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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' TRIAL BRIEF**
)
13   Plaintiffs,   )   **Hon. Joel R. Wohlfeil, Judge**
)
14   vs.   )   Complaint filed: June 16, 2016
)
15   MICHAEL VU, San Diego Registrar of   )   Trial Date: October 4, 2016
     Voters; HELEN N. ROBBINS-MEYER,   )   Hearing Time: 9:00 a.m.
16   San Diego County Chief Administrative   )   Dept: C-73
     Officer; COUNTY OF SAN DIEGO, a   )
17   public entity; DOES 1-10,   )
)
18   Defendants.   )
)
19   _____)

20   Plaintiffs submit the following Trial Brief for consideration of issues anticipated at trial.

21   **I.**

22   **INTRODUCTION**

23   This is an action to enforce election integrity. This matter was filed after the presidential

24   primary election of June 7, 2016.   After the precincts all report a result from their polling place,

25   the real work of verification and certification of results begins. The San Diego County Registrar

26   of Voters (Defendant Michael Vu, hereafter "Registrar") has refused to comply with California

27   Elections Code Section 15360.[1]   Section 15360 requires the Registrar to canvass the election

28

     _____

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

1 process by conducting a manual tally of the ballots tabulated by voting devices and ballots

2 received from voters by mail by randomly selecting 1% of the precinct ballots and 1% of the

3 votes-by-mail and compare the manual audit to the automated count. The purpose of Section

4 15360 is to provide an objective and statistical basis to test the integrity of the voting method and

5 process. Discrepancies can isolate defective tabulation, employee error, or nefarious conduct

6 such as "hacking."

7   The modern age of voting with electronic and automated systems has been heavily

8 scrutinized in recent election cycles. Only strict compliance with the legislative intent of Section

9 15360 is one method that can assure the electorate of fair elections. By not complying with

10 Section 15360, the San Diego Registrar leaves doubt about the stated results.

II.

NATURE OF THE CASE

13   The San Diego Registrar only includes 1% of the ballots cast by the end of election night

14 at the precincts and 1% of the votes by mail received by election day. This is a failure to comply

15 because the Registrar is not including a manual tally of *all ballots cast* in 1% of the precincts

16 chosen at random. Specifically, the Registrar's selections do not include provisional ballots

17 added to the tally nor does the Registrar include all vote-by-mail (VBM) ballots.

18   The evidence will show that there is a trend for voters to use VBM ballots as it allows

19 voters to consider their choices while they can research options. This year, there was also an

20 increase in the number of provisional ballots cast at the precincts. Provisional ballots are

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

22 or the eligibility of the voter, so that these can be reviewed later. This year the some precincts

23 were using provisional envelopes to process "cross-over" ballots where a non-party preference

24 voter selects a party which permits "cross-over" to vote in their primary, i.e. Democratic Party,

25 American Independent Party, and Green Party allowed voters to "cross-over" and vote in their

26 primary. By putting these ballots in "provisional envelopes", the Registrar put the ballots

27 through the added scrutiny during the official canvass. By excluding those ballots from the 1%

28 manual tally process, NONE of those ballots were audited under Election Code Section 15360.

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

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

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

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

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

5 or to the Registrar of Voters. After the June 7th Primary Election, there were approximately

6 285,000 VBM and provisional ballots still to be counted or 37% of the total ballots cast.

7 Elections Code §15101 allows Defendants to begin processing VBM ballots 10 business

8 days prior to the election. The initial tally provided to the public and media on Election Day after

9 the polls have closed consist of VBM ballots that were received early in the process or ballots

10 cast by voters at the Registrar's office.

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

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

13 the night. The unofficial results are determined by tabulation software called "GEMS" which

14 runs on the "central tabulator" computer.

15 By failing to comply with Section 15360, the Registrar, a nefarious insider or a "hacker"

16 could alter the results and the alterations would be invisible to this audit procedure thereby

17 making the audit procedure useless. So it is absolutely essential that the precincts and VBM

18 batches which are selected for the 1% manual tally remain secret until the results are fixed as

19 unofficial results. The element of surprise is essential to make sure that the "hacker" is not able

20 to simply avoid altering votes in the precincts and VBM batches which are involved in the

21 manual tally, thus rendering the 1% manual tally worthless.   Furthermore, it is essential that the

22 unofficial results are fixed and provided to the public prior the random selection process.

23 Otherwise, the "hacker" may be able to reverse any alterations made to those specific precincts to

24 cover their tracks, in which case, the 1% manual tally would again be worthless. These

25 constraints are designed to ensure the effective implementation of a manual tally procedure under

26 the law. They are well understood and implied by the concept of random selection necessary to

27 effectuate an accurate, meaningful manual tally procedure.

28

III.

THE LEGISLATURE CLEARLY INTENDED
THAT "ALL BALLOTS CAST" BE INCLUDED
IN THE 1% MANUAL TALLY

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

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

> 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.

Section 15360(a) requires that "[d]uring 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 VBM ballots." This process is called the one percent manual tally. The purpose of the one percent manual tally is "to <u>verify</u> the accuracy of the automated count." Section 336.5 (emphasis added).

Section 15360 clearly states that "not less than 1 percent of the VBM ballots cast" must be included in the one percent manual tally. Section 15360(a)(2)(B)(i). This quantity must be calculated based on the total number of vote by mail ballots cast, not the number of vote by mail ballots counted to date. One percent of the total number of ballots counted is less than one percent of the total number of ballots cast. Thus, counting a mere one percent of the total number of ballots counted to date is in direct violation of the requirement that "not less than one

1 percent of the VBM ballots cast in the election" be counted. Section 15360(a)(2)(B)(i) (emphasis

2 added).

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

4 count," supports this conclusion. Section 336.5. The legislative history of Section 15360 also

5 supports 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 in

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

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

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

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

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

12 counted efficiently. *Id.* The proponents of AB707 state the intent clearly: "The votes on

13 absentee ballots are no less valid or important than the votes cast at the polling place, and the

14 potential for the vote to be incorrectly tabulated on an absentee ballot is just as likely as a vote

15 cast in a traditional polling booth. Therefore, it makes no sense to exclude absentee ballots,

16 provisional ballots and ballots cast at satellite locations from the 1% manual tally. By excluding

17 them from the manual tally, there is no way to verify that the votes cast on them are being

18 recorded accurately. Moreover, in the event that counties are authorized to conduct an all-mail

19 election, this provision would ensure that the manual tally is still conducted in those counties."

20 (Exhibit 54, page 3) Further support was provided by the then-serving Secretary of State Bruce

21 McPherson (served from March 2005 - December 2006)[2]: "This proposal also requires a county

22 election official to include all ballots cast in a precinct in the one percent manual tally. This

23 means that a county will need to include any ballots cast at the polls, via absentee ballot,

24 provisional voters, and any ballots cast on direct recording electronic (DRE) voting machines."

25 (Exhibit 54, page 15). In the final recommendation to Governor Scwarzenegger: "Summary:

26 This bill establishes a uniform procedure for elections officials to conduct the 1% manual tally of

27 the ballots including (1) the requirement that absentee ballots, provisional ballots, and ballots

28

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      [2] Democrat, Debra Bowen defeated Bruce McPherson in the November 2006 election.

cast at satellite locations be included in the tally of ballots..." (Exhibit 54, page 37.)

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

        2.   <u>It would be arbitrary and capricious to exclude provisional ballots from the 1% manual tally</u>.

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

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

IV.

CONCLUSION

In sum, history has shown that election fraud is not theoretical. Computer experts have demonstrated that voting systems can be hacked. But even setting aside the chance of voter fraud or tampering, no voting system – no machine – can operate to perfection. Neither can humans. Machines misinterpret ballots, people mis-mark ballots. Errors

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happen, and auditing determines whether those errors matter – in other words, whether a full hand count would show a different winner. Only a audit system that tests 100% of the ballots cast can be reliable as a verifiable tool of the accuracy of the automated count.   By seeking Declaratory Relief and Mandamus, we are asking the Court to both protect the voters of San Diego County from misuse of the audit process and to both declare that the Primary Election of June 7, 2016, was not audited pursuant to Elections Code Section 15360 and that the Registrar must fully comply with the full intention of the audit law and conduct his 1% manual tally of "all ballots cast", including 100% of ballots cast at precincts (including verified provisional ballots) and all VBM ballots.

Respectfully Submitted,

Dated: October 3, 2016

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Citizens Oversight Inc. and Raymond Lutz