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8   **SUPERIOR COURT OF CALIFORNIA**

9   **COUNTY OF SAN DIEGO–CENTRAL DIVISION**

10

11 CITIZENS OVERSIGHT INC., a Delaware)   CASE NO: 37-2016-00020273-CL-MC-CTL
    non-profit corporation; RAYMOND LUTZ,)
12 an individual,   )   **PLAINTIFFS' MEMORANDUM OF**
)   **POINTS AND AUTHORITIES IN**
13   Plaintiffs,   )   **SUPPORT OF INJUNCTIVE RELIEF**
)
14 vs.   )   **Hon. Joel R. Wohlfeil, Judge**
)
15 MICHAEL VU, San Diego Registrar of   )   Complaint filed: June 16, 2016
    Voters; HELEN N. ROBBINS-MEYER,   )   No Trial Date Set
16 San Diego County Chief Administrative)
    Officer; COUNTY OF SAN DIEGO, a   )   Hearing Date: July 6, 2016
17 public entity; DOES 1-10,   )   Hearing Time: 1:30 p.m.
)   Dept: C-73
18   Defendants.   )
)   **Hon. Joel R. Wohlfeil**
19 _____)

20   Plaintiffs submit the following Memorandum of Points and Authorities in Support of

21 Injunctive Relief.

22   **I.**

23   **INTRODUCTION**

24   Our democracy depends upon full, free and fair elections. Irregularities in American

25 elections have been reported nationwide. Presidential elections have been put into doubt based

26 on suspicious or nefarious conduct. Some of the evidence is circumstantial, some is statistical,

27 and some is pretty direct and clear-cut. Taken together, a pattern that emerges strongly suggesting

28 that ever since electronic voting machines were introduced in the United States, reports of a

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string of suspect election results that frankly are not consistent with a free and fair election outcome. Trust is different than 'verifiable'. Trust, frankly, has no place in elections. We need to be able to verify outcomes period.

Unlike some other states, California has put some checks into place to help verifying election results. In this case, the San Diego County Registrar of Voters wishes to cut corners, avoid strict compliance with this check on election results and to cheat San Diego's voters from the legislated verification process required. An injunction is required to stop the Registrar from certifying the recent election until that office has completed the final count of every vote and verified results as required by law.

II.

FACTUAL BACKGROUND

A Primary Election occurred on June 7, 2016, in all of California. After the precincts all report a result from their 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 comply with California Elections Code Section 15360.[1] Section 15360 requires the Registrar to canvass the election process by conducting a manual tally of the ballots tabulated by voting devices and ballots received from voters by mail. The purpose of Section 15360 is to provide an objective and statistical basis to test the integrity of the voting method and process. Discrepancies can isolate defective tabulation, employee error, or nefarious conduct such as "hacking." The modern age of voting with electronic and automated systems has been heavily scrutinized in recent election cycles. Only strict compliance with the legislative intent of Section 15360 can assure the electorate of fair elections. [Declaration of Raymond Lutz in Support of Plaintiffs' Motion for Injunction [hereinafter "Lutz Decl", para 5]

The Registrar is not complying with Section 15360 because he is not including a manual tally of *all ballots cast* in 1% of the precincts chosen at random. Specifically, the Registrar's selections do not include provisional ballots added to the tally nor does the Registrar include all vote-by-mail (VBM) ballots. [Lutz Decl, para 6]

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

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1   Plaintiffs have repeatedly made written requests that the Registrar produce a written

2   procedural manual describing how their office will conduct a 1% manual tally to fully comply

3   with Section 15360(a) including provisional ballots and vote-by-mail ballots.   [Lutz Decl, para 7

4   and NOL #8, Exhibit 1][2]

5   After publishing Public Notice and the filing and service of this lawsuit, the Registrar has

6   reported that he intends to comply with Section 15360(a)(1) instead of Section 15360(a)(2) but

7   has not changed his approach of failing to include all votes cast, including provisional ballots and

8   vote-by-mail ballots.   Public Notice (FAC "Exhibit C", NOL#3) was posted on the Registrar's

9   website [Lutz Decl, para 8]

10   There are two major classes of ballots processed by the 1% manual tally. First, ballots

11   cast at physical precinct polling places ("PPP", usually on election day). Included in this set are

12   all ballots that are not vote-by-mail ballots, but including provisional ballots. Provisional ballots

13   are intended to be used at the polling place if there is some question about the validity of the

14   ballot or the eligibility of the voter, so that these can be reviewed later. Second, ballots deposited

15   in the mail and postmarked no later than election day (vote-by-mail or "VBM"). In contemporary

16   elections, VBM ballots may comprise as much as or more than 60% of the total votes cast.

17   [Lutz Decl, para 9]

18   Section 15360 of the Elections Code refers to "ballots cast." The word "cast" is not

19   explicitly defined by the elections code, but the common meaning is that a ballot is "cast" when it

20   leaves control of the voter and is turned over to the elections official for tally. In the precinct

21   polling place, a ballot is "cast" when it is inserted into the ballot box. VBM ballots are "cast"

22   when they are submitted to the U.S. Postal Service or hand-delivered to a precinct polling place

23   or to the Registrar of Voters.   [Lutz Decl, para 10] After the June 7th Primary Election, there

24   were approximately 285,000 VBM and provisional ballots still to be counted.   [Lutz Decl, para

25   12 and "Exhibit B" FAC, NOL#2]

26   California Elections Code §15101 allows Defendants to begin processing VBM ballots 10

27   business days prior to the election. The initial tally provided to the public and media on Election

28   _____

[2] Reference to "FAC" is First Amended Complaint and "NOL" is Notice of Lodgement.

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1 Day after the polls have closed consist of VBM ballots that were received early in the process or

2 ballots cast by voters at the Registrar's office. [Lutz Decl, para 13]

3 After the polls close, precinct polling place (PPP) ballots are to be transported from each

4 polling place directly to the Registrar of Voters' office and they are scanned over the course of

5 the night. [Lutz Decl, para 14] The unofficial results are determined by tabulation software

6 called "GEMS" which runs on the "central tabulator" computer. [Lutz Decl, para 17]

7 By not complying with Section 15360, the Registrar, a "hacker" could alter the results

8 and the alterations would be invisible to this audit procedure.   [Lutz Decl, para 18] So it is

9 absolutely essential that the precincts and VBM batches which are selected for the 1% manual

10 tally remain secret until the results are fixed as unofficial results. The element of surprise is

11 essential to make sure that the "hacker" is not able to simply avoid altering votes in the precincts

12 and VBM batches which are involved in the manual tally, thus rendering the 1% manual tally

13 worthless. [Lutz Decl, para 18]   Furthermore, it is essential that the unofficial results are fixed

14 and provided to the public prior the random selection process. Otherwise, the "hacker" may be

15 able to reverse any alterations made to those specific precincts to cover their tracks, in which

16 case, the 1% manual tally would again be worthless. [Lutz Decl, para 19] These constraints are

17 designed to ensure the effective implementation of a manual tally procedure under the law. They

18 are well understood and implied by the concept of random selection necessary to effectuate an

19 accurate, meaningful manual tally procedure. [Lutz Decl, para 20]

20 Moreover, n this election, there was also an unusually high number of provisional ballots

21 primarily due to No Party Preference (NPP) voters who have the option of choosing a partisan

22 ballot only for the presidential race for most parties (but not the Republican Party). These

23 "crossover" ballots included the presidential race for that party, all the nonpartisan races, but not

24 the strictly partisan races such as central committee members. In this election, the vast majority

25 of cases were NPP voters choosing the DEM ballot (Democratic Party crossover ballot) so they

26 could vote for Sen. Bernie Sanders. [Lutz Decl, para 31] Using provisional ballots in this way

27 unnecessarily elevated the count of provisional ballots to process. [Lutz Decl, para 33]

28 //

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III.

LEGAL DISCUSSION

Section 527 of the California Code of Civil Procedure governs when a preliminary injunction may be ordered. That section provides in relevant part,

(a) A preliminary injunction may be granted at any time before judgment upon a verified complaint, or upon affidavits if the complaint in the one case, or the affidavits in the other, show satisfactorily that sufficient grounds exist therefor. No preliminary injunction shall be granted without notice to the opposing party.

Section 526 of the Code of Civil Procedure sets forth those cases in which an injunction may or may not be granted. As provided by that section:

       (a) An injunction may be granted in the following cases:

           (1) When it appears by the complaint that the plaintiff is entitled to the relief demanded, and that the relief, or any part thereof, consists in restraining the commission or continuance of the act complained of, either for a limited period or perpetually.

           (2) When it appears by the complaint of affidavits that the commission or continuance of some act during the litigation would produce waste, or great or irreparable injury, to a party to the action.

           (3) When it appears, during the litigation, that a party to the action is doing or threatens or is about to do, or is procuring or suffering to be done, some act in violation of the rights of another party to the action

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1 respecting the subject of the action, and

2 intending to render the judgment ineffectual.

3 (4) When pecuniary compensation would not afford

4 adequate relief.

5 It is the general rule in this state that while the right to injunctive relief under proper

6 circumstances is well- established, the issuance of an injunction is largely within the discretion of

7 the court and depends on the consideration of the equities between the parties. *Phillips v. Isham*

8 (1952) 111 Cal.App.2d 537. In exercising its discretion, the court should recognize that the

9 general purpose of a preliminary injunction is for preservation of the *status quo* until a final

10 determination on the merits can be made. *Continental Baking Co. v. Katz* (1968) 68 Cal.2d 512,

11 528. In determining whether or not a preliminary injunction should issue, the court should

12 consider two inter related questions. First, are the plaintiffs likely to suffer greater injury from a

13 denial of the injunction than the defendant is likely to suffer from the granting of the injunction.

14 Secondly, is there a reasonable probability plaintiffs will prevail on the merits. *Robbins v.*

15 *Superior Court* (1985) 38 Cal.3d 199, 206. Ultimately, the court should determine which party is

16 more likely to be injured by the exercise of the court's discretion and that discretion must be

17 exercised in favor of that party. *Continental Baking Company v. Katz, supra.* 68 Cal.2d at 528.

18 **A. Plaintiffs Are Likely to Prevail in this Action.**

19 In analyzing this matter in terms of this motion, at issue here is the Defendants legal basis

20 to proceed with certification of the recent election without full compliance of the 1 percent

21 manual tally required under California Elections Code Section 15360.

22 **1. Excluding even some vote-by-mail ballots is illegal.**

23 Section 15360(a) requires that "[d]uring the official canvass of every election in which a

24 voting system is used, the official conducting the election shall conduct a public manual tally of

25 the ballots tabulated by those devices, including vote-by-mail ballots." This process is called the

26 one percent manual tally. The purpose of the one percent manual tally is "to verify the accuracy

27 of the automated count." Section 336.5.

28 Section 15360 clearly states that "not less than 1 percent of the vote-by-mail ballots cast"

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1 | must be included in the one percent manual tally. Section 15360(a)(2)(B)(i). This quantity must

2 | be calculated based on the total number of vote by mail ballots cast, not the number of vote by

3 | mail ballots counted to date. One percent of the total number of ballots counted is less than one

4 | percent of the total number of ballots cast. Thus, counting a mere one percent of the total

5 | number of ballots counted to date is in direct violation of the requirement that "not less than one

6 | percent of the vote-by-mail ballots cast in the election" be counted. Section 15360(a)(2)(B)(i)

7 | (emphasis added).

8 | The stated purpose of the one percent tally, "to verify the accuracy of the automated

9 | count," supports this conclusion. Section 336.5. The legislative history of Section 15360

10 | supports this conclusion. "In 2006, Elections Code § 15360 was amended to require that *all*

11 | *vote-by-mail ballots be included* in the 1% manual tally by precinct. This requirement resulted in

12 | over 540 additional staff hours to complete the manual tally process and approximately $12,000

13 | in additional costs for each election . . . ." 06/03/11- Senate Elections And Constitutional

14 | Amendments, 2011 Cal Stat. Ch. 52 (emphasis added). Clearly, *all vote-by-mail ballots* have to

15 | be counted. The onerous nature of this requirement led the legislators to add the option to

16 | account for vote-by-mail ballots separately, in batches, to ensure, that all of them could be

17 | counted efficiently. *Id.*

18 | Precedent supports this conclusion. "Section 15360 appears on its face to be concerned

19 | solely with assuring the accuracy of the vote, not with limiting unnecessary vote tallying. Indeed,

20 | the explicit intent of section 15360, as expressed in a companion statute, is "to verify the

21 | accuracy of the automated count." *County of San Diego v. Bowen*, 166 Cal. App. 4th 501,

22 | 511-12 (Cal. Ct. App. 2008).

23 | **2. Arbitrary and capricious exclusion of provisional ballots is illegal.**

24 | In addition to the vote by mail ballots, accuracy must be determined for "the ballots, not

25 | including vote-by- mail ballots, cast in 1 percent of the precincts." Section 15360(a)(2)(A).

26 | The legislative history indicates clearly that this must include provisional ballots.

27 | "This bill, and SB 1235 (Bowen), stems from anecdotal reports

28 | that some counties routinely exclude absent voter and provisional

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ballots from the one percent manual tally process and may not be

choosing the relevant precincts in a truly "random" manner. Over

40 percent of the votes cast in the last statewide election were from

absent voter ballots, a number that has steadily risen in recent

years. 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."

8/29/06 Senate Floor Analysis, 2006 Cal Stat. Ch. 894.

Given the unprecedented surge in provisional ballots in the present election cycle, this

reasoning rings truer than ever. The intent of Section 15360 is to determine the accuracy of all

ballots cast, including provisionals.

B. **Plaintiffs Will Suffer Irreparable Injury Unless The Registrar Is Enjoined.**

In terms of this motion, the Court should note that if the Defendants are not enjoined

from certifying the recent election until they fully comply with Section 15360, citizens like

Plaintiffs will be deprived of the full verification required by law.

In addition, because this matter necessarily involves the right of the parties to verification

of the election process, which is generally considered unique, the general rule that compensatory

damages are inadequate in such a case should apply and justifies a finding of irreparable injury if

the requested relief is not granted. See *Wilkison v. Wiederkehr* (2002) 101 Cal.App.4th 822, 830;

3. **Changing the 1 percent manual tally method from Section 15360(a)(2)**

to Section 15360(a)(1) aggravates the illegal conduct and requires a

new public notice be issued.

Originally, the Registrar was employing Section 15360(a)(2) as his method of choice for

performing the 1 percent manual tally. Section 15360(a)(2) states:

```
        (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
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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.

Upon changing his method after public notice and being served this lawsuit, the Registrar

now intends to employ Section 15360(a)(1). Section 15360(a)(1) states:

(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.

By making this change and playing this game of "whack a mole", the Registrar

compounds the issue of his failure to include all votes cast as afore stated, he now voids the

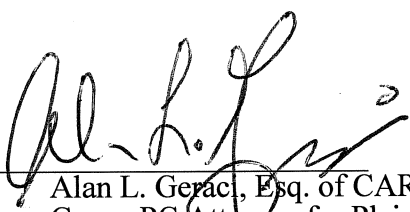Public Notice [FAC, "Exhibit C"] and must restart the process.

V.

CONCLUSION

In sum, omitting all of the provisional ballots and half of the vote by mail ballots from the

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1   1 percent manual tally is in direct violation of California Elections Code Section 15360. The

2   Court must enjoin the Registrar from certifying the June 7th Primary Election until he has

3   complied fully with Section 15360.

4   Respectfully Submitted,

5

6   Dated: June 24, 2016

                                  Alan L. Geraci, Esq. of CARE Law

7   Group PC Attorney for Plaintiffs
Citizens Oversight Inc. and Raymond Lutz

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