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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' 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 Code<sup>1</sup> 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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<sup>1</sup> Unless otherwise noted all references are to the Elections Code.

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**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.<sup>2</sup> § 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

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<sup>2</sup> 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.)<sup>3</sup>  
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 <sup>3</sup> 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.)<sup>4</sup>

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

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<sup>4</sup> 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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