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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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**Other Authorities**

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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."<sup>1</sup> (Emphasis added.) Among the  
24 goals an audit can fulfill are:

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25  
26 <sup>1</sup> "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".<sup>2</sup> (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 <sup>2</sup> 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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<u>Page</u>	<u>Date</u>	<u>Title</u>	<u>Description</u>
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."

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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.”
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"> <li>• Public process</li> <li>• Verifiably random</li> <li>• Greater uniformity and transparency</li> <li>• wanted the 1% manual tally report included in the certification, including any variances</li> <li>• 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.</li> </ul>
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.”
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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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...”
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.
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.”
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.”
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

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”
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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.”
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13	49	9/30/2006	Final Version SB1235
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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.<sup>3</sup> Professor Stark is a highly competent and renowned  
16 legislative expert in the area of election integrity.<sup>4</sup> 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.<sup>5</sup> Saliently, Professor Stark testified:

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20  
21 <sup>3</sup> Exhibit 53 represents Professor Stark's Curricula Vitae.

22 <sup>4</sup> 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 <sup>5</sup> “. . . 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).

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. Louden* (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: \_\_\_\_\_  
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