26-27 "In his opinion, the 1% manual tally detects simple tabulator errors
7 which could result in a shift of as many as 10,000 votes from one candidate to another."
8 This misstates testimony. The sentence should read: "In his opinion, the 1% manual tally
9 detects simple tabulator errors as well as possible central tabulator hacking which could
10 result in a shift of as many as 10,000 votes from one candidate to another."
- 11 12. Page 21, lines 24-25 "San Luis Obispo does not include VBM ballots not counted as of
12 the election or provisional ballots in the 1% manual tally." This misstates testimony. The
13 sentence should read: "San Luis Obispo did not perform the random draw until a week
14 after the election to allow more VBM ballots to be included."
- 15 13. Page 27, line 6 to perhaps page 29 line 15 -- The Court excerpts an extended section from
16 Defendants' trial brief but it is unclear when this quotation ends. Without proper
17 demarcation, the reader may be inclined to think this the opinion of the court when it is
18 only the opinion of the Defendants.
- 19 14. Page 30, line 6-7: "There appears to be good reason to conclude that this omission was
20 not inadvertent." Plaintiffs never claimed that the omission was inadvertent. Plaintiffs
21 claim the omission was intentional as its inclusion was redundant to the construction of
22 the phrase "ballots cast at precincts" as a validated provisional ballot, once validated, is
23 considered a ballot cast at the precinct.
- 24 15. As we read the SOID, the Court's conclusions and decision commence on page 29, line
25 16. Plaintiffs object to the SOID commencing on page 30, line 8 - page 32, line 21. This
26 is essentially the "provisional ballot" portion of the decision. It would appear that the
27 Court misconstrues Plaintiffs contention and request for declaratory relief with regard to a
28 "provisional ballot." It is not Plaintiffs' position nor Plaintiffs' request that unvalidated

1 provisional ballots be included in the 1% manual tally, only the validated provisional
2 ballots must be included because such ballots are, indeed, tabulated by the central
3 tabulation system used by the Registrar. (Elections Code Section 15360(a)). Specifically,
4 the Court states that "(i)f the Court were to accept Plaintiffs' argument that Section
5 15360's 1% manual tally audit procedure includes "all ballots cast" including provisional
6 ballots, Plaintiffs are, in effect, advocating that Defendants assume the risk of including
7 more than 100% of the ballots cast in the 1% manual tally." Plaintiffs have never thought
8 that the 1% manual tally should include unvalidated provisional ballots. Plaintiffs
9 contention is and has been that once the provisional ballot is validated, it is no longer
10 "provisional" and is simply another ballot cast at a precinct and tabulated in the
11 Registrar's central tabulation system. The presentation of evidence at trial was that the
12 Registrar excludes the entire block of "provisional ballots" from the 1% manual tally and
13 must include the validated ballots in the audit. (See Plaintiffs' Closing Brief, page 3, line
14 27 - page 4, line 4: "There were 75,386 provisional ballots cast at the 1522 county
15 precincts, of which **68,653 were ultimately verified and counted in the Official**
16 **Canvass** but were not included in the 1% Manual Tally. (Testimony of Michael Vu)
17 Thus, by the numbers, 234,000 VBM plus 68,653 provisional ballots cast at the precincts
18 (a combined 302,653 ballots) — more than 39% of the 775,930 total votes cast — were
19 omitted entirely from the 1% Manual Tally conducted by defendants."

- 20 16. Page 31, lines 23-24 "inevitable consequences of adding burden to the County's ROV,
21 whose resources are already stretched far too thin." There is no evidence that the
22 resources of the County or the Registrar are "already stretched far too thin" nor that
23 including validated provisional ballots, which would amount to tallying about 2 batches
24 of 400 ballots and consuming less than a day of two teams of workers, would
25 demonstrably affect the budget of the Registrar. Moreover, evidence has been presented
26 in this proceeding that the Registrar has made operational decisions that has consumed
27 additional time, such as switching from batch to precinct mode and employing 40 people
28 for a week to search for ballots. The inclusion of validated provisional ballots is not a

1 substantial burden which the Registrar cannot easily address. Moreover, the budgetary
2 concerns of the Registrar are not a concern for which the Court should alter statutory
3 interpretation here.

- 4 17. Mandamus: On page 33, lines 19-24, the Court defers, without prejudice, from ruling on
5 the relief sought by Plaintiffs that Defendants be “stayed from certifying any future
6 election.” Plaintiffs are concerned that a final ruling or judgment in this case will not be
7 timely for the November election. Election Day is November 8, 2016. The Official
8 Canvass period expires on December 8, 2016. Waiting until December 1, 2016, for a
9 “Status Conference” will effect a repeat of making any decision herein mooted by the
10 time delay. Plaintiffs would request a sooner meeting so that a final judgment can be
11 issued and filed. A “stay from certifying” is unnecessary if the Registrar complies with
12 the judgment. Moreover, Plaintiffs acknowledge that this is an enforcement issue which
13 would be requested or briefed after a judgment is final.

14
15 Respectfully Submitted,

16 Dated: November 8, 2016

17 By: Alan L. Geraci
18 Alan L. Geraci, Esq. of CARE Law
19 Group PC Attorney for Plaintiffs
20 Citizens Oversight Inc. and Raymond Lutz
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ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NO: NAME: Alan L. Geraci SBN108324 FIRM NAME: CARE Law Group PC STREET ADDRESS: 817 W. San Marcos Blvd. CITY: STATE: ZIP CODE: TELEPHONE NO.: 619-261-2048 FAX NO.: 760-650-3484 E-MAIL ADDRESS: alan@carelaw.net ATTORNEY FOR (name): Plaintiff Citizens Oversight Inc., Ray Lutz	FOR COURT USE ONLY ELECTRONICALLY FILED Superior Court of California, County of San Diego 11/08/2016 at 02:21:00 PM Clerk of the Superior Court By E-Filing, Deputy Clerk
SUPERIOR COURT OF CALIFORNIA, COUNTY OF San Diego STREET ADDRESS: 330 W. Broadway MAILING ADDRESS: CITY AND ZIP CODE: San Diego, CA 92101 BRANCH NAME: Central	CASE NUMBER: 37-2016-00020273
Plaintiff/Petitioner: Citizens Oversight Inc. and Raymond Lutz Defendant/Respondent: Michael Vu, San Diego Registrar of Voters, et al	JUDICIAL OFFICER: 73
PROOF OF ELECTRONIC SERVICE	DEPARTMENT: Hon. Joel R. Wohlfeil

1. I am at least 18 years old.

a. My residence or business address is (specify): 817 W. San Marcos Blvd, San Marcos, CA 92078

b. My electronic service address is (specify): alan@carelaw.net

2. I electronically served the following documents (exact titles): PLAINTIFFS' OBJECTIONS TO COURT'S STATEMENT OF INTENDED DECISION

The documents served are listed in an attachment (Form POS-050(D)/EFS-050(D) may be used for this purpose.)

3. I electronically served the documents listed in 2 as follows:

a. Name of person served: Timothy Barry, Chief Deputy County Counsel, Stephanie Karnavas, Deputy Count
 On behalf of (name or names of parties represented, if person served is an attorney): Michael Vu, San Diego County Registrar of Voters; Helen N. Robbins-Meyer, San Diego County Chief Administrative Officer; County of San Diego, a public entity

b. Electronic service address of person served: Timothy.Barry@sdcounty.ca.gov;
 Stephanie.Karnavas@sdcounty.ca.gov

c. On (date): 11/8/2016

d. At (time): 2:30 p.m.

The documents listed in item 2 were served electronically on the persons and in the manner described in an attachment. (Form POS-050(P)/EFS-050(P) may be used for this purpose.)

Date: 11/8/2016

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Alan L. Geraci

(TYPE OR PRINT NAME OF DECLARANT)

/s/ Alan L. Geraci

(SIGNATURE OF DECLARANT)

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

6 Attorneys for Defendants

7
8 **IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA**
9 **IN AND FOR THE COUNTY OF SAN DIEGO**
10 **CENTRAL DIVISION**

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, HELEN N. ROBBINS-MEYER, San
16 Diego County Chief Administrative Officer,
SAN DIEGO COUNTY, a public entity;
17 DOES 1-10,

18 Defendants.

No. 37-2016-00020273-CL-MC-CTL
Action Filed: June 16, 2016

**DEFENDANTS' OBJECTIONS TO
STATEMENT OF INTENDED DECISION
AND PROPOSED FINDINGS**

IMAGED FILE

Hearing Date: December 1, 2016
Time: 3:00 p.m.
Dept.: 73
ICJ: Hon. Joel Wohlfell

19
20 Defendants/Respondents Michael Vu, sued in his official capacity as the Registrar of
21 Voters for the County of San Diego ("Vu") and the County of San Diego ("County")
22 respectfully submit the following objections to the Statement of Intended Decision ("SOID")
23 and also submit additional proposed findings:

24 The purpose of a statement of decision is to set forth the factual and legal basis for the
25 court's decision as to each of the principal controverted issues. Code of Civil Procedure,
26 Section 632; *Muzquiz v. City of Emeryville* (2000) 79 Cal.App.4th 1106, 1124. It is reversible
27 error where a statement of decision "fails to make findings on a material issue which would
28

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28

1 fairly disclose the trial court's determination. *Sperber v. Robinson* (1994) 26 Cal.App.4th 736,
2 345.

3 In response to the court's SOID defendants request that the court:

- 4 • Correct inaccuracies set forth in the court's restatement of the testimony of the
5 witnesses;
- 6 • Consider defendants' objections, detailed below, to findings contained in the
7 SOID; and
- 8 • Consider adding the additional proposed findings, also set forth below.

9 **INACCURACIES IN THE RESTATEMENT OF TESTIMONY**

10 The court's restatement of the testimony misstates the testimony of the witnesses, which
11 statements should be corrected or clarified as follows:

12 **A. MICHAEL VU**

13 **Misstatement No. 1:**

14 Page 9, ll. 3-4: "The County does not maintain the white out tape on ballots for
15 inspection."

16 **Corrected Statement No. 1:**

17 The County secures and maintains the redacted white out taped ballots for 22 months for
18 federal elections and for six months for local elections.

19 **Misstatement No. 2:**

20 Page 9, l. 8: "... with 1,500 precincts ..."

21 **Corrected Statement No. 2:**

22 Mr. Vu testified that there will be 1,552 precincts for the November 2016 Presidential
23 General Election.

24 **Misstatement No. 3:**

25 Page 9, l. 16: "The County counted 68.2% of the provisional ballots."

26 **Corrected Statement No. 3:**

27 Mr. Vu testified and Exhibit 148 reflects that the County **fully** counted 51,427, or 68.2%
28 of the provisional ballots cast.

Misstatement No. 4:

Page 9, ll. 17-18: "The County partially counted 17,226 provisional ballots."

Corrected Statement No. 4:

Mr. Vu testified and Exhibit 148 reflects that the County partially counted 17,226, or 22.9%, of the provisional ballots.

Misstatement No. 5:

Page 9, ll. 21-22: "The County received 256,000 VBM ballots, of which 233,000 were included in the official canvass for the June election."

Corrected Statement No. 5:

As reflected elsewhere in the SOID (See p. 8, ll. 23-24; and p. 11, ll. 15-16) there were 489,610 VBM ballots of which 256,685 were included in the semi-final official canvass for the June election. The remaining approximately 233,000 VBM ballots were processed and counted during the official canvass.

Misstatement No. 6:

Page 10, l. 11: "The County has 35 days 'to certify the election.'"

Corrected Statement No 6:

Mr. Vu testified that the County has 30 days to certify the election.

Misstatement No. 7:

Page 10, ll. 18-19: "He expects the volume of VBM ballots to be processed in November to be greater than the 235,000 VBM ballots processed in the June election."

Corrected Statement No. 7:

He expects the volume of VBM ballots to be processed in November during the official canvass to be greater than the 235,000 VBM ballots processed during the official canvass of the June election.

Misstatement No. 8:

Page 11, ll. 17-19: "The ballots of non-registered democratic voters cast for a democratic candidate in the June election were cast as provisional ballots which was not included in the semi-final unofficial canvass."

Corrected Statement No. 8:

Hypothetically, if a non-partisan voter cast a non-partisan democratic ballot and the poll worker mistakenly placed the ballot in a provisional envelope it would not have been included in the semi-final official canvass but rather would have been processed and counted during the canvass following the election.

B. RAYMOND LUTZ**Misstatement No. 9:**

Page 12, l. 4: "The County has 1,522 precincts."

Corrected Statement No. 9:

The County had 1,522 precincts for the June Presidential Primary Election. The County will have 1,552 precincts for the November Presidential General Election.

Misstatement No. 10:

Page 13, l. 3: "The last time he voted at a poll was 2014"

Corrected Statement No. 10:

Mr. Lutz testified that the last time he **visited** a poll was 2014.

C. DEBORAH SEILER**Misstatement No. 11:**

Page 15, ll. 13-14: "She denies that the word 'all' does not appear in section 15360."

Corrected Statement No. 11:

She denies that the word 'all' appears in section 15360.

Misstatement No. 12:

Page 15, ll. 23-24: "The County based the 1% manual tally on the unofficial canvass."

Corrected Statement No. 12:

The County based the 1% manual tally on the **semi-final official** canvass.

Misstatement No. 13:

Page 16, ll. 9-10: "She considers the reference to include absentee and provisional ballots to be an error."

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1 **Corrected Statement No. 13:**

2 She considers the statements in the August 30th letter from then Secretary of State
3 Bruce McPherson (Exhibit 59, p. 45) and the Enrolled Bill Memorandum to Governor
4 dated 9/7/06 (Exhibit 59, p. 37-38) that SB 1235 requires elections officials to include
5 absentee and provisional ballots to be an error.

6 **D. CHARLIE WALLIS**

7 **Misstatement No. 14:**

8 p. 18, l. 18: “VVPPT” stands for voter verified paper trail.”

9 **Corrected Statement No. 14:**

10 VVPAT stands for voter verified paper **audit** trail.

11 **E. DEAN LOGAN**

12 **Misstatement No. 15:**

13 Page 21, l. 4: “12,000,000 persons live in L.A. County.”

14 **Corrected Statement No. 15:**

15 Twelve million persons live in L.A. County and Mr. Lutz is the only one who has ever
16 complained about how they conduct the 1 percent manual tally.

17 **F. JULIE RODEWALD**

18 **Misstatement No. 16:**

19 Page 21, l. 24-25: “San Luis Obispo does not include VBM ballots not counted as of the
20 election or provisional ballots in the 1 % manual tally.”

21 **Corrected Statement No. 16:**

22 San Luis Obispo included those VBM ballots that had already been counted at the
23 time of the random selection for manual tally and did not include any provisional ballots in
24 the 1% manual tally.

25 **OBJECTIONS TO PROPOSED FINDINGS**

26 Defendants object to the following findings set forth in the SOID:

27 **Finding No. 1:** At page 24, l. 26 the court concludes: “Declaratory relief is a proper
28 remedy.”

1 **Objection to Finding No. 1:** Under CCP § 1061 the court has discretion whether to
 2 grant relief sought by declaratory relief. *Communist Party of United States v. Peck*, 20 Cal.2d
 3 536, 540 (1942). Where, as here, it appears from the face of the complaint that plaintiffs have a
 4 speedy and adequate remedy it is within the court's discretion to refuse to grant declaratory
 5 relief. *Id.*

6 **Finding No. 2:** At page 31, l. 27 through page 32, l. 1 the court concludes: "On the
 7 other hand, Plaintiffs' interpretation that all VBM ballots should be included in the 1% manual
 8 tally strikes the Court as more reasonable than Defendants' rejection of the need to do so."

9 **Objection to Finding No. 2:** The court's interpretation of Section 15360 requires the
 10 court to insert the word "all" into the Section 15360(a). As detailed in defendants' trial brief and
 11 in their closing brief, **as introduced**, AB 2769 provided that: "[t]he manual tally shall include
 12 **all** ballots cast by voters in each of the precincts selected, including absentee, provisional, and
 13 special absentee ballots." (Emphasis added.) AB 2769 was amended on May 26, 2006, and the
 14 provision relating to "**all** ballots cast by voters in each of the precincts selected, including
 15 absentee, provisional, and special absentee ballots." **was deleted**. **As enacted** by AB 2769
 16 Section 15360 provided that:

17 During the official canvass of every election in which a voting system is
 18 used, the official conducting the election shall conduct a public manual tally of the
 19 ballots tabulated by those devices including absent voters' ballots, cast in 1
 percent of the precincts chosen at random by the elections official.

20 When interpreting a statute the court is "to ascertain and declare what is in terms or in
 21 substance contained therein not to insert what has been omitted" CCP § 1858. "When the
 22 Legislature chooses to omit a provision from the final version of a statute which was included in
 23 an earlier version, this is strong evidence that the act as adopted should not be construed to
 24 incorporate the original provision." [citation]" *UFCW & Employers Benefit Trust v. Sutter*
 25 *Health* 241 Cal.App.4th 909, 927 (2015), citing *People v. Delgado* 214 Cal.App.4th 914, 918
 26 (2013). See also, *Berry v. American Exp. Publishing, Inc.* 147 Cal.App.4th 224, 231 (2007) –
 27 "courts must not interpret a statute to include terms the Legislature deleted from earlier drafts."

28 ///

1 As such, it is clear that the Legislature considered but rejected the idea that “all” vote by mail
2 ballots were to be included in the manual tally.

3 **Finding No. 3:** At page 32, ll. 15-16 the court concludes: “The Secretary of State’s
4 contrary opinion (Exh. “107”) is rejected.

5 **Objection to Finding No. 3:** The administrative construction of Section 15360 by
6 elections officials is entitled to deference by the court. The court must “defer to an
7 administrative agency’s interpretation of a statute or regulation involving its area of expertise,
8 unless the interpretation flies in the face of the clear language and purpose of the interpreted
9 provision.” *Communities for a Better Environment v. State Water Resources Control Board* 109
10 Cal.App.4th 1089, 1104 (2003). See also, *Carson Citizens for Reform v. Kawagoe*, 178
11 Cal.App.4th 357, 366 - 367, (2009). [“An agency interpretation of the meaning and legal effect
12 of a statute is entitled to consideration and respect by the courts”]

13 In this case, the Secretary of State who is the chief elections official for the State and who
14 is charged with oversight of elections in California issued a 3-page directive/guideline on
15 September 15, 2016, to all county clerks and registrars in the State regarding Section 15360.
16 After discussing the legislative history of Section 15360, the Secretary of State concluded that
17 “neither provisional ballots nor all vote-by-mail ballots are required to be included in the one
18 percent manual tally.” In addition, elections officials throughout the state have consistently
19 interpreted and applied Section 15360 in a manner consistent with the manner in which San
20 Diego County has interpreted and applied that provision. The administrative construction of
21 Section 15360 by the Secretary of State and election officials around the State is due deference
22 and it is error for the court to reject this evidence out of hand.

23 **Finding No. 4:** At page 32, ll. 17-18 the court concludes: “Accordingly, the Court
24 accepts Plaintiff’s interpretation that the 1% manual tally include all VBM ballots.”

25 **Objection to Finding No 4:** See Objection to Finding No. 2 above, which is
26 incorporated herein by reference.

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28 ///

1 **Finding No. 5:** At page 32, ll. 25-26 the court concludes: “A writ of mandate
2 compelling the County Registrar of Voters Office to comply with the California Elections Code
3 is a proper remedy.”

4 **Objection to Finding No. 5:** While a court may issue a writ of mandate to compel a
5 public officer to perform a ministerial, mandatory duty (see *Code Civ. Proc.*, § 1085; *City of*
6 *Dinuba v. County of Tulare*, 41 Cal.4th 859, 868 (2007)), a writ will not lie to control the
7 discretion conferred upon a public officer absent an abuse of discretion. *Ellena v. Department*
8 *of Insurance*, 230 Cal.App.4th 198, 205–06 (2014). No abuse of discretion has been shown here
9 and the issuance of a writ would be contrary to law.

10 Section 15360 provides that a 1 percent manual tally “shall” be conducted using one of
11 the methodologies described in that section. But the use of the term “shall” does not eliminate a
12 public official’s discretion in carrying out his or her statutory duty. See *California Public*
13 *Records Research, Inc. v. County of Stanislaus*, 246 Cal.App.4th 1432, 1453–54 (2016). Unless
14 the statute requires a particular action, the official retains discretion. *Id.* In other words, an
15 action is ministerial only if the public officer “is required to perform in a prescribed manner”
16 and “without regard to his or her own judgment or opinion concerning the propriety of such
17 act.” *Ridgecrest Charter School v. Sierra Sands Unified School District*, 130 Cal.App.4th 986,
18 1002 (2005) (citations omitted). In the context of elections, courts have repeatedly recognized
19 that local elections officials exercise discretion in fulfilling their statutory duties relating to the
20 processing and counting of ballots. See *Clark v. McCann*, 243 Cal.App.4th 910, 918 and 920
21 (2015); *Escalante v. City of Hermosa Beach*, 195 Cal.App.3d 1009, 1024–25 (1987); *Mapstead*
22 *v. Anchundo*, 63 Cal.App.4th 246, 268 (1968). Likewise, local election officials exercise
23 discretion in fulfilling their statutory duty to conduct a 1 percent manual tally.

24 As relevant here, the Registrar has discretion regarding the timing of the manual tally.
25 Section 15360 requires a manual tally “during the official canvass” that extends 30 days past the
26 election. § 15360 (a) (capitalization omitted) (emphasis added). But the precise timing of the
27 manual tally within this 30-day period is left to the discretion of local elections officials. While
28 some smaller counties may conduct the manual tally after most or all ballots are processed,

1 larger counties like Los Angeles, San Diego and Sacramento that are faced with a much greater
2 number of VBM and provisional ballots may conduct the manual tally before all of these ballots
3 are processed. This practice reflects the inherent and practical problems that delaying the
4 manual tally would pose to completing the official canvass in a timely manner. As
5 demonstrated by the evidence and testimony, not only is the processing and counting of VBM
6 and provisional ballots extremely complicated and labor intensive, the Registrar must now
7 accept VBM ballots for up to three days after the election (Section 3020(b) and voters now have
8 up to eight days after the election to sign their VBM envelope (Section 3019(f)).

9 With respect to the mandamus relief sought by plaintiffs, Section 13314 provides that “an
10 elector may seek a writ of mandate alleging that ... any neglect of duty has occurred or is about
11 to occur” but is only entitled to relief upon proof that the “neglect is in violation of this code or
12 the Constitution” and “the issuance of a writ will not substantially interfere with the conduct of
13 the election.” Section 13314 (a)(1) and (2). It is also presumed that the Registrar has and will
14 properly perform the duties and obligations of his office. CCP § 664. Plaintiffs in this action
15 therefore had the burden to prove that the Registrar has or is about to fail to perform a duty in
16 violation of the Elections Code **and** that the granting of any relief would not substantially
17 interfere with the conduct of the upcoming November Presidential General Election. Plaintiffs
18 failed to present any evidence in satisfaction of the second prong of Section 13314 and their
19 request for the issuance of a writ of mandate should be denied.

20 **Finding No. 6:** At page 33, ll. 14-18 the court concludes: “The Court finds that
21 Defendants are ‘obligated’ to include all VBM ballots in the 1% manual tally, in performance of
22 the requirements imposed on elections officials by Election Code Sections 336.5 and 15360. To
23 the extent, the Court grants the relief sought by Plaintiffs to require Defendants to “to fully
24 comply with the breadth of California Elections Code Section 15360” SAC, page 12.”

25 **Objection to Finding No. 6:** See Objection to Finding Nos. 2 and 5 above, which are
26 incorporated herein by reference.

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PROPOSED ADDITIONAL FINDINGS

In addition to the corrections to the testimony of the witnesses and the objections to the court's findings as set forth above, defendants request that the court make and incorporate the following additional findings into its final Statement of Decision:

1. Except as stated below, elections officials are required to complete the official canvass and certify election results to the Secretary of State's office no later than 30 days after an election. Elections Code Section 15372.

2. Elections officials are required to complete the canvass for persons voted for at the presidential primary for delegates to national conventions and for results for presidential electors within 28 days after an election. Section 15375(c) and (d).

3. As part of the official canvass, Section 15360(a) directs elections officials to conduct a "public manual tally of the ballots tabulated by [the vote tabulating system], including vote by mail ballots" using one of two approved methods.

4. Section 15360(a)(1) directs elections officials to complete a manual tally of the ballots, including vote-by-mail ("VBM") ballots, cast at 1 percent of the precincts chosen at random and, for each race not included in the initial group of precincts, one additional precinct.

5. Alternatively, elections officials may opt to conduct a two part manual tally that includes the ballots cast in 1 percent of the precincts on election-day, excluding VBM ballots, and 1 percent of the VBM ballots cast in the election in batches randomly selected by the elections official. Section 15360(a)(2).

6. The purpose of the manual tally is to verify the accuracy of the voting systems that are used to count the ballots. Section 336.5. It is not a recount of election results.

7. The court finds that latent ambiguities exist in the language of Section 15360(a) and that it is appropriate for the court to consider extrinsic aids, "including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part." [Citation]" *Hoeschst Celanese Corp. v. Franchise Tax Bd.*, 25 Cal.4th 508, 519 (2001).

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1 8. In addition, the court must consider “the entire substance of a statute and the
2 scheme of law of which it is a part to determine the scope and purpose, construe its words in
3 context and harmonize its various parts.” *Varshock v. Department of Forestry & Fire*
4 *Protection*, 194 Cal.App.4th 635, 641 (2011).

5 9. The goal is to arrive at a “reasonable and common sense interpretation consistent
6 with the apparent purpose and intention of the lawmakers, practical rather than technical in
7 nature, which upon application will result in wise policy rather than mischief or absurdity.”
8 [Citation]” *City of Poway City of San Diego*, 229 Cal.App.3d 847, 858 (1991).

9 10. In 1965, with the introduction of electronic vote tabulating systems, the California
10 Legislature enacted Section 15417. Section 15417 required elections officials to conduct a
11 public manual count of 1% of randomly selected ballots within 15 days after an election, the
12 purpose of which was to verify the accuracy and reliability of the software used to count the
13 ballots. (Stats. 1965, ch. 2040.)

14 11. In 1998, the Legislature amended and renumbered the previous iteration of the
15 manual tally as new Section 15360. (Stats. 1997-1998, ch. 1073, § 31.) As enacted, Section
16 15360 clarified that the process required a “manual tally” and not a recount of the ballots
17 tabulated by the devices cast in 1 percent of the precincts.

18 12. In addition, at that time, the Legislature repealed the term “semi-official canvass,”
19 and added Sections 335.5, 336.5, and 353.5 defining “the official canvass,” “1% manual tally,”
20 and “semifinal official canvass,” respectively. (See Stats 1997-1998, ch. 1073, §§ 3, 4, and 5.)

21 13. In 2006 two competing bills worked their way through the legislative process. SB
22 1235 was introduced by then State Senator Debra Bowen.

23 14. **As introduced**, SB 1235 proposed to amend the sentence of Section 15360 to
24 expressly provide as follows:

25 During the official canvass of every election in which a voting system is
26 used, the official conducting the election shall conduct a public manual tally of the
27 ballots tabulated by those devices *including absent voter’s* [sic] ballots,
provisional ballots and ballots cast in satellite locations, cast in 1 percent of the
precincts chosen at random by the elections official. (Emphasis added.)

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1 15. In addition, SB 1235 proposed to add language requiring election officials to use
2 either a random number generator or other method specified in regulations to be adopted by the
3 Secretary of State to randomly choose the initial precincts to be included in the manual tally.

4 16. AB 2769 was introduced by Assembly Member John Benoit and sponsored by
5 then Secretary of State Bruce McPherson. As introduced, AB 2769 focused on the timing and
6 notice requirements for the manual tally; the reporting requirements for reporting the results of
7 the manual tally to the Secretary of State; and the establishment of uniform procedures for the
8 manual tally by the Secretary of State's office.

9 17. **As introduced**, AB 2769 also provided that: “[t]he manual tally shall include **all**
10 ballots cast by voters in each of the precincts selected, including absentee, provisional, and
11 special absentee ballots” but when amended on May 26, 2006, the specific language set forth
12 immediately above **was deleted**.

13 18. On August 7, 2006, SB 1235 was amended expressly deleting the reference to
14 “*provisional ballots, and ballots cast at satellite locations*”. As amended, proposed Section
15 15360(a) read:

16 During the official canvass of every election in which a voting system is
17 used, the official conducting the election shall conduct a public manual tally of the
18 ballots tabulated by those devices *including absent voter's* [sic] ballots,
~~*provisional ballots and ballots cast in satellite locations*~~, cast in 1 percent of the
precincts chosen at random by the elections official.” (Emphasis added.)

19 19. On August 7, 2006, AB 2769 was also amended to provide in relevant part that:
20 “This bill shall become operative only if Senate Bill 1235 of the 2005-06 Regular Session is
21 enacted and becomes effective on or before January 1, 2007.

22 20. SB 1235 was again amended on August 21, 2006 and AB 2769 was again
23 amended on August 24, 2006. The amendments essentially conformed the language of each bill
24 to substantially mirror the other.

25 21. The Governor subsequently signed both bills into law but because AB 2769 (Stats
26 2006, ch. 894) was chaptered after SB 1235 (Stats 2006, ch. 893) AB 2769 “chaptered out” SB
27 1235, and became the operative amendment going forward. **As enacted** by AB 2769 Section
28 15360 provided that:

1 During the official canvass of every election in which a voting system is
2 used, the official conducting the election shall conduct a public manual tally of the
3 ballots tabulated by those devices including absent voters' ballots, cast in 1
4 percent of the precincts chosen at random by the elections official.

5 22. In 2010, the Legislature enacted AB 46 as urgency legislation effective June 22,
6 2010. (Stats 2010, ch. 28.) As enacted AB 46 added and repealed Section 15360.5. AB 46 was
7 necessitated by the fact that the Governor had declared a special election to take place in San
8 Luis Obispo, Santa Barbara, Santa Clara and Santa Cruz counties on June 22, 2010, (and
9 possibly August 17, 2010, if a runoff proved necessary) just two weeks after the regular
10 Statewide Primary Election on June 8, 2010.

11 23. The purpose of AB 46 was to streamline the process and reduce the costs incurred
12 by those four counties in conducting the manual tally of polling place and vote by mail ballots.
13 Specifically, Section 15360.5 provided election officials with an alternative method for
14 conducting the manual tally. Election officials could conduct the manual tally by precinct as
15 provided under AB 2769 (see § 15360.5(a)(1)) or, alternatively could conduct a two-part manual
16 tally that allowed elections officials to manually tally randomly selected batches of VBM
17 ballots, thereby avoiding the cost and time of having to integrate the VBM ballots into the
18 randomly selected precincts (see § 15360.5(a)(2)). By its own terms, AB 46 expired January 1,
19 2011.

20 24. In 2011, the Legislature enacted AB 985 (Stats 2011, c. 52, § 1.) amending
21 Section 15360 by incorporating the operative provisions of Section 15360.5 and making those
22 provisions applicable to all jurisdictions in the State. (See Section 15360(a)(2)(A) and (B).)
23 Section 15360 as amended by SB 985 is the operative iteration of that section for purposes of
24 this case.

25 25. The words "provisional ballots" do not appear in Section 15360.

26 26. The word "all" does not appear in Section 15360(a).

27 27. The Registrar has discretion regarding the timing of the manual tally which must
28 be completed "*during* the official canvas."

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1 28. Though the subject of much discussion throughout its history (see for example,
2 Defendants' trial brief, pages 2 - 4), the legislature chose not to include "provisional ballots" in
3 Section 15360. There appears to be good reason to conclude that this omission was not
4 inadvertent.

5 29. "When the Legislature chooses to omit a provision from the final version of a
6 statute which was included in an earlier version, this is strong evidence that the act as adopted
7 should not be construed to incorporate the original provision." [citation]" *UFCW & Employers*
8 *Benefit Trust v. Sutter Health* 241 Cal.App.4th 909, 927 (2015), citing *People v. Delgado* 214
9 Cal.App.4th 914, 918 (2013). See also, *Berry v. American Exp. Publishing, Inc.* 147
10 Cal.App.4th 224, 231 (2007) – "courts must not interpret a statute to include terms the
11 Legislature deleted from earlier drafts."

12 30 As such, it is clear that the Legislature considered but rejected the idea that
13 provisional ballots be included in the manual tally.

14 31. Vu's testimony – which the court perceived to be credible – is consistent with
15 defendants' trial brief explanation of the circumstances under which provisional ballots are cast.
16 The court finds the initial explanation (a provisional voter may be a voter who is "registered as a
17 VBM voter and been issued a mail ballot, but wants to vote at the poll") to be significant. The
18 court infers from this explanation that provisional ballots may be nothing more than duplicate
19 ballots of VBM ballots cast by the same voters. Indeed, according to defendants "In the June
20 Presidential Primary, more than one-half of the 75,386 voters who voted provisionally were
21 VBM voters who appeared at the polls on election day but who could not surrender their VBM
22 ballot. And, in fact, during the canvass, the Registrar determined that 521 voters voted both
23 their VBM ballot and a provisional Ballot." If the court were to accept plaintiffs' argument that
24 Section 15360's 1 percent manual tally procedure includes "all ballots cast" including
25 provisional ballots (Plaintiffs' trial brief at pages 4-7), plaintiffs are in effect, advocating that
26 defendants assume the risk of including more than 100% of the ballots cast in the 1 percent
27 manual tally. Not only does this interpretation strike the court as unreasonable but it has the

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1 inevitable consequence of adding burden to the County's ROV, whose resources are already
2 stretched too thin.

3 32. Accordingly, the court rejects plaintiffs' interpretation that the 1 percent manual
4 tally include provisional ballots.

5 33. Since 1984 voters have been permitted to vote provisional ballots. Sections
6 14310-14313.

7 34. Voters have been allowed to cast absentee ballot in limited circumstances since the
8 1920's. Since 1979 all voter have had the option to vote-by-mail. Sections 3000-3025.

9 35. On election-day in November 2016 there will be more than 7,000 poll workers
10 manning 1,552 voting precincts throughout the County.

11 36. Each of these poll-workers will have participated in both in person and online
12 training.

13 37. The Registrar's office has printed 623 ballot types in five different languages for
14 the upcoming November 2016 Presidential General Election.

15 38. Each ballot type is coded so that the devices used to tabulate the ballots can
16 recognize each ballot type and properly count the ballots. Each ballot type must be correctly
17 distributed to one or more or the 1,552 voting precincts and 1,378 physical polling locations.

18 39. Due to the high number of contests (184), including a historical number of 52
19 statewide propositions and local measures across the County, the Registrar must print for the
20 first time a two-card ballot for every registered voter within the County.

21 40. There will be approximately 1.6 million registered voters in San Diego County for
22 the November Presidential General Election. Of the 1.6 million registered voters, more than
23 62% are permanent vote-by-mail voters.

24 41. The official canvass includes, but is not limited to, the following:

25 "(a) An inspection of all materials and supplies returned by poll workers.

26 (b) A reconciliation of the number of signatures on the roster with the number of
27 ballots recorded on the ballot statement.

28 ///

1 (c) In the event of a discrepancy in the reconciliation required by subdivision (b),
2 the number of ballots received from each polling place shall be reconciled with the number of
3 ballots cast, as indicated on the ballot statement.

4 (d) A reconciliation of the number of ballots counted, spoiled, canceled, or
5 invalidated due to identifying marks, overvotes, or as otherwise provided by statute, with the
6 number of votes recorded, including vote by mail and provisional ballots, by the vote counting
7 system.

8 (e) Processing and counting any valid vote by mail and provisional ballots not
9 included in the semifinal official canvass.

10 (f) Counting any valid write-in votes.

11 (g) Reproducing any damaged ballots, if necessary.

12 (h) Reporting final results to the governing board and the Secretary of State, as
13 required.”

14 Section 15302.

15 42. VBM ballots may be sent to voters beginning 29 days before the election and can
16 be returned to the Registrar up to three days after the election.

17 43. The processing of VBM ballots begins immediately after the Registrar begins
18 mailing the ballots to voters. Section 15101.

19 44. The Registrar has extensive procedures for processing VBM ballots. The
20 procedures for processing VBM ballots are both complicated and time consuming.

21 45. Each VBM ballot envelope is manually reviewed by the Registrar’s staff. VBM
22 ballots must be scanned, sorted, and signature checked against the records on file with the
23 Registrar’s office before the ballots are extracted from the envelopes and tabulated.

24 46. New legislation has further complicated the processing and handling of VBM
25 ballots. As of this election, the Registrar’s office accepts and processes all VBM ballots that are
26 received within three days of the election provided they are postmarked as of election day.
27 (Section 3020). In addition, voters who failed to sign their VBM ballot envelope now have up
28

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1 to eight days after the election to provide the Registrar's office with their signature. Section
2 3019(f).

3 47. If there are any anomalies in the envelope or the ballot, the Registrar's staff will
4 further review the ballot/envelope and liberally construe any defects in the envelope/ballot in
5 favor of the voter.

6 48. The Registrar utilizes approximately 281 election workers working every day both
7 before and after election-day to process the VBM ballots. The review and verification of the
8 VBM ballots requires tens of thousands of man hours to complete.

9 49. Voters may be required to vote provisionally on the day of the election.

10 50. In the June Presidential Primary there were 75,386 provisional ballots cast.

11 51. More than one-half of the 75,386 voters who voted provisionally were VBM
12 voters who appeared at the polls on election-day but who could not surrender their VBM ballot.

13 52. During the canvass, the Registrar determined that 521 voters voted both their
14 VBM ballot and a provisional ballot.

15 53. In the June Presidential Primary more than 12,000 voters appeared at a poll other
16 than where they were registered and voted provisionally.

17 54. A large percentage of provisional ballots must be remade to eliminate votes for
18 contests for which the provisional voter was not eligible to vote. This process is also labor
19 intensive, requiring election workers to place white-out tape over invalid votes cast by the voter.

20 55. The amount of labor required to be able to timely certify an election involves
21 hundreds of thousands of man-hours.

22 REQUEST FOR CLARIFICATION

23 Page 33, l. 28 – page 34, l. 2: “The Court finds, as set forth above, in favor of Plaintiffs
24 and against Defendants MICHAEL VU and COUNTY OF SAN DIEGO, and in favor of
25 Defendant HELEN N. ROBBIINS-MEYER and against Plaintiff, on Plaintiffs' claims against
26 Defendants.”

27 Clarification Requested:

28 As set forth above, the court:

1 1. Finds in favor of plaintiffs and against defendants MICHAEL VU and COUNTY
2 OF SAN DIEGO on plaintiffs' claim that Section 15360 requires the Registrar of Voters to
3 include all VBM ballots in the random selection process for purposes of completing the 1
4 percent manual tally;

5 2. Finds in favor of defendants and against plaintiffs on plaintiffs' claim that Section
6 15360 requires the Registrar of Voters to include provisional ballots in the random selection
7 process for purposes of completing the 1 percent manual tally;

8 3. Finds in favor defendant HELEN ROBBINS-MEYER and against plaintiffs on all
9 causes of action raised by plaintiffs' Second Amended Complaint; and

10 4. Denies all other relief requested by the Second Amended Complaint.

11 DATED: November 10, 2016

THOMAS E. MONTGOMERY, County Counsel

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By: /s/Timothy M. Barry
TIMOTHY M. BARRY, Chief Deputy
Attorneys for Defendants

DECLARATION OF SERVICE

I, the undersigned, declare under penalty of perjury that I am not a party to the case; I am employed in the County of San Diego, California. My business address is 1600 Pacific Highway, Room 355, San Diego, California, 92101.

On November 10, 2016, I served the following documents:

- 1. DEFENDANTS' OBJECTIONS TO STATEMENT OF INTENDED DECISION AND PROPOSED FINDINGS.**

In the following manner:

- (BY E-mail) I cause to be transmitted a copy of the foregoing document(s) this date via OneLegal System, which electronically notifies all counsel as follows:

Alan L. Geraci, Esq.
CARE Law Group PC
817 W. San Marcos Blvd.
San Marcos, CA 92078
Ph: (619) 231-3131 Fax: (760) 650-3484
alan@carelaw.net

Executed on November 10, 2016, at San Diego, California.

By:


ODETTE ORTEGA

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO
CENTRAL

0517

MINUTE ORDER

DATE: 12/01/2016

TIME: 03:00:00 PM

DEPT: C-73

JUDICIAL OFFICER PRESIDING: Joel R. Wohlfeil

CLERK: Juanita Cerda

REPORTER/ERM: Not Reported

BAILIFF/COURT ATTENDANT: R. Camberos

CASE NO: 37-2016-00020273-CL-MC-CTL CASE INIT.DATE: 06/16/2016

CASE TITLE: Lutz vs Michael Vu [IMAGED]

CASE CATEGORY: Civil - Limited CASE TYPE: Misc Complaints - Other

EVENT TYPE: Status Conference (Civil)

APPEARANCES

Alan L Geraci, counsel, present for Plaintiff(s).

Raymond Lutz, Plaintiff is present.

Timothy M Barry, counsel, present for Defendant(s).

Michael Vu, Defendant, present.

The Court continues the matter so counsel can obtain a court reporter.

Status Conference (Civil) is continued pursuant to Court's motion to 12/02/2016 at 11:00AM before Judge Joel R. Wohlfeil.

Parties waive notice.

Joel R. Wohlfeil

Judge Joel R. Wohlfeil

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO
CENTRAL

0518

MINUTE ORDER

DATE: 12/02/2016

TIME: 11:00:00 AM

DEPT: C-73

JUDICIAL OFFICER PRESIDING: Joel R. Wohlfeil

CLERK: Juanita Cerda

REPORTER/ERM: Lori Kowalski CSR# 10810

BAILIFF/COURT ATTENDANT: R. Camberos

CASE NO: 37-2016-00020273-CL-MC-CTL CASE INIT.DATE: 06/16/2016

CASE TITLE: Lutz vs Michael Vu [IMAGED]

CASE CATEGORY: Civil - Limited

CASE TYPE: Misc Complaints - Other

EVENT TYPE: Status Conference (Civil)

APPEARANCES

Alan L Geraci, counsel, present for Plaintiff(s).

Raymond Lutz, Plaintiff is present.

Timothy M Barry, counsel, present for Defendant(s).

Michael Vu, Defendant, present.

The Court and counsel discuss objections as to the Statement of Intended Decision. Counsel submit Stipulation Regarding Objections To Statement of Intended Decision, which the Court reduces to a court order.

The Court directs the courtroom clerk to e-mail the Statement of Intended Decision to counsel in Word so counsel can make objections and which will be e-mailed back to the court on or before 12/14/2016. Matter will be deemed submitted at that time.

Joel R. Wohlfeil

Judge Joel R. Wohlfeil

1 THOMAS E. MONTGOMERY, County Counsel
County of San Diego
2 By TIMOTHY M. BARRY, Chief Deputy (State Bar No. 89019)
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5 *Exempt From Filing Fees (Gov't Code § 6103)*

FILED
Clerk of the Superior Court

DEC -2 2016

By: J. CERDA

6 Attorneys for Defendants

8 **IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA**

9 **IN AND FOR THE COUNTY OF SAN DIEGO**

10 **CENTRAL DIVISION**

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

No. 37-2016-00020273-CL-MC-CTL
Action Filed: June 16, 2016

13 Plaintiffs,

**STIPULATION REGARDING
OBJECTIONS TO STATEMENT OF
INTENDED DECISION**

14 v.

IMAGED FILE

15 MICHAEL VU, San Diego Registrar of
Voters, HELEN N. ROBBINS-MEYER, San
16 Diego County Chief Administrative Officer,
SAN DIEGO COUNTY, a public entity;
17 DOES 1-10,

Hearing Date: December 2, 2016
Time: 11:00 a.m.
Dept.: 73
ICJ: Hon. Joel Wohlfell

18 Defendants.

19
20 Plaintiffs Citizens Oversight, Inc. and Raymond Lutz, by and through their attorney of
21 record Alan Geraci, Esq. and defendants/respondents Michael Vu, sued in his official capacity
22 as the Registrar of Voters for the County of San Diego ("Vu") and the County of San Diego
23 ("County") by and through their attorneys of record, the Office of County Counsel by Timothy
24 M. Barry, Chief Deputy, hereby stipulate as follows:

25 The Statement of Intended Decision issued by the court on October 26, 2016, may be
26 amended as follows:

27 ///

28 ///

1 At page 9, ll. 3-4, **delete**: "The County does not maintain the white out tape on ballots
2 for inspection." and **insert**: "The County secures and maintains the redacted white out taped
3 ballots for 22 months for federal elections and for six months for local elections."

4 At page 9, l. 8, **delete**: "... with 1,500 precincts ..." and **insert**: "with 1,552 precincts".
5 ...

6 At page 9, l. 16, **delete**: "The County counted 68.2% of the provisional ballots." and
7 **insert**: "Mr. Vu testified and Exhibit 148 reflects that the County fully counted 51,427, or
8 68.2% of the provisional ballots cast."

9 At page 9, ll. 17-18, **delete**: "The County partially counted 17,226 provisional ballots."
10 and **insert**: "Mr. Vu testified and Exhibit 148 reflects that the County partially counted 17,226,
11 or 22.9%, of the provisional ballots."

12 At page 9, ll. 21-22, **delete**: "The County received 256,000 VBM ballots, of which
13 233,000 were included in the official canvass for the June election." and **insert**: "There were
14 489,610 VBM ballots of which 256,685 were included in the semi-final official canvass for the
15 June election. The remaining approximately 233,000 VBM ballots were processed and counted
16 during the official canvass."

17 At page 10, l. 3, **delete**: "Every single VBM ballot is counted manually." and **insert**:
18 "VBM ballots are validated manually but processed with optical scanners."

19 At page 10, l. 11, **delete**: "The County has 35 days 'to certify the election.'" and **insert**:
20 "The County has 30 days to certify the election."

21 At page 10, ll. 14-15, **delete**: "The provisional ballots are processed after the election"
22 and **insert**: "Provisional ballots are processed after election day but before the end of the
23 official canvass period."

24 At page 10, ll. 18-19, **delete**: "He expects the volume of VBM ballots to be processed in
25 November to be greater than the 235,000 VBM ballots processed in the June election." and
26 **insert**: "He expects the volume of VBM ballots to be processed in November during the official
27 canvass to be greater than the 235,000 VBM ballots processed during the official canvass of the
28 June election."

1 At page 11, ll. 15, **delete**: “75,000 provisional ballots were cast in the June election.” and
2 **insert**: “75,000 ballots were cast provisionally in the June election, and about 68,000 were
3 ultimately validated and officially cast.”

4 At page 11, ll. 17-19, **delete**: “The ballots of non-registered democratic voters cast for a
5 democratic candidate in the June election were cast as provisional ballots which was not
6 included in the semi-final unofficial canvass.” and **insert**: “Hypothetically, if a non-partisan
7 voter cast a non-partisan democratic ballot and the poll worker mistakenly placed the ballot in a
8 provisional envelope it would not have been included in the semi-final official canvass but
9 rather would have been processed and counted during the canvass following the election.”

10 At page 12, l. 4, **delete**: “The County has 1,522 precincts.” and **insert**: “The County had
11 1,522 precincts for the June Presidential Primary Election. The County will have 1,552
12 precincts for the November Presidential General Election.”

13 At page 12, ll. 6-7, **delete**: “Vu’s practice is to choose only 8 precincts, instead of 32
14 precincts, to develop the batches.” and **insert**: “Vu chose only 8 precincts, instead of 16
15 precincts, to develop the set of VBM batches to be manually tallied.”

16 At page 12, ll. 12-13, **delete**: “He prepared a report of the 1% manual tally from the
17 2008 election” and **insert**: “He prepared a report of election procedures including the 1%
18 manual tally from the 2008 election.”

19 At page 12, ll. 26-27, **delete**: “In his opinion, the 1% manual tally detects simple
20 tabulator errors which could result in a shift of as many as 10,000 votes from one candidate to
21 another.” and **insert**: “In his opinion, the 1% manual tally detects simple tabulator errors as well
22 as possible central tabulator hacking which could result in a shift of as many as 10,000 votes
23 from one candidate to another.” At page 13, l. 3, **delete**: “The last time he voted at a poll was
24 2014” and **insert**: “The last time he visited a poll was 2014.”

25 At page 13, l.3, **delete**: “The last time he voted at a poll was 2014” and **insert**: “The last
26 time he visited a poll was 2014.”

27 At page 15, ll. 13-14, **delete**: “She denies that the word ‘all’ does not appear in section
28 15360.” and **insert**: “She denies that the word ‘all’ appears in section 15360.”

1 At page 15, ll. 23-24, **delete**: "The County based the 1% manual tally on the unofficial
2 **canvas.**" and **insert**: "The County based the 1% manual tally on the **semi-final official**
3 **canvass.**"

4 At page 16, ll. 9-10, **delete**: "She considers the reference to include absentee and
5 provisional ballots to be an error." and **insert**: "She considers the statements in the August 30th
6 letter from then Secretary of State Bruce McPherson (Exhibit 59, p. 45) and the Enrolled Bill
7 Memorandum to Governor dated 9/7/06 (Exhibit 59, p. 37-38) that SB 1235 requires elections
8 officials to include absentee and provisional ballots to be an error."

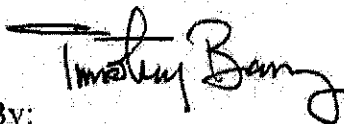
9 At page 18, l. 18, **delete**: "'VVPPT' stands for voter verified paper trail." and **insert**:
10 "VVPAT stands for voter verified paper audit trail.

11 At page 21, ll. 24-25, **delete**: "San Luis Obispo does not include VBM ballots not
12 counted as of the election or provisional ballots in the 1% manual tally." and **insert**: "San Luis
13 Obispo did not perform the random draw until a week after the election to allow more VBM
14 ballots to be included and did not include any provisional ballots in the 1% manual tally."

15
16 So Stipulated:

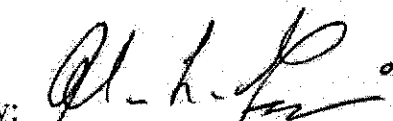
17
18 December 2, 2016

THOMAS E. MONTGOMERY, County Counsel

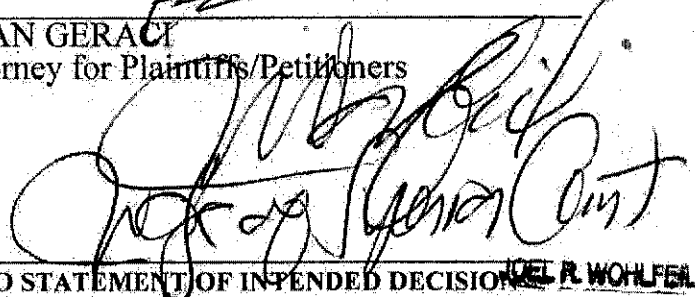
19
20 By: 
21 TIMOTHY M. BARRY, Chief Deputy
22 Attorneys for Defendants/Respondents

23 December 2, 2016

CARE Law Group

24
25 By: 
26 ALAN GERACI
27 Attorney for Plaintiffs/Petitioners

28
SO ordered
12-2-16


4
KEL R. WOHLFEL

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO
CENTRAL

0523

MINUTE ORDER

DATE: 12/16/2016

TIME: 11:00:00 AM

DEPT: C-73

JUDICIAL OFFICER PRESIDING: Joel R. Wohlfeil

CLERK: Juanita Cerda

REPORTER/ERM: Not Reported

BAILIFF/COURT ATTENDANT: R. Camberos

CASE NO: **37-2016-00020273-CL-MC-CTL** CASE INIT.DATE: 06/16/2016

CASE TITLE: **Lutz vs Michael Vu [IMAGED]**

CASE CATEGORY: Civil - Limited CASE TYPE: Misc Complaints - Other

EVENT TYPE: Status Conference (Civil)

APPEARANCES

Alan L Geraci, counsel, failed to appear.

Timothy M Barry, counsel, present for Defendant(s).

Upon the Court's inquiry, Attorney Barry informs the Court he spoke to Attorney Geraci who stated he would be appearing today. Attorney Barry also states Attorney Geraci agreed with the Statement of Intended Decision.

Joel R. Wohlfeil

Judge Joel R. Wohlfeil

FILED

Clerk of the Superior Court

DEC 19 2016

By: J. CERDA

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN DIEGO

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

Plaintiffs,

v.

MICHAEL VU, San Diego Registrar of Voters;
HELEN N. ROBBINS-MEYER, San Diego
County Chief Administrative Officer; SAN
DIEGO COUNTY, a public entity; DOES 1-10,

Defendants.

Case No. 37-2016-00020273-CL-MC-CTL

STATEMENT OF DECISION

Judge: Hon. Joel R. Wohlfeil
Dept.: 73

This case came on regularly for trial on October 4 – 6 and 11, 2016 before the Honorable Joel R. Wohlfeil, Judge presiding. Plaintiffs CITIZENS OVERSIGHT INC. (“COI”) and RAYMOND LUTZ (“Plaintiff” or “Lutz”) (collectively “Plaintiffs”) were represented by Alan L. Geraci of CARE Law Group PC; Defendants MICHAEL VU (“Defendant” or “Vu”), HELEN N. ROBBINS-MEYER (“ROBBINS-MEYER”) and COUNTY OF SAN DIEGO (“County”) (collectively “Defendants”) were represented by TIMOTHY M. BARRY and STEPHANIE KARNAVAS of the County Counsel for the County of San Diego. The Court, after hearing testimony of witnesses (Vu, Lutz, Erin Mayer, Deborah Seiler, Charlie Wallis, Jill LaVine, Dean Logan, Julie Rodewald (through her deposition taken on September 23, 2016 – Exh’s “196, 197”) and Phillip Stark), receiving exhibits into evidence including the materials that the Court took

1 judicial notice of (Exhibits "1, 4, 9 - 14, 19, 49 - 53, 56, 58, 59, 62, 68, 69, 100 - 107, 109, 110, 138
2 - 140, 146, 147, 149, 150, 152, 154, 155, 158, 171, 175 - 180, 195, 199"), reading pre-trial briefs
3 (ROA # 92, 93), hearing arguments of counsel, reading post-trial closing briefs (ROA # 116, 118,),
4 ruling on Plaintiffs and Defendants' objections to the Court's Statement of Intended Decision
5 ("SOID") (ROA # 132, 137, 139), and good cause appearing therefore, hereby issues this Statement
6 of Decision ("SOD").
7

8 Introduction

9
10 No other country in the world works as hard as the United States to preserve its election
11 integrity, a bedrock of its democratic principles.

12 Plaintiffs allege that Defendants have not done enough; that Defendants have, in effect, cut
13 corners; that Defendants have not conducted the post-election 1% manual tally of "all" votes cast,
14 one risk of which is that Defendants have compromised the security of the County's voting system;
15 to wit, "a nefarious insider or a "hacker" could alter the results and the alterations would be
16 invisible to this audit procedure thereby making the audit procedure useless." ROA # 92, page 3.

17 Defendants respond that the 1% manual tally statute is ambiguous and susceptible to more
18 than one interpretation; that Defendants have complied with the most reasonable of the competing
19 interpretations; and that to direct Defendants to do more would place an undue burden on
20 Defendants' resources, one risk of which is that Defendants would be unable to "complete the
21 official canvass and certify election results to the Secretary of State's office no later than 30 days
22 after an election." Elections Code Section 15372.2. ROA # 93, page 1.

23 Simply stated, Plaintiffs argue breadth and Defendants respond with burden, the
24 reconciliation of which is, from the Court's perspective, not easy.
25

26 Operative Pleadings

27
28

1 In their verified Second Amended Complaint ("SAC" - ROA # 79), Plaintiffs allege causes
2 of action for declaratory relief and mandamus under CCP 1085, the focus of which is California
3 Election Code Section 15360.

4 In their verified Answer (ROA # 81) to the SAC, Defendants, at par. 11, "generally and
5 specifically deny that the Registrar does not fully comply with the requirements of Section 15360"
6 and assert as an affirmative defense that the SAC "fails to set forth facts sufficient to constitute a
7 cause of action or right of relief against defendants, or any of them."

8
9 **The Court's July 25, 2016 Minute Order (ROA # 70)**

10
11 The Court's previous order states, in pertinent part:

12 "The Application of Plaintiffs Citizens Oversight Inc. and Raymond Lutz ("Plaintiffs") for
13 a Preliminary Injunction to direct Defendants MICHAEL VU, San Diego Registrar of Voters,
14 HELEN N. ROBBINS-MEYER, San Diego County Chief Administrative Officer, and COUNTY
15 OF SAN DIEGO ("Defendants") to comply with California Election Code Section 15360, in
16 certifying the Primary Election results of June 7, 2016, is DENIED AS MOOT, without prejudice,
17 as reflected below.

18 First, the Court takes judicial notice of the July 15, 2016 press release from the California
19 Secretary of State certifying California's June statewide primary results. Evid. Code 452(c).
20 (<http://www.sos.ca.gov/administration/news-releases-and-advisories/2016-news-releases-and->
21 [advisories /secretary-state-padilla-certifies-election-results/](http://www.sos.ca.gov/administration/news-releases-and-advisories/secretary-state-padilla-certifies-election-results/)). The Court infers that the state
22 certification also entails the certification of the San Diego County primary results. As a result, the
23 Application for preliminary injunction is MOOT as to Plaintiff's request for injunctive relief for
24 the certification of the June 7, 2016 election. "In dismissing the appeal as moot...reversal of the
25 judgment could not afford the plaintiffs relief because the issuance of an injunction restraining the
26 defendant from doing that which he has already done, would be an idle and frivolous act, since
27 such decision would have no binding authority and would not affect the legal rights of the parties."
28 *Finnie v. Town of Tiburon* (1988) 199 Cal. App. 3d 581, 586. "... [A]lthough a case may originally

1 present an existing controversy, if before decision it has, through act of the parties or other cause,
2 occurring after the commencement of the action, lost that essential character it becomes a moot
3 case or question which will not be considered by the court." *Wilson v. Los Angeles County Civil
Service Commission* (1952) 112 Cal. App. 2d 450, 453.

4 However, the Court is cognizant of the importance and exigent circumstances in this
5 action, thereby necessitating an expedited ruling in this matter. Although moot to the Primary
6 Election results of June 7, 2016, when an issue of broad public interest is posed, the Court may
7 exercise its inherent discretion to resolve the issue. *Johnson v. Hamilton* (1975) 15 Cal. 3d 461,
8 465.

9 Liberally construing the first cause of action for declaratory relief in Plaintiff's First
10 Amended Complaint (FAC"), Plaintiff appears to seek a declaration regarding all future elections,
11 which may recur as imminently as the upcoming November election. Therefore, the first cause of
12 action is not moot.

13 The "1 percent manual tally is a procedure used in California to test whether there are any
14 discrepancies between the electronic record generated by a voting machine and what is essentially
15 a manual audit of that electronic record." *Nguyen v. Nguyen* (2008) 158 Cal. App. 4th 1636, 1643.
16 In accordance with California law, the official canvass must include a manual tally as a means of
17 verifying the accuracy of the system count. Elec. Code 15360. "This procedure is conducted
18 during the official canvass to verify the accuracy of the automated count." Elec. Code 336.5.

19 Section 15360 provides two alternative methods to conduct this manual tally, using section
20 15360(a) (1) or 15360(a) (2). Initially, Defendants opted to conduct the 1 percent manual tally
21 under section 15360(a) (2). A public notice was subsequently posted on the San Diego County
22 Registrar's website. Thereafter, Defendants' chose to conduct the 1 percent manual tally utilizing
23 section 15360(a) (1). Declaration of Vu, pg. 6, 1-2.

24 California Elections Code 15360(a) (1), reads in relevant part: (a) During the official
25 canvass ... the official conducting the election shall conduct a public manual tally of the ballots
26 tabulated by those devices, including vote by mail ballots, using either of the following methods:
27 (1) (A) A public manual tally of the ballots, including vote by mail ballots, cast in 1 percent of the
28

1 precincts chosen at random by the elections official. If 1 percent of the precincts is less than 1
2 whole precinct, the tally shall be conducted in 1 precinct chosen at random by the elections
3 official.

4 Plaintiffs provide evidence that Defendants are not complying with the elections code by
5 failing to include all ballots cast in 1 percent of the precincts chosen at random. Specifically,
6 Plaintiffs demonstrate Defendants are in violation of the statute by 1) not including any provisional
7 ballots in the manual tally, and 2) by not including all vote by mail ballots.

8 The legislative history of California Elections Code 15360, amended in 2006, provides
9 insight: SB 1235 stems from anecdotal reports that some counties routinely exclude absent voter
10 and provisional ballots from the 1% manual tally process and may not be choosing the relevant
11 precincts in a truly "random manner." California Bill Analysis, S.B. 1235 Sen., 4/19/2006.

12 The comments addressing auditing for accuracy provides: "Requiring all of the ballots –
13 not just those cast at the polling place on Election Day – in a given precinct to be a part of the 1
14 percent audit should increase the thoroughness and the reliability of the audit. Absent a complete
15 count of all of the ballots in a precinct that's subject to the 1% audit, it's difficult to see how
16 elections officials can argue they've complied with the audit requirements under the law."
17 California Bill Analysis, S.B. 1235 Sen., 4/19/2006.

18 Therefore, in reviewing the legislative intent and explicit text of section 15360, there is a
19 reasonable probability Plaintiffs will prevail. Section 15360 requires election officials to include
20 Vote-by-Mail ballots cast and provisional ballots when conducting the one percent manual tally.
21 Defendants did not do this.

22 Defendants demonstrate that complying with section 15360 will require additional "man
23 hours" and additional costs in excess of \$100,000. Vu Dec. (ROA # 35), par's 21, 30, 36.
24 Defendants also argue completing the manual tally process as soon as possible is a "prudent
25 business practice." Opposition, p. 12, par's 15-16. County elections officials have approximately
26 one month to complete their extensive tallying, auditing, and certification work so they can timely
27 send a report to the California Secretary of State.

28

1 Plaintiffs' argue they 1) will be deprived of the verification required by law and 2) the
2 integrity of the election results will be compromised if Defendants are not in compliance with
3 section 15360. Section 15360 was enacted to serve as a check on the election process by means of
4 a manual audit. Notwithstanding the fact that San Diego County Registrar does not include
5 provisional ballots in their manual tally procedure, a practice consistent with other counties (ROA
6 #'s 36 - 42), it does not follow that Defendants are therefore in compliance with section 15360.
7 The San Diego County Registrar of Voters has a legal obligation to comply with section 15360. It
8 is imperative that auditing requirements are followed completely in order to ensure the continued
9 public confidence of election results. The San Diego County Registrar of Voters is obligated to
10 allocate its resources appropriately in order to comply with the law. If Defendants are unable to do
11 so, they must seek redress with the legislative or executive branches of government, not the
12 Court.”

13
14 **Joint Trial Readiness Conference Report (“TRC”) / Advance Trial Review Order (“ATRO”)**

15
16 In their TRC (ROA # 91), Plaintiff and Defendants described the nature of the case as
17 follows:

18 “This is a Declaratory Relief and Mandamus action filed by Plaintiffs Raymond Lutz and
19 Citizens Oversight, Inc. against the County of San Diego, Michael Vu in his capacity of the
20 Registrar of Voters, and Helen Robbins-Meyer in her capacity as Chief Administrative Officer of
21 the County of San Diego. Plaintiffs contend that the manner in which the County conducts the one
22 percent manual tally, as defined by Elections Code 336.5, does not meet the requirements of
23 Elections Code Section 15360.”

24 The parties identified the legal issues which are not in dispute as follows:

25 “1. Elections Code Sections 336.5 and 15360 are the operative provisions of the Elections
26 Code that define and govern the one percent manual tally.

27 2. Provisional voters are defined in Election Code Section 14310 - 14313.

28 3. Vote-by-mail voters are defined in Election Code Section 300.

1 4. The one percent manual tally must be conducted and completed during the official
2 canvass.

3 5. The purpose of the manual tally is to verify the accuracy of the automated count.”

4 The parties identified the legal issues which are in dispute as follows:

5 “1. The requirements imposed on elections officials by Elections Code Sections 336.5 and
6 15360.

7 2. Plaintiffs contend the above includes whether verifying the accuracy of the automated
8 count should include the review, supervision and oversight of ballots on which white out or ballots
9 were remade. Defendants contend this is not a "legal issue" to be addressed in this action.”

10 After the parties filed the TRC Report, the Court entered the ATRO. ROA # 90.

11
12 **Non-Jury Trial**

13
14 The parties are not entitled to a jury trial in view of the nature of the relief at issue.

15
16 **Motion for Non-Suit to Dismiss Defendant HELEN N. ROBBINS-MEYER (“ROBBINS-
17 MEYER”)**

18
19 After the opening statement of Plaintiff’s counsel, Defendant ROBBINS-MEYER made a
20 Motion for non-suit. The Court, after hearing arguments of counsel, GRANTED the Motion and
21 dismissed ROBBINS-MEYER from this lawsuit.

22
23 **Witnesses and Exhibits at Trial**

24
25 Vu, Plaintiff, Mayer, Seiler, Wallis, LaVine, Logan and Rodewald testified to his / her
26 recollection of events which took place years ago. The recollection of these witnesses have been
27 influenced by their bias, prejudice or personal relationship with the parties involved in this case. If
28 for no reason other than the passage of time, much less the absence of reliable corroboration, the

1 Court questions the capacity of the witnesses to accurately recollect and communicate his / her
2 perception of the events. The witnesses have “testified untruthfully about some things but told the
3 truth about others” and, accordingly, the Court has accepted the part it perceives to be true and has
4 ignored the rest. CACI 107, 212.

5 Michal Vu: He is the County’s Registrar of Voters (“ROV”). He is responsible for overall
6 direction and conduct of SD elections. He is responsible for “the implementation of law.” He was
7 chief election official for the County of Cuyahoga in Ohio during the 2004 presidential election.
8 He resigned from his position in Ohio though not because he was asked to do so following a
9 controversy involving two staff. The two staff were prosecuted following the controversy. His
10 current duties include application of his interpretation of the law. He is familiar with Election
11 Code 15360. He described his options on how to conduct the 1% manual tally. Exh. “4” is the
12 County’s policy manual – 1% manual tally. He admits that Exh. “4” does not reflect the
13 “batching” method to conduct the 1% manual tally. The policy manual does not reflect the
14 County’s practice of conducting the 1% manual tally by batching method. The County is in the
15 process of updating the policy to reflect its practice of the batching method. Exh. “19” is the
16 official results of County’s June 7, 2016 election. There were 775,930 ballots cast. There were
17 1,523,251 registered voters. There were 285,000 ballots yet to be processed as of the end of
18 election day. Provisional ballots are cast at polling places. There were 68,000 validated
19 provisional ballots processed. There were 75,000 provisional ballots received. There were
20 490,000 votes by mail (“VBM”) ballots received, the majority of which were received before the
21 election. There were non-party partisan ballots placed in provisional ballots. The County’s
22 practice is to not include provisional ballots in the 1% manual tally. The County appears to
23 include in the “semifinal official” count, VBM ballots received on or before the election. The
24 County received 489,610 VBM ballots, of which 256,685 were included in the 1% manual tally.
25 The combination of the excluded VBM ballots and the provisional ballots numbered
26 approximately 37% of the total votes cast which were not subject to the 1% manual tally. He
27 excluded from the 1% manual tally VBM ballots received after the election and provisional ballots
28 cast at polling places. The County uses “white out tape” on ballots, one purpose of which is to

1 identify an ineligible voter. The County created a non-partisan democratic ballot. The County
2 does not have written procedures for the use of white out tape. The County does not keep records
3 of the white out tape on ballots. The County secures and maintains the redacted white out taped
4 ballots for 22 months for federal elections and for six months for local elections.” He was
5 employed for less than a year before the election controversy occurred in Ohio. Exh. “140” is his
6 CV. He described his duties as the County’s ROV. He’s been the County’s ROV since 2012. The
7 County has 1,650,000 registered voters. 62% of the registered voters vote by mail. 775,000
8 persons voted in the June election. He expects 1,200,000 persons to vote in the November
9 election, with 1,552 precincts and 623 ballot types. He described the voluminous types of
10 contests on the November ballot. Exh. “199” is a demonstrative sample ballot for the November
11 election. He described the challenges with a two card ballot. He described the operational issues
12 to manage the 7,000 to 8,000 poll workers to be hired for the November election. He described the
13 process of issuing VBM ballots to voters. A VBM voter can only vote provisionally at the polling
14 place after receiving a VBM ballot. 490,000 persons cast VBM ballots in the June election. He
15 estimated that 675,000 to 725,000 persons will cast VBM ballots in the November election. Exh.
16 “148” is the report of the provisional ballots cast in the June election. Mr. Vu testified and
17 Exhibit 148 reflects that the County fully counted 51,427, or 68.2% of the provisional ballots.
18 Exh. “148” also reflects persons who voted both by mail and a provisional ballot. Mr. Vu
19 testified and Exhibit 148 reflects that the County partially counted 17,226, or 22.9%, of the
20 provisional ballots. The County did not count 6,773 provisional ballots. When a voter voted both
21 by mail and with a provisional ballot, the County counted the VBM ballot instead of a voter’s
22 provisional ballot. The ROV employs 65 staff, and intends to hire 800 to 900 temporary workers.
23 He expects to recruit 7,400 to 8,000 poll workers for the November election. There were 489,610
24 VBM ballots of which 256,685 were included in the semi-final official canvass for the June
25 election. The remaining approximately 233,000 VBM ballots were processed and counted during
26 the official canvass. Exh. “146” is the County’s procedures for processing VBM ballots. The
27 County trains the staff who process VBM ballots. Exh. “177” is a snap shot of the steps to process
28 VBM ballots. The County expended 10,000 or more staff hours to process VBM ballots in the

1 June election. He estimates the County will mail more than 900,000 VBM ballots to voters prior
2 to the November election. He described the process by which the County receives and counts the
3 VBM ballots.

4 The Pitney Bowes "sorter" sorts batches of no more than 400 VBM envelopes as a form of
5 quality assurance. The bar code on the envelopes are read and encoded into a memory card which
6 is imported into the County's voting system. VBM ballots are validated manually but processed
7 with optical scanners. The County evaluates the signatures on VBM ballots but liberally construes
8 the signatures in favor of counting the votes. The County begins to count VBM ballots 10
9 business days before the election. He emphasized that the County counts every ballot cast by
10 every eligible voter. He described the process by which the County re-makes a ballot. He
11 explained why the County uses "white out tape." He explained the County's activities during the
12 official canvass. He explained the "reconciliation of the voting precincts." He explained the steps
13 to avoid the risk of "double voting" by voters. He referred to section 15302 to describe the steps
14 the County takes to complete the official canvass. The County has 30 days to certify the election.
15 The County can count VBM ballots post marked no later than election day and received by the
16 ROV within 3 days after the election. Exh. "171" is a diagram of how paper ballots and touch
17 screen votes are counted. The County manually transfers touch screen votes to paper ballots.
18 Provisional ballots are processed after election day but before the end of the official canvass
19 period. Exh. "181" is a demonstrative video of ballots being processed by the Pitney Bowes sorter
20 in batches of 400 envelopes. The sorter outstacks or suspends ballots with a perceived defect. The
21 sorter sorts the envelopes at the rate of 24,000 envelopes per hour. After election night, the
22 County expends 10,000 or more hours to process VBM ballots. He expects the volume of VBM
23 ballots to be processed in November during the official canvass to be greater than the 235,000
24 VBM ballots processed during the official canvass of the June election. Exh. "147" is the
25 County's procedures for processing the provisional ballots. Exh. "178" is a summary of the
26 County's steps to process provisional ballots, the purpose of which is to insure that the County
27 counts every provisional ballot. Exh. "176" is a provisional ballot envelope. The County uses 100
28 staff to process provisional ballots, most of whom are temporary staff. The County conducts a

1 background check of temporary staff. The County completes the process of counting provisional
2 ballots by the time the results are certified. The County's processes are intended to balance the
3 integrity of the voting system with the ROV's ability to count the votes. The volume of the VBM
4 ballots are larger than provisional ballots; however, it takes more time to process the provisional
5 ballots. He described the purpose and process of the 1% manual tally. The 1% manual tally must
6 start as soon as possible after the election in order to timely certify the results. Exh. "179" is the
7 1% manual tally sheets for the June election. The County expends thousands of staff hours to
8 complete the 1% manual tally. The 1% manual tally counted 7,800 ballots. The 1% manual tally
9 counted ballots from randomly selected precincts as well as additional precincts. The 1% manual
10 tally did not reveal any "issues." The County does not include VBM ballots not processed by
11 election night in the 1% manual tally. The County does not include provisional ballots in the 1%
12 manual tally. His first presidential election as the County's ROV was 2008. He described the
13 severe impact on the County's ability to certify the November election results if the County
14 included VBM ballots and provisional ballots in the 1% manual tally. He questioned the impact
15 on the County's ability to complete an accurate count of the vote if required to include VBM and
16 provisional ballots in the 1% manual tally. The County counts every vote, regardless of the type of
17 ballot cast. The County reserves white space on the ballots to provide for additional languages as
18 necessary, pursuant to the 1965 voting rights act. There were 490,000 VBM ballots cast in the
19 June election. He agreed with the trend that more voters are voting by mail. 75,000 ballots were
20 cast provisionally in the June election, and about 68,000 were ultimately validated and officially
21 cast. 256,000 of the VBM ballots were processed as part of the semi-final unofficial canvass. The
22 1% manual tally did not include 37 % of the total votes cast in the June election. Hypothetically, if
23 a non-partisan voter cast a non-partisan democratic ballot and the poll worker mistakenly placed
24 the ballot in a provisional envelope it would not have been included in the semi-final official
25 canvass but rather would have been processed and counted during the canvass following the
26 election. He decided that the 1% manual tally would be changed from the batching method to the
27 precinct method, after he received Plaintiffs' lawsuit. The County's procedures did not include
28

1 processing the 1% manual tally of VBM ballots by batch. He expects to hire more than 7,000 poll
2 workers for the November election.

3 **Raymond Lutz**: He is a citizen and registered voter in SD County. COI is a 501c3 non-
4 profit organization, the purpose of which is to encourage citizen oversight of SD County elections.
5 His education includes a master's degree in electronics. His work experience includes document
6 imaging technology. Exh. "58" is his CV. He knows Vu. His participation in overseeing SD
7 County elections dates back a number of years to 2008. He has developed a cooperative working
8 relationship with Vu. He discovered in or about 2010 the County's practice of conducting the 1%
9 manual tally, although the practice was not entirely clear to him. He video recorded the County's
10 selection of the ballots which were the subject of the 1% manual tally for the June 2016 election.
11 The County had 1,522 precincts for the June Presidential Primary Election. The County will have
12 1,552 precincts for the November Presidential General Election. "Batches" are mixed precincts
13 which are chosen from 32 areas. Batches must have a report of all the precincts from which the
14 ballots are counted in the 1% manual tally. Vu chose only 8 precincts, instead of 16 precincts, to
15 develop the set of VBM batches to be manually tallied. He objected to Vu's practice. Exh's "12 -
16 14." He photographed a list of the batches chosen by Vu to conduct the 1% manual tally, although
17 he did not receive a "batch mode report." He filed this lawsuit when he discovered that Wu
18 decided not to conduct a 1% manual tally of all of the mail and provisional ballots cast in the June
19 2016 election. He considers himself to be a citizen advocate. He studied the election process used
20 by the County in 2008 by evaluating votes cast in a sampling of 5 of the 85 precincts. He
21 prepared a report of election procedures including the 1% manual tally from the 2008 election. He
22 concluded from his review that he needed the "snap shot file" from the County. He conducted
23 another review of the 2014 election in "all counties in California" and, once again, realized he
24 needed the "snap shot file." In 2014, he made a request from the registrar of voters in all counties.
25 In his opinion, the County conducts a 1% manual tally without including VBM ballots. The ROV
26 conducts a selection meeting the day after the election, selects the precincts and the batches. The
27 ROV receives boxes of ballots from the polling places. Exh. "64" demonstrates the start and stop
28 dates and times of the County's teams conducting the 1% manual tally of the selected precincts,

1 the source of which is data created by the County. Exh's "49 - 52." The County's 1% manual
2 tally did not start until June 27 with multiple stretches over the 30 day period in which the County
3 did no work. In his opinion, the County could have conducted the 1% manual tally more
4 efficiently and started the tally earlier than June 27. He conducted a roster review of the County's
5 teams who participated in the 1% manual tally as well as a review of the votes cast from a
6 sampling of 5 precincts. He reviewed and compared the 1% manual tally results with the snap shot
7 file, which did not match. In his opinion, the 1% manual tally detects simple tabulator errors as
8 well as possible central tabulator hacking which could result in a shift of as many as 10,000 votes
9 from one candidate to another. He requested the legislative history for the senate bill culminating
10 in section 15360, from the secretary of state's office. Exh. "59." His question is whether the
11 legislature intended to include VBM and provisional ballots in the 1% manual tally. He has never
12 been a poll worker or an election official. He votes by mail at this time. The last time he visited a
13 poll was 2014. He has owned and operated multiple businesses, including Creative Minds Inc. He
14 started COI in or about 2006, which is connected to the east county democratic party. He is the
15 only officer and director and of COI. COI has due paying members. He is the sole operating
16 manager of COI. An audit is "an historical review of something that happened." He is not
17 familiar with the regulations adopted outside of the election code. He did not participate in the
18 legislative process to amend Section 15360. He corresponded with Vu and other registrars of
19 voters throughout California on the subject of the 1% manual tally. Exh's "9 - 11." He
20 understood that not all ballots would be included in the "subset" of the votes for the 1% manual
21 tally. In 2016, he again requested a snapshot of the "subset" of the votes for the 1% manual tally.
22 Exh. "11." The County provided him with a snapshot of the "subset" of the votes for 1% manual
23 tally of the June 7, 2016 election. He described his understanding of the process by which the
24 County receives and records VBM ballots. His description appears to be reasonable and informed,
25 although critical, in part, of the County's process. The County processes provisional ballots last,
26 after first having processed VBM ballots. In his opinion, the ROV is required to include all of the
27 provisional ballots. "Batch" is defined in section 15360. Section 15360(a) (B)(ii) states: ""batch"
28 means a set of ballots tabulated by the voting system devices, for which the voting system can

1 produce a report of the votes cast.” He admits section 15360 does not refer to “all,” “audit” or
2 “provisional ballots.” He described his understanding of “hashing” as part of the County’s
3 security system. He believes that an outside hacker can hack into the County’s security system.
4 He has not witnessed any election fraud in the County. He considers the County’s failure to follow
5 his interpretation of the law to be a form of election fraud. He is not aware of anyone hacking into
6 the County’s “vote tabulation system.” In the SAC, at par. 36, Plaintiffs allege that the County
7 should include all VBM and provisional ballots in the 1% manual tally. A “snap shot file” is a
8 snap shot of all votes the County counted. It was a big file ... 200 megabytes. One purpose of the
9 snap shot was to evaluate whether an “internal hacker” had manipulated the election results. Exh.
10 “56” is the snap shot he received from the County of the election results tabulated as of June 8,
11 2016 at 3:00 pm. He received Exh. “56” just before the County conducted the “random draw.”
12 There are counties which conduct the “random draw” as much as two months before the election
13 which alerts potential hackers of the precincts not to manipulate, to avoid detection. The County
14 conducts the 1% manual tally after the random draw takes place.

15 **Erin Mayer:** She is chief departmental officer in charge of the 1% manual tally. She
16 supervises Diane Elsheikh. She has occupied her current position for 2 ½ years. She described the
17 procedure she has followed to conduct the 1% manual tally. The procedure changed from batching
18 to precincts after the County received a demand from Lutz. The precincts consisted of the
19 precincts randomly polled. She participated in a lot of discussions with Lutz during the random
20 draw. She referred to Exh’s “49 – 52,” the subject of which is the County’s 1% manual tally after
21 the June 7, 2016 election. On June 13, her team started the process of counting the poll ballots.
22 On June 21, her team started the process of counting the touch screen ballots. On June 27, her
23 team started the process of counting the VBM from the precincts chosen in the random draw. The
24 1% manual tally did not include VBM ballots from precincts not selected in the random draw. The
25 1% manual tally did not include VBM ballots received by the County after the June election.
26 Exh.”50” is the tally of the votes received from the precincts. Exh. “52” is the tally of the touch
27 screen votes. The County includes 100% of the touch screen ballots in the 1% manual tally. The
28 County tabulates the paper ballots followed by the VBM ballots. She denies any “problems” with

1 the "paper trail" of the votes in the June election. She agrees that the County is required to possess
2 a paper trail of the touch screen ballots. She described the "back end" of the processing of the
3 ballots which takes place before the beginning of the 1% manual tally. She described the technical
4 services necessary to process the ballots. The County can re-make a paper trail to memorialize the
5 touch screen ballots. The County started the 1% manual tally by batch before switching to
6 precincts.

7 **Deborah Seiler**: She is retired from the County. Previously, she was the ROV for the
8 County. She described her elections experience as reflected in her CV. Exh. "138." She
9 contributed to the development of elections legislation in California. She has acted as an election
10 observer in other countries like, for example, the former Soviet Union. Her credentials /
11 qualifications are impressive. She described her duties as ROV for the County. She described her
12 understanding of the post-election 1% manual tally which has been in effect since 1965. The
13 initial purpose of the 1% manual tally was to verify the accuracy of the "coding process." There
14 have been multiple amendments to the 1% manual tally legislation. She encouraged the expansion
15 of the 1% manual tally legislation. She participated in drafting the 1986 legislation amendment.
16 She proposed a re-structuring of the "whole elections code." She proposed that the 1% manual
17 tally be re-located into the "canvass procedures." The 1% manual tally was not contemplated to be
18 a part of the re-count procedures. She referred to Elections Code section 336.5 which defines the
19 "1% manual tally," the drafting of which she participated in. She described her understanding of
20 "verify" in context of the 1% manual tally. A manual tally is required to be performed during the
21 official canvass. Exh's "100 - 103" are the 2006 proposed amendments known as Senate Bill 1235.
22 In her opinion, the absence of provisional ballots from the ultimate legislation is significant. She
23 denies that the word 'all' appears in section 15360. A reference to "all" and "provisional ballots"
24 were stricken from the proposed amendments. Exh's "104, 180." The 2008 election was the first
25 election she presided over as the County's ROV after AB 2769 was enacted. She included some,
26 but not all, of the VBM ballots in the 1% manual tally. She made minor changes to the procedures
27 for the 1% manual tally after the enactment of AB 2769. She was familiar with the enactment of
28 section 15360.5, as urgency legislation, in 2010. Exh. "105." In her opinion, the application of

1 section 15360.5 was limited to 4 specific counties. She described her understanding of the options
2 available to counties to conduct the 1% manual tally. Exh. "106" is the 2011 proposed amendment
3 to section 15360 which extended section 15360.5 to all counties. The 2011 amendment was
4 financially important to, and was supported by, the County. The County based the 1% manual
5 tally on the semi-final official canvass. The inclusion of "all ballots" including VBM and
6 provisional ballots in the 1% manual tally would have worked a financial and administrative
7 hardship on the County. She characterized the Secretary of State's proposal (Exh. "109") as "an
8 underground regulation" which the County successfully challenged. The County devoted 100
9 hours or more to respond to the accusations asserted by Lutz in 2010. Exh's "62, 110." She
10 expressed her opinion of the remedies available to a citizen who challenges the integrity of the
11 election results. She is not aware of any evidence that anyone has hacked into the County's voting
12 system. She described the purpose of placing the "source codes" in escrow. The computer vote
13 count program is deposited with the Secretary of State's office. Within 5 days after the election
14 results are certified, any voter may demand a re-count at the challenger's expense; however, if the
15 re-count is successful, the expense is reimbursed to the challenger. Any voter may file an election
16 contest in Court. In 2006, Senator Debra Bowen was the sponsor of SB 1235. The Court takes
17 judicial notice of the legislative history of section 15360. Exh. "59." The history indicates support
18 to include absentee and provisional ballots in the 1% manual tally. She considers the statements in
19 the August 30th letter from the Secretary of State Bruce McPherson (Exhibit 59, p. 45) and the
20 Enrolled Bill Memorandum to Governor dated 9/7/06 (Exhibit 59, p. 37-38) that SB 1235 requires
21 elections officials to include absentee and provisional ballots to be an error. Provisional ballots are
22 cast at the polls.

23 **Charlie Wallis**: He has been the principal IT analyst with the County for 26 years. He
24 manages information technology for the ROV. He is responsible for supplying the information to
25 the team who conduct the 1% manual tally. He supervised the information services for the June 7,
26 2106 election. He pulled the batches of ballots cast at the polling place and by mail. He is not
27 aware of any issue with the voter verified paper trail. He first pulled the boxes for the polling
28 place ballots. He next pulled the VBM ballots. He described the process to pull the precinct

1 boxes. He delivered the precinct boxes to the 1% manual tally. The reference to "deck" and
2 "batch" are synonymous. The boxes are secured in the ROV's office. He retrieved the VBM
3 ballots from the chosen precincts, which took 40 staff working a full week to complete. He is
4 familiar with the unofficial results of the June election. Exh. "56." He posted the unofficial results
5 on the internet. He agrees that the unofficial results should match the computer reports. Exh. "44"
6 is a report which "identifies how many cards for a particular precinct are in a deck." There is a
7 comparable report for the VBM ballots. The County has a short period of time to certify the
8 election. There were more provisional ballots in the June election than he expected. The County
9 received more than 70,000 provisional ballots. He has noted an increase in VBM voting. He
10 described the responsibilities he is performing to prepare for the upcoming November election.
11 The County changes the precincts from one election to the next. He has been working 6 to 7 days
12 per week, 12 hours per day, to prepare for the November election. He described the voter
13 registration system. He described the election management system. He described the vote
14 tabulation system. He described the global election management system ("GEM"). The County's
15 election systems must be certified by the Secretary of State. The Secretary of State and the Federal
16 Election Commission ("FEC") has certified the County's use of GEM. The Secretary of State
17 provides the County with use procedures, including security, for GEM. He disagreed with Lutz
18 that the security procedures for GEM are not available to the public. He described the hardware
19 components for GEM. Exh. "155." The server of the County's GEM is not connected to the
20 internet. He described the County's security for GEM. Since 2008, security for GEM has been
21 "hardened." The security contemplates protection if the server is stolen. He described the
22 County's touch screens. Exh. "154." Touch screens are available for voters with special needs.
23 He described the County's security for the touch screens. The touch screens contain a memory
24 card. 1,000 or fewer voters cast ballots using the touch screen in the June election. He described
25 the function of voting on the touch screens. He described the paper trail generated by voting on
26 the touch screens. He described the optical scan device to scan ballots and upload results to the
27 County's central tabulator. Exh. "152." The County sets up approximately 160 optical scan
28 devices on election night. He described the function of the optical scan device. He described the

1 purpose of the memory card for the optical scan device. The optical scan device generates a paper
2 trail. He described the "ender card" which is run through the scanner. Exh. "158." Exh. "190"
3 demonstrates the paper tape generated by the scanner operator. He explained examples of why
4 some ballots cannot be scanned. Exh."150" is a diagram of the County's election night central
5 count floor. He described the roles performed by the staff depicted in the diagram. He estimates
6 that the process for the upcoming election will take longer than usual. Exh. "151" is a video which
7 reflects the County's "ballot inspection" during a past election. He described the function of the
8 "serial digy box" and "os device" depicted in Exh. "153." He described the function of the "start
9 card," referring to Exh. "157" for demonstrative purposes only. Each ballot is coded to a precinct.
10 The os and tsx units are tested for use prior to the election. Exh. "159" is a test card to make sure
11 the units are functioning before the election. After running the hardware tests, the County
12 performs a full logic and accuracy test on the system, all of which takes place under his
13 supervision. He described the series of tests he supervises to test the 623 ballot types. The County
14 conducted approximately 20,000 tests prior to the June election. The test data is transmitted to
15 GEM. He successfully completed logic and accuracy testing prior to the June election. The pre
16 June election tests took approximately 10 days. The tests are conducted prior to every election.
17 He recognizes Lutz but does not believe Lutz has taken advantage of the opportunity available to
18 the public to observe the testing. Exh. "175" is the results bulletin for the 1% manual tally of polls
19 ballots for the June election. The County's GEM generated Exh. "175." The County generates
20 different reports for poll ballots and VBM ballots. The June election generated 600 to 700 decks.
21 He described the process to produce a report for each deck. The County used GEM to process a
22 re-count challenge within the last 12 years. The County's count was upheld. He described the
23 process by which the integrity of the ballot tabulations is preserved. He described how the hash
24 value of the GEM would change if the security system were breached. He is not aware of any
25 manipulation of the County's GEM. In his opinion, it would be difficult, if not impossible, to hack
26 into the County's GEM, alter data and manipulate election results. He is involved in the quality
27 control process of re-making ballots. He described the County's use of "white out tape." He
28 described the "uniform counting standards" which the County applies, if necessary, to use "white

1 out tape." Exh. "149." The County submits the provisional ballots to a verification process.
2 "VVPAT" stands for voter verified paper audit trail. The County is required to retain the paper
3 trail under the Elections Code.

4 Jill LaVine: She has been the ROV for Sacramento County for 13 years. She described
5 her duties as ROV. Her elections career dates back to 1987. "CACEO" stands for California
6 Association of Clerks and Elections Officials. Sacramento has 900,000 eligible voters and
7 733,000 registered voters. Sacramento employs 34 staff and 2,800 poll workers. Sacramento will
8 add up to 200 temporary staff for the upcoming election. She is familiar with the 1% manual tally.
9 Sacramento conducts a random selection of precincts for the 1% manual tally. The January 1,
10 2007 amendment to section 15360 added VBM ballots. Exh. "109" is a directive to county clerk
11 registrar of voters ("ccrov") throughout California on the subject of the post-election manual tally.
12 The 2010 option to four counties was to choose between conducting the 1% manual tally by either
13 batch or precinct process. Sacramento continued to conduct the 1% manual tally by the precinct
14 process. Sacramento's procedures are consistent with the conclusion in Exh. "107" not to include
15 VBM ballots or provisional ballots in the 1% manual tally. She described the process by which
16 Sacramento counts VBM ballots and provisional ballots. Sacramento counts the provisional
17 ballots at or near the end. To include all VBM ballots would create a logistical problem for
18 Sacramento. She is not aware that Sacramento's voting system has been hacked. 340,000 persons
19 voted in Sacramento's June election. 67% of Sacramento's voters voted by mail. Sacramento has
20 not used the batching method to conduct the 1% manual tally. It is administratively more
21 convenient for Sacramento to use the precinct method. Exh. "68" is Sacramento's 2014 report of
22 the results of the 1% manual tally. The report reflects errors that did not match the computer count
23 on election night. Exh. "69" is Sacramento's June 2016 report of the results of the 1% manual
24 tally. The report reflects errors that did not match the computer count on election night. In both
25 instances, Sacramento made the corrections in the official certified results. She described how
26 Sacramento could conduct the 1% manual tally by including VBM ballots and provisional ballots.
27 Sacramento would need to add staff and incur additional resources to include VBM ballots and
28 provisional ballots. She denied that the batching method would assist Sacramento to conduct the

1 1% manual tally with the inclusion of VBM ballots and provisional ballots. Sacramento had not
2 yet counted 136,000 ballots as of election night, none of which were subject to the 1% manual
3 tally. Sacramento starts to count VBM ballots as early as 10 days before the election. Sacramento
4 strives to include as many VBM ballots as possible into the 1% manual tally. Sacramento included
5 200,000 VBM ballots in the 1% manual tally. She explained the reasons for the discrepancy in the
6 official certified results from the semi-final official results after the 1% manual tally. As reflected
7 in Exh. "69", the discrepancy also arose from a break down in the scanning operation during the
8 June election.

9 Dean Logan: He is the L.A. County ROV county clerk. Exh. "139" is his CV which
10 reflects 25 years of elections experience. He described his duties as L.A.'s ROV. L.A. has
11 5,042,000 registered voters, of which 2,026,000 voted in the June election. 772,000 persons voted
12 by mail. 271,000 persons cast provisional ballots. He described the reasons why persons cast
13 provisional ballots. He expects L.A. to receive more VBM ballots in the November election. L.A.
14 employs 841 staff in the ROV office, all of whom participate in the election process (although
15 L.A. will add another 500 temporary staff for the November election). L.A. will use 22,000 poll
16 workers for the November election. L.A. included 387,000 VBM ballots in the semi-final results.
17 334,000 VBM ballots were not included in the 1% manual tally. L.A. assigns 150 staff to count
18 VBM ballots. He described the process by which L.A. counts VBM ballots, which he also
19 characterized as "labor intensive." He described the training L.A. provides to the staff to count
20 VBM ballots and the provisional ballots. L.A. staff devoted 57,000 hours to count VBM ballots as
21 of the June election. L.A. devoted an additional 12,000 staff hours to count VBM ballots received
22 after the June election. The official results included 236,788 of the total 271,000 provisional
23 ballots in the official results. L.A. starts to process provisional ballots the day after the election.
24 He described the process by which L.A. counts the provisional ballots. 150 to 400 staff counted
25 the provisional ballots cast in the June election. The processing of provisional ballots are more
26 labor intensive than the processing of VBM ballots. L.A. staff devoted 61,000 hours to process the
27 provisional ballots. He described his understanding of the 1% manual tally, a process which starts
28 the day after the election. In his opinion, the inclusion of VBM ballots and provisional ballots in

1 the 1% manual tally would delay the certification of the official results. He described the process
2 by which the 1% manual tally takes place after notice is provided to the public. L.A. devoted 55
3 staff to complete the 1% manual tally and 7,500 staff hours to count 20,217 ballots in the June
4 election. The 20,217 represents 1% of the total 2,026,068 ballots cast in the June election. L.A.
5 uses the precinct method to conduct the 1% manual tally. L.A. did not include VBM ballots that
6 were processed after the election, and did not include provisional ballots, in the 1% manual tally.
7 He's been employed with L.A. ROV office since 2006. Prior to 2007, L.A. did not include VBM
8 ballots in the random draw. L.A. has not included the provisional ballots in the 1% manual tally.
9 He described the reasons why L.A. has not included provisional ballots in the 1% manual tally.
10 The 2012 amendment allowed counties to choose between the batch or precinct method to conduct
11 the 1% manual tally. L.A. continues to not include all VBM ballots in the 1% manual tally. The
12 recent amendment to section 15360 allows VBM ballots received up to 3 days after the election to
13 be counted in the election results. He described the additional delay and costs to include all ballots
14 cast in the 1% manual tally, and still be able to certify the official results. He received multiple
15 emails from Lutz on the subject of the 1% manual tally for the June election. Exh. "195."
16 12,000,000 persons reside in L.A. county. He is not aware of any person hacking into L.A.'s
17 voting system. His departmental budget is more than \$178,000,000 per year. L.A. has 5,000,000
18 eligible voters. 722,000 persons voted by mail. 271,000 provisional ballots were validated and
19 included in the certified returns. 387,000 of the 722,000 VBM ballots were included in the semi-
20 final official results. L.A. sorts VBM ballots by precinct prior to tabulation. He described the
21 process by which L.A. secures the ballots. L.A. conducts the 1% random draw the day after the
22 election. The actual 1% manual tally starts 2 or 3 days after the election. L.A. only includes VBM
23 ballots which were both received and counted as of the election, in the 1% manual tally. L.A.
24 takes 8 – 10 days to conduct the 1% manual tally. He described the process by which L.A. would
25 conduct the 1% manual tally if all ballots cast were included; however, he questions whether L.A.
26 could achieve the 1% manual tally within the statutorily required time frame, to certify the official
27 results. He described L.A.'s vote tabulation system, components of which are the Inka vote and
28 Inka vote plus. The Secretary of State certifies L.A.'s voting system. L.A.'s voting system is

1 capable of processing VBM ballots by batch. He described his understanding of the batching
2 methodology and, agreed that, arguably, a precinct is a batch.

3 **Julie Rodewald (through her deposition taken on September 23, 2016 – Exh’s “196,**
4 **197”**): She retired in 2014 as the county clerk recorder for San Luis Obispo County after 20 years.
5 She described her duties to include “conducting elections.” She also served as the ROV for San
6 Luis Obispo. She was a member of CACEO. She described her understanding of the purpose of
7 the 1% manual tally, and the process by which San Luis Obispo conducts the 1% manual tally.
8 She described her understanding of the amendments to section 15360. San Luis Obispo did not
9 perform the random draw until a week after the election to allow more VBM ballots to be included
10 and did not include any provisional ballots in the 1% manual tally. In her opinion, the law did not
11 require San Luis Obispo to include provisional ballots in the 1% manual tally. San Luis Obispo
12 was one of the four counties which were the subject of section 15360.5. The purpose of the 1%
13 manual tally is “to verify the automated count ... to finish the official canvas within the 28 days.”
14 The 2011 amendment permitted all counties to tally VBM ballots by batch. San Luis Obispo did
15 not change its practice to include, or not include, VBM ballots in the 1% manual tally. She is not
16 aware that San Luis Obispo’s voting system has been hacked. San Luis Obispo started the 1%
17 manual tally one week after the election. San Luis Obispo included VBM ballots which had been
18 received and processed as of the election in the 1% manual tally. San Luis Obispo has 145 polling
19 precincts. 12 precincts were selected for the 1% manual tally. 60,228 persons cast VBM ballots in
20 the November 2014 election, and approximately 90 - 95% were processed before San Luis Obispo
21 started the 1% manual tally. San Luis Obispo could have included the provisional ballots, like
22 VBM ballots, in the 1% manual tally. She observed that the volume of VBM ballots and
23 provisional ballots cast continued to increase. The provisional ballots were the last ballots to be
24 counted before the results were certified.

25 **Phillip Stark**: He is a professor of statistics at UC Berkley, and has been since 1988. His
26 education includes a Ph.D. in earth science from UCSD. Exh. “53” is his CV. His qualifications
27 are adequate, if not superior. He identified the materials he reviewed to form and express his
28 opinions. He is familiar with Election Code 15360 including AB 985 effective January 1, 2012.

1 He has reviewed the legislative history of SB 1235 effective January 1, 2007. Secretary of State
2 Deborah Bowen appointed him to a committee to review post-election audit standards of the
3 State's voting systems. He has spoken to 10 to 15 ROV's throughout the State. The foundation on
4 which he based his opinions are adequate. He is familiar with the 1% manual tally which he
5 characterized as a "quality control check" on election results. He has participated in a "risk
6 limiting audit," the purpose of which is to confirm the confidence in the election result. The
7 framework of the audit is based on a statistical model which confirms that the "outcome is
8 correct." The risk of the audit varies depending upon the degree of confidence that the outcome is
9 correct. He emphasized that a "robust chain of custody" is imperative to the reliability of the
10 result. He identified the counties, including Orange, in the State which have utilized his audit. His
11 bias, if any, is to promote election integrity, which is why he has chosen to testify without
12 compensation. He identified the types of errors which the 1% manual tally can detect which
13 includes whether the central tabulating system has been compromised. He described his
14 understanding of the batching method and the precinct method to conduct the 1% manual tally. In
15 his opinion, the batching method provides a higher statistical advantage to detect errors in the
16 election result. In his opinion, it's important that all votes cast have been counted before the
17 random selection / 1% manual tally occurs. In his opinion, the 1% manual tally conducted on a
18 sampling of ballots instead of all votes cast, undermines, from a statistical perspective, the
19 "accuracy of the voting system results." In his opinion, the County's random selection is, from a
20 statistical perspective, flawed. He described his understanding of provisional ballots. In his
21 opinion, the omission of ballots cast, including provisional ballots and VBM ballots, impairs the
22 ability of the 1% manual tally to detect errors. In his opinion, the manner in which the County
23 conducts the 1% manual tally creates a "frame bias." He has reviewed Plaintiff's SAC in this case
24 as well as pertinent legislation connected to section 15360. He has not reviewed the County's
25 procedures for processing VBM and provisional ballots. He has not participated in an audit of the
26 County's 1% manual tally. He is not familiar with the County's GEM to process voting results.
27 He performed election calculations relating to *Bush v. Gore*. He agreed that the official canvas
28 includes elements other than the 1% manual tally. He agreed that he is not familiar with all of the

1 requirements of the official canvas. His focus is limited to the completion of the 1% manual tally.
2 He agreed that a risk limiting audit is different than the 1% manual tally, which have very different
3 goals. The goal of a risk limiting audit is to confirm the accuracy of the election results. He
4 disagreed that a risk limiting audit is similar to a recount procedure, though he characterized the
5 1% manual tally to be "like an intelligent incremental recount." He generally agreed that the
6 "broad" goals of both a risk limiting audit and the 1% manual tally is to check that the election
7 results are correct. He agreed that the 1% manual tally is not a recount. He agreed that the ROV is
8 required to report discrepancies detected from the 1% manual tally to the Secretary of State. L.A.
9 and San Francisco are developing their own vote tabulating systems. The Elections Code does not
10 require that jurisdictions perform a risk limiting audit. In his opinion, the 1% manual tally is an
11 ineffective and inefficient means to confirm election results. In his opinion, the 1% manual tally
12 has a small chance of detecting errors in the election results. In his opinion, a risk limiting audit
13 has up to a 90% chance of detecting errors in the election results. He agreed that the 1% manual
14 tally measures, although ineffectively and inefficiently, the accuracy of the election count. The
15 pilot program he participated in conducted risk limiting audits in elections in eleven counties in
16 2011 – 2012. The audits used a software program other than the counties' existing voting system
17 software program. The most common tabulation error is, in his experience, the misinterpretation
18 of voter ballots, or voter intent. He is not familiar with the voter guidelines promulgated by the
19 Secretary of State. He is not familiar with the County's procedures to test whether ballots are
20 scanned properly. He agreed that a quality control system should reduce errors in the ballots
21 counted. He has not reviewed the County's 1% manual tally results for the June 2016 election. In
22 reviewing Exh. "51," he identified discrepancies in the scanned count and the 1% manual tally in
23 the June election. In his opinion, the entire election audit system needs an overhaul. He agreed
24 that the current voting system does not require a risk limiting audit. He is not familiar with the
25 term "semi-final official" canvas as reflected in the Elections Code. David Jefferson was the
26 chairperson of the post-election audit standards working group. He recognized Dean Logan to be
27 L.A. County's ROV. He identified the existing elements of the official canvas. In his opinion, the
28 existing elements of the official canvas, including the 1% manual tally, are "not enough." In his

1 opinion, the 1% manual tally as a “double check” is not as good as a risk limiting audit. He
2 assumed that the County, like other counties, has a quality control system in tabulating votes. He
3 described his understanding of the manner in which the County conducts its “random draw.” He
4 has no opinion on the accuracy of the results of the County’s June election. To be a reliable
5 accuracy indicator, the random draw should occur after the results of the election are known. He
6 expects that the risk-limiting audit will be the next generation of audits in the State’s election
7 procedures.

8
9 **Plaintiffs’ FIRST CAUSE OF ACTION for DECLARATORY RELIEF**

10
11 Declaratory relief is a proper remedy. The purpose of a declaratory judgment is to serve
12 some practical end in “quieting or stabilizing an uncertain or disputed jural relation.” *In re*
13 *Claudia E.* (2008) 163 Cal. App. 4th 627, 633 (declaration that Department of Social Services not
14 complying with statutory time requirements for juvenile removal proceedings). Another purpose
15 is to liquidate doubts with respect to uncertainties or controversies which might otherwise result in
16 subsequent litigation. *Id.* “The proper interpretation of a statute is a particularly appropriate
17 subject for judicial resolution.” *Id.* Judicial economy strongly supports the use of declaratory
18 relief to avoid duplicative actions to challenge an agency’s statutory interpretation or alleged
19 policies. *Id.* The remedy of declarative relief is cumulative and does not restrict any other remedy
20 such that it is wrong for a court to decline a declaration on the ground that another remedy is
21 available. *Id.* at 633-634.

22 In their trial brief (ROA #92), at pages 4 – 6, Plaintiffs assert:

23 “Election Code section 15360 describes the 1% manual tally audit procedure. This
24 provision begins as follows:

25 15360(a) During the official canvass of every election in which a voting system is used, the
26 official conducting the election shall conduct a public manual tally of the ballots tabulated by those
27 devices, including vote by mail ballots, using either of the following methods:

28 (1) (A) A public manual tally of the ballots, including vote by mail ballots, cast in 1 percent of the

1 precincts chosen at random by the elections official. If 1 percent of the precincts is less than one
2 whole precinct, the tally shall be conducted in one precinct chosen at random by the elections
3 official.

4 Section 15360(a) requires that "[d]uring the official canvass of every election in which a
5 voting system is used, the official conducting the election shall conduct a public manual tally of
6 the ballots tabulated by those devices, including VBM ballots." This process is called the 1%
7 manual tally. The purpose of the 1% manual tally is "to verify the accuracy of the automated
8 count." Section 336.5.

9 Section 15360 clearly states that "not less than 1 percent of the VBM ballots cast" must be
10 included in the 1% manual tally. Section 15360(a)(2)(B)(i). This quantity must be calculated
11 based on the total number of vote by mail ballots cast, not the number of vote by mail ballots
12 counted to date. 1% of the total number of ballots counted at that point is less than 1% of the total
13 number of ballots cast and ultimately counted after that point. Thus, including a mere 1% of the
14 total number of ballots counted to date is in direct violation of the requirement that "not less than
15 1% of the VBM ballots cast in the election" be counted. Section 215360(a)(2)(B)(i).

16 The stated purpose of the 1% tally, "to verify the accuracy of the automated count,"
17 supports this conclusion. Section 336.5. The legislative history of Section 15360 also supports this
18 conclusion. "In 2006, Elections Code 15360 was amended to require that all vote by mail ballots
19 be included in the 1% manual tally by precinct. This requirement resulted in over 540 additional
20 staff hours to complete the manual tally process and approximately 12,000 in additional costs for
21 each election...." 06/03/11 - Senate Elections and Constitutional Amendments, 2011 Cal Stat. Ch.
22 52. Clearly, all vote by mail ballots have to be counted. The onerous nature of this requirement
23 led the legislators to add the option to manually tally VBM ballots separately, in batches, to
24 ensure, that all of them could be counted efficiently. *Id.* The proponents of AB707 state the intent
25 clearly: "The votes on absentee ballots are no less valid or important than the votes cast at the
26 polling place, and the potential for the vote to be incorrectly tabulated on an absentee ballot is just
27 as likely as a vote cast in a traditional polling booth. Therefore, it makes no sense to exclude
28 absentee ballots, provisional ballots and ballots cast at satellite locations from the 1% manual tally.

1 By excluding them from the manual tally, there is no way to verify that the votes cast on them are
2 being recorded accurately. Moreover, in the event that counties are authorized to conduct an all-
3 mail election, this provision would ensure that the manual tally is still conducted in those
4 counties." (Exhibit 54, page 3) Further support was provided by the then-serving Secretary of
5 State Bruce McPherson (served from March 2005 - December 2006): "This proposal also requires
6 a county election official to include all ballots cast in a precinct in the 1% manual tally. This
7 means that a county will need to include any ballots cast at the polls, via absentee ballot,
8 provisional voters, and any ballots cast on direct recording electronic (DRE) voting machines."
9 (Exhibit 54, page 15). In the final recommendation to Governor Schwarzenegger: "Summary:
10 This bill establishes a uniform procedure for elections' officials to conduct the 1% manual tally of
11 the ballots including (1) the requirement that absentee ballots, provisional ballots, and ballots cast
12 at satellite locations be included in the tally of ballots..." (Exhibit 54, page 37.)

13 Precedent furthers the support for this conclusion. "Section 15360 appears on its face to be
14 concerned solely with assuring the accuracy of the vote, not with limiting unnecessary vote
15 tallying. Indeed, the explicit intent of section 15360, as expressed in a companion statute, is "to
16 verify the accuracy of the automated count." *County of San Diego v. Bowen* 166 Cal. App. 4th
17 501, 511-12 (Cal. Ct. App. 2008)."

18 In their trial brief (ROA # 93), Defendants assert, at pages 15 - 17:

19 When conducting the random sample selected for the manual tally by the Registrar
20 includes all ballots included in the semifinal official canvass the day after the election, including
21 VBM ballots. The County does not include VBM ballots that have yet to be processed and added
22 into the official canvass results. Similarly, the Registrar does not include any provisional ballots in
23 the manual tally. The practice followed by the Registrar is consistent with the intent and purpose
24 of the manual tally and satisfies the requirements of Section 15360.

25 **A. Section 15360 does not Require Provisional Ballots to be Included in the Manual**
26 **Tally**

27 The Registrar does not include provisional ballots in the manual tally. This practice is
28 consistent with the practices of other counties and the opinion of the Secretary of State. It is also

1 consistent with the original intent of the Legislature in conducting the 1% manual tally and does
2 not run afoul of the requirements of Section 15360.

3 As detailed above, prior to 2006, Section 15360 did not expressly require VBM or
4 provisional ballots to be included in the manual tally. In 2006, the Legislature enacted AB 2769
5 (Stats. 2006, c. 893, § 1) and AB 2769 (Stats. 2006, ch. 894) amending Section 15360 to read, in
6 relevant part as follows: "... the official conducting the election shall conduct a public manual
7 tally of the ballots tabulated by those devices, including absent voters' ballots, cast in 1 percent of
8 the precincts"

9 When introduced, SB 1235 proposed that Section 15360 be amended to also include
10 "provisional ballots, and ballots cast at satellite locations, cast in 1 percent of the precincts" But,
11 the reference to "provisional ballots, and ballots cast at satellite locations" was deleted before the
12 second reading of the bill in committee. Similarly, AB 2769 when introduced also proposed to
13 include VBM and provisional ballots in the manual tally, but also like SB 1235, once amended all
14 references to provisional ballots were deleted. "'When the Legislature chooses to omit a provision
15 from the final version of a statute which was included in an earlier version, this is strong evidence
16 that the act as adopted should not be construed to incorporate the original provision.' [citation]"
17 *UFCW & Employers Benefit Trust v. Sutter Health* 241 Cal. App. 4th 909, 927 (2015), citing
18 *People v. Delgado* 214 Cal. App. 4th 914, 918 (2013). As such, it is clear that the Legislature
19 considered but rejected the idea that provisional ballots were to be included in the manual tally.

20 **B. The Registrar Properly Includes Vote by Mail Ballots in the 1 Percent Manual**
21 **Tally**

22 VBM ballots are received at different times by different means of delivery. The VBM
23 ballots associated with a particular precinct are by the very nature of the process sprinkled
24 throughout all of the VBM ballots included in the semifinal official canvass. Prior to 2012, after
25 the precincts to be included in the manual tally were selected, elections officials were required to
26 locate the VBM ballots associated with the randomly selected precincts and integrate those ballots
27 into the ballots cast at the precincts. This process had to be initiated within several days of the
28 election in order to complete the manual tally "during the official canvass" and of course could not

1 include VBM ballots that have not yet been processed and counted.

2 In 2011, in an effort to streamline the process and reduce the costs of completing the
3 manual tally, the Legislature enacted AB 985 amending Section 15360. As amended by AB 985,
4 Section 15360 election officials now have an option for conducting the manual tally. Election
5 officials can now conduct the manual tally by precinct as provided under 15360(a)(1)) or,
6 alternatively may conduct a two part manual tally that allows elections officials to manually tally
7 randomly selected batches of VBM ballots, thereby avoiding the cost and time of having to
8 integrate the VBM ballots into the randomly selected precincts (see § 15360(a)(2)).

9 The intended purpose of AB 985 was to streamline the process and make it easier, more
10 efficient and less costly to conduct the manual tally. If the court now interprets AB 985 to require
11 the Registrar to include all VBM in the manual tally, that interpretation would make the process
12 more difficult, less efficient and more costly, all of which are contrary to the stated purpose of the
13 amendment.

14 Both before and after the enactment of AB 985, the Registrar has only included VBM
15 ballots included in the semifinal official canvass in the manual tally. This practice is consistent
16 with the intent and purpose of the statute as amended and is also consistent with the practices of
17 other counties. The practice also reflects the practical necessity of having to complete the official
18 canvass of the election and certify the results within the statutorily mandated period after the
19 election.

20 Another reason for not waiting to conduct the manual tally until all of the VBM ballots are
21 included in the official canvass is that if the Registrar waited and then determined that the vote
22 tabulating devices were not recording the votes accurately, there would be no time left to correct
23 the error and rerun all of the ballots previously included in the official canvass. It is in the public's
24 interest and it is a prudent business practice to begin and complete the manual tally as soon as
25 possible. Waiting until all of the VBM ballots have been processed and included in the official
26 canvass would inarguably substantially delay that process."

27 In resolving the controversy over the scope of the "1 percent manual tally" in Section
28 15360, the Court accepts the issues the parties do not dispute: 1. Elections Code Sections 336.5

1 and 15360 are the operative provisions of the Elections Code that define and govern the one
2 percent manual tally (to wit, “**One percent manual tally**” is the public process of manually
3 tallying votes in 1 percent of the precincts, selected at random by the elections official, and in one
4 precinct for each race not included in the randomly selected precincts.”); 2. Provisional voters are
5 defined in Election Code Section 14310 – 14313 (to wit, “... a voter claiming to be properly
6 registered, but whose qualification or entitlement to vote cannot be immediately established upon
7 examination of the index of registration for the precinct or upon examination of the records on file
8 with the county elections official, shall be entitled to vote a **provisional ballot ...**”); 3. Vote-by-
9 mail voters are defined in Election Code Section 300 (to wit, “**Vote by mail voter**” means any
10 voter casting a ballot in any way other than at the polling place.”); 4. The one percent manual tally
11 must be conducted and completed during the official canvass; 5. The purpose of the manual tally is
12 to verify the accuracy of the automated count. (emphasis added by the Court)

13 The Court is disinclined to read any more into the term “1% manual tally” than is necessary
14 to reasonably construe or interpret its scope.

15 Though the subject of much discussion throughout its history (see, for example,
16 Defendants’ trial brief, pages 2 – 4), the legislature chose not to include “provisional ballots” in
17 Section 15360. There appears to be good reason to conclude that this omission was not
18 inadvertent.

19 As Defendants argue, at pages 8 – 9 of their trial brief:

20 “Voters may be required to vote provisionally on the day of the election for a number of
21 reasons. One reason that a voter may be asked to vote provisionally is because the voter is
22 registered as a VBM voter and has been issued a mail ballot, but wants to vote at the poll. The
23 purpose of having a voter registered as a VBM voter vote provisionally is to provide a safeguard
24 against the possibility that the VBM voter has already returned his or her VBM ballot and had his
25 or her VBM ballot counted. In the June Presidential Primary more than one-half of the 75,386
26 voters who voted provisionally were VBM voters who appeared at the polls on election-day but
27 who could not surrender their VBM ballot. And, in fact, during the canvass, the Registrar
28 determined that 521 voters voted both their VBM ballot and a provisional ballot.

1 Another reason for requiring a voter to vote provisionally is because the voter does not
2 appear on the roster of voters at the precinct where they appear to vote. For example, if a non-
3 VBM voter is registered to vote in a precinct in Poway but the voter appears at a poll in Chula
4 Vista, that voter would be given a provisional envelope in which the voter would place his voted
5 ballot, which is then returned to the Registrar's office unopened for final determination. After
6 voting, the voter is instructed to complete all of the information required on the outside of the
7 provisional ballot envelope, including, among other things, the voter's current residence address.
8 The voter is also required to sign and seal the envelope, and return the envelope to the poll worker
9 for deposit into the ballot box. In the June Presidential Primary more than 12,000 voters appeared
10 at a poll other than where they were registered and voted provisionally.

11 Another reason for requiring a voter to vote provisionally is unique to "semi-open primary"
12 elections like the June Presidential Primary. The Republican, Green, and Peace and Freedom party
13 primaries were "closed elections" meaning that only voters registered with one of those particular
14 parties were allowed to vote for that party's presidential candidates. In contrast, the Democratic,
15 American Independent, and Libertarian party primaries were "open primaries" meaning that voters
16 who had registered "No Party Preference" ("NPP") were allowed to vote for any one of those
17 parties' presidential candidates. In no instance could a voter registered with a particular party vote
18 for the presidential candidates of another political party. These rules are established by the parties,
19 not the State and not by local election officials."

20 Vu's trial testimony – which the Court perceived to be credible – is consistent with
21 Defendants' trial brief explanation of the circumstances under which provisional ballots are cast.
22 The Court finds the initial explanation (a provisional voter may be a voter who is "registered as a
23 VBM voter and has been issued a mail ballot, but wants to vote at the poll") to be significant. The
24 Court infers from this explanation that provisional ballots may be nothing more than duplicate
25 ballots of VBM ballots cast by the same voters. Indeed, according to Defendants "In the June
26 Presidential Primary, more than one-half of the 75,386 voters who voted provisionally were VBM
27 voters who appeared at the polls on election-day but who could not surrender their VBM ballot.
28 And, in fact, during the canvass, the Registrar determined that 521 voters voted both their VBM

1 ballot and a provisional ballot.” If the Court were to accept Plaintiffs’ argument that Section
2 15360’s 1% manual tally audit procedure includes “all ballots cast” including provisional ballots
3 (Plaintiffs’ trial brief at pages 4 – 7), Plaintiffs are, in effect, advocating that Defendants assume
4 the risk of including **more than 100% of the ballots cast** in the 1% manual tally. Not only does
5 this interpretation strike the Court as unreasonable but it has the inevitable consequences of adding
6 burden to the County’s ROV, whose resources are already stretched far too thin.

7 Accordingly, the Court rejects Plaintiff’s interpretation that the 1% manual tally include
8 provisional ballots.

9 On the other hand, Plaintiffs’ interpretation that all VBM ballots should be included in the
10 1% manual tally strikes the Court as more reasonable than Defendants’ rejection of the need to do
11 so. First, Section 15360 specifically dictates that the 1% manual tally include VBM ballots.
12 Second, the statute’s legislative history supports the inclusion of VBM ballots. Third, the
13 inclusion of all VBM ballots strikes the Court as more conducive to a “**uniform procedure** for
14 elections’ officials to conduct the 1% manual tally of the ballots” (Plaintiffs’ trial brief, at pages 5
15 – 6) and toward accomplishing the goal of verifying “the accuracy of the automated count.” Based
16 on the trial evidence, the ROVs appear to include as many, or as few, VBM ballots as have been
17 received and processed in the 1% manual tally. For example, according to Rodewald, San Luis
18 Obispo does not include VBM ballots not counted as of the election day in the 1% manual tally;
19 according to Logan, L.A. only includes VBM ballots which were both received and counted as of
20 the election day in the 1% manual tally; according to LaVine, Sacramento strives to include as
21 many VBM ballots as possible into the 1% manual tally; according to Vu, San Diego does not
22 include VBM ballots not processed by election night in the 1% manual tally. The disparity of the
23 ROVs practices throughout the State strikes the Court as more a reflection upon the limited
24 resources within which the ROVs are expected to discharge their statutory duties than compliance
25 with a reasonable interpretation of Section 15360. The Secretary of State’s contrary opinion (Exh.
26 “107”) is rejected.

27 Accordingly, the Court accepts Plaintiff’s interpretation that the 1% manual tally include
28 all VBM ballots. In doing so, the Court emphasizes that its intention is not to call into question the

1 credibility of the ROVs who testified at trial. It's apparent that the ROVs are experienced, skillful
2 and devoted public servants who are tasked with the challenge of overseeing an extraordinarily
3 complex voting system.

4
5 **Plaintiffs' SECOND CAUSE OF ACTION for MANDAMUS - CCP 1085**

6
7 A writ of mandate compelling the County Registrar of Voters Office to comply with the
8 California Elections Code is a proper remedy. The Court will issue a writ of mandate "to any
9 inferior tribunal, corporation, board, or person, to compel the performance of an act which the law
10 specifically enjoins, ... or to compel the admission of a party to the use and enjoyment of a right or
11 office to which the party is entitled, and from which the party is unlawfully precluded by such
12 inferior tribunal, corporation, board, or person." Code Civ. Proc. 1085(a). "Mandamus is the
13 correct remedy for compelling an officer to conduct an election according to law.... It is also an
14 appropriate vehicle for challenging the constitutionality of statutes and official acts." *Hoffman v.*
15 *State Bar of California* (2003) 113 Cal. App. 4th 630, 639 (internal citations omitted).

16 In *People v. Karriker* (2007) 149 Cal. App. 4th 763, 774, the Court stated:

17
18 ... Mandamus will lie, however, "to compel a public official to
19 perform an official act required by law." (*Ibid.*) "Code of Civil
20 Procedure section 1085, providing for writs of mandate, permits
21 challenges to ministerial acts by local officials. To obtain such a
22 writ, the petitioner must show (1) a clear, present, ministerial duty on
23 the part of the respondent and (2) a correlative clear, present, and
24 beneficial right in the petitioner to the performance of that duty.
[Citations.] A ministerial duty is an act that a public officer is
obligated to perform in a prescribed manner required by law when a
given state of facts exists. [Citations.]

25 The Court finds that Defendants are "obligated" to include all VBM ballots in the 1%
26 manual tally, in performance of the requirements imposed on elections officials by Elections Code
27 Sections 336.5 and 15360. To this extent, the Court grants the relief sought by Plaintiffs to require
28 Defendants to "to fully comply with the breadth of California Elections Code Section 15360."
SAC, page 12.

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Conclusion

The Court:

1. Finds in favor of Plaintiffs and against Defendants MICHAEL VU and COUNTY OF SAN DIEGO on Plaintiffs' claim that Section 15360 requires the Registrar of Voters to include all VBM ballots in the random selection process for purposes of completing the 1 percent manual tally;

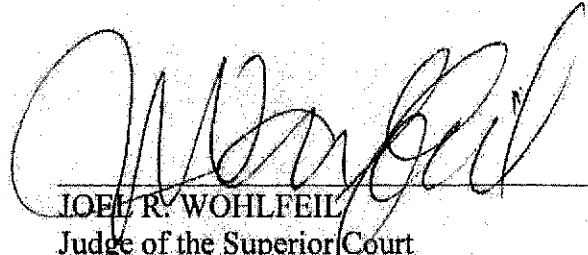
2. Finds in favor of Defendants and against Plaintiffs on Plaintiffs' claim that Section 15360 requires the Registrar of Voters to include provisional ballots in the random selection process for purposes of completing the 1 percent manual tally; and

3. Finds in favor Defendant HELEN ROBBINS-MEYER and against Plaintiffs on all causes of action raised by Plaintiffs' Second Amended Complaint.

IT IS SO ORDERED.

Dated: _____

12-19-16



JOEL R. WOHLFEIL
Judge of the Superior Court

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO
CENTRAL

0558

MINUTE ORDER

DATE: 12/19/2016

TIME: 10:08:00 AM

DEPT: C-73

JUDICIAL OFFICER PRESIDING: Joel R. Wohlfeil

CLERK: Juanita Cerda

REPORTER/ERM: Not Reported

BAILIFF/COURT ATTENDANT:

CASE NO: **37-2016-00020273-CL-MC-CTL** CASE INIT.DATE: 06/16/2016

CASE TITLE: **Lutz vs Michael Vu [IMAGED]**

CASE CATEGORY: Civil - Limited CASE TYPE: Misc Complaints - Other

APPEARANCES

The Court sets a Status Conference on January 27, 2017 at 2:30 PM to resolve objections, if any, to the Court's Statement of Decision ("SOD"). If there are no objections, the Court directs Plaintiffs' counsel to prepare a Judgment consistent with the Court's findings and orders in the SOD.

The Status Conference (Civil) is scheduled for 01/27/2017 at 02:30PM before Judge Joel R. Wohlfeil.

Joel R. Wohlfeil

Judge Joel R. Wohlfeil