

COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FOURTH APPELLATE DISTRICT  
DIVISION ONE

DEPARTMENT 73

HON. JOEL WOHLFEIL

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CITIZENS OVERSIGHT INC., a Delaware	)	)
non-profit corporation; RAYMOND LUTZ,	)	)
an individual,	)	)
	)	)
Plaintiffs and Appellants,	)	)
	)	)
vs.	)	)
	)	)
MICHAEL VU, San Diego Registrar of	)	)
Voters; HELEN N. ROBBINS-MEYER,	)	)
San Diego County Chief Administrative	)	)
Officer; COUNTY OF SAN DIEGO, a	)	)
public entity; DOES 1-10,	)	)
	)	)
Defendants and Appellants.	)	)
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Case No.:  
37-2016-00020273-  
CL-MC-CTL  
  
COURT OF APPEAL  
Case No.:  
D071907

REPORTER'S APPEAL TRANSCRIPT

OCTOBER 4, 2016  
Volume 1 of 3  
Pages 1 - 158

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SAN DIEGO, CALIFORNIA

TUESDAY, OCTOBER 4, 2016; 9:13 A.M.

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THE COURT: All right. Calling Citizens Oversight, Inc., et al. versus Michael Vu, et al. Case number ending 20273.

Counsel, can you give me appearances.

MR. GERACI: Good morning, your Honor. Alan Geraci appearing on behalf of both plaintiffs, Citizens Oversight, Incorporated and Raymond Lutz, who is present in court.

MR. BARRY: Good morning, your Honor. Timothy Barry, Office of the County Counsel, on behalf of defendants and respondents.

MS. KARNAVAS: Good morning, your Honor. Stephanie Karnavas also on behalf of defendants and respondents.

THE COURT: Please have --

MR. BARRY: And Michael Vu, who is present in court.

THE COURT: Good morning to you, Mr. Lutz and Mr. Vu.

All right. Mr. Mullin, are you in the courtroom?

MR. MULLIN: Yeah.

THE COURT: Come up here.

I have read and considered your request coupled

1 with your explanation for the request, and the Court is  
2 going to deny your request. I'm not persuaded that good  
3 cause exists to grant your request.

4 Thank you very much, though. You are more than  
5 welcome to remain in the audience.

6 MR. MULLIN: Thank you.

7 THE COURT: Okay. Let's take care of a few  
8 administrative matters and then move forward as quickly  
9 as possible. I have a jury deliberating, Counsel, so we  
10 may need to interrupt for questions and to take the  
11 verdict. I apologize in advance for that.

12 Do you have an exhibit list and a witness list  
13 for the Court?

14 MS. KARNAVAS: Yes, your Honor. There's a  
15 couple of issues that we would like to bring up about  
16 the exhibit list and the witness list.

17 So as to our requirement we need three court  
18 days to confer with the exhibits, we tried to initiate  
19 that conference last week. Mr. Geraci was unavailable.  
20 He was only available to come to our office yesterday  
21 around 11:00 a.m., at which point we met and we had  
22 given him an updated exhibit list.

23 He indicated at that meeting that he may have  
24 some additional exhibits and he may be adding some  
25 additional witnesses, but he didn't have them with him  
26 at the time and couldn't give us the names of the  
27 witnesses.

28 Around 11:00 o'clock last night, I received an

1 e-mail from Mr. Geraci that listed an additional five  
2 names on his witness list that were not previously  
3 disclosed in the TRC nor did he indicate he was planning  
4 on providing them.

5 I will note that one of those witnesses is the  
6 CAO of the County, Helen Robbins-Meyer, who served no  
7 notice of intent, no notice to attend pursuant to CCP  
8 1987, and I'm not quite sure who the other witnesses  
9 are.

10 Additionally, he served me with a number of  
11 exhibits that we have not seen before. He did not  
12 provide -- oh, despite the fact that I provided him a  
13 joint exhibit list that indicated our objections to his  
14 exhibits, he did not send back an exhibit list that had  
15 his objections. He did not edit the one that I had  
16 sent. He just sent me another one, an older draft, and  
17 I did not have the opportunity to manually go through  
18 and review it to determine what new exhibits were on  
19 there, what ones had been produced or not.

20 So I had the exhibit list as it stood at the  
21 time of our meet and confer yesterday with the addition  
22 of our objections.

23 THE COURT: All right. Mr. Geraci.

24 MR. GERACI: Your Honor, yes, we did meet and  
25 confer yesterday. Counsel have been cooperating  
26 throughout this process and there has been no issues  
27 concerning our cooperation throughout.

28 Sunday evening I got word that my mom was taken

1 to the hospital for some kidney problems and I had to  
2 both on Sunday and Monday deal with that issue, talk to  
3 the doctors, et cetera. It's a rather critical  
4 situation.

5 So I did make time to meet yesterday with  
6 counsel. We went over the exhibit list. I did indeed  
7 tell her --

8 MS. KARNAVAS: Excuse me. I don't want to  
9 interrupt, your Honor. Could we get this taken down,  
10 please?

11 THE COURT: Can somebody that's got something  
12 on the overhead please remove it for just a moment.

13 MR. LUTZ: Just trying to test it.

14 THE COURT: All right. But even as it is right  
15 now, there is no -- where they are sitting on the  
16 court's left side, there is a glare. So why don't you  
17 just shut it down for the time being.

18 MR. GERACI: Indeed.

19 THE COURT: Thank you very much.

20 MR. GERACI: So, your Honor, not to belabor the  
21 issue, I met and conferred with them yesterday. I did  
22 indicate that I had some more exhibits on my desk that I  
23 hadn't yet included on the exhibit list and that I would  
24 do so. Unfortunately, I didn't get back to my office  
25 until about 9:00 p.m. last night. I dealt with all the  
26 issues, sent counsel everything that I had, got a scan  
27 of everything.

28 So I understand their concern that, you know,

1 things came late. And I apologize. But there is no  
2 surprises in the exhibits. They are all things that  
3 were generated and/or reviewed during the discovery  
4 process of depositions, et cetera.

5 As to witnesses, I did indicate both on my TRC  
6 report and to counsel during the course of our  
7 preparation thereof that I would have some percipient  
8 witnesses to testify anecdotally about some of the  
9 problems that occurred in the polling places during the  
10 past election, but they wouldn't be very lengthy  
11 witnesses but just to give the court a perspective of  
12 the scope of the problem.

13 And I added those witnesses and I did add the  
14 party witness Ms. Robbins-Meyer out of an abundance of  
15 caution just to make sure I had all the parties. That's  
16 it.

17 THE COURT: So you've got what you consider to  
18 be a complete list?

19 MR. GERACI: Yes, sir. And I have already  
20 e-mailed it.

21 THE COURT: And the list that you have ready to  
22 provide the Court is what you considered complete -- to  
23 be complete until you got the additional names and  
24 exhibits from opposing counsel?

25 MS. KARNAVAS: That's correct. Well, it's  
26 complete to the extent it had been completed. He still  
27 hasn't provided us with his objections, you know.

28 THE COURT: Well --



1 MS. KARNAVAS: And your Honor, I would just say  
2 as to the late witnesses, there was no -- there were  
3 some vague references to, well, I may be adding a couple  
4 of poll workers, not five additional people. We don't  
5 even know who these people are.

6 THE COURT: All right. So, Counsel, here  
7 again, all I asked for was the witness and exhibit list.  
8 I'm not going to issue any exclusionary orders at this  
9 moment. In the Court's experience, even the one in  
10 oftentimes both sides want to add witnesses and  
11 exhibits, those additional exhibits and witnesses are  
12 not called or not even offered. So I'm not going to  
13 cross that bridge yet.

14 Now, so here is what we -- does the Court work  
15 with a list which does not include everything and then  
16 if and when we start to add or somebody wants to add  
17 witnesses or exhibits we take the time to pencil them in  
18 in similar shape and form, and I emphasize take the  
19 time, which is always so limited in this department, or  
20 do we start with the more inclusive list recognizing  
21 that without prejudice in this case the defense can  
22 object to any witness that may be called or any exhibit  
23 that may be presented for all the reasons and maybe more  
24 now arguing they may care to do, Counsel, but I'm just  
25 trying to figure out a way we can move forward as  
26 efficiently as possible. So what do you think?

27 MS. KARNAVAS: That's fine, your Honor. I  
28 understand.

1           THE COURT: Well, I'm not -- so we can either  
2 start with your list, which may not be inclusive, or we  
3 can go to the other side and start with something more  
4 inclusive.

5           Again, I want to emphasize without prejudice to  
6 either one of you interposing objections to witnesses  
7 being called, exhibits being offered. And whether they  
8 are reflected on the witness list or the TRC report,  
9 you're all going to be given a chance to try your case.  
10 I'm going to be spending a lot more time listening to  
11 what you've got to say today than what's in your report.

12           MR. GERACI: Your Honor, I apologize. We've  
13 been going back and forth with the exhibit list as far  
14 as it evolving over the last week, and I did indeed get  
15 a copy of the exhibit list with the objections and it  
16 was my intention to use that file. Apparently I opened  
17 up the wrong Word file and added my five exhibits to an  
18 older version of the exhibit list.

19           So I think all we need to do, your Honor, is  
20 use the exhibit list that we meet and conferred with  
21 yesterday and just add my page that has the added five  
22 exhibit lists and then we have a complete list.

23           THE COURT: All right. So what the Court's  
24 inclined to do is direct counsel provide the Court with  
25 a couple copies of more inclusive list for witnesses and  
26 exhibits, one for my clerk, one for me. And, again, I  
27 want to emphasize without prejudice to either one or  
28 both of you interpose whatever objection you think

1 appropriate if and when the witnesses are called or  
2 exhibits are offered.

3 So with that having been said, does somebody  
4 have a couple of the more inclusive exhibit and witness  
5 lists?

6 MS. KARNAVAS: I do not have your additional  
7 exhibits, so...

8 MR. GERACI: I have multiple copies of the  
9 added page so I can provide that.

10 THE COURT: Can I ask that you two confer with  
11 one another so you can put together an inclusive list or  
12 lists.

13 MS. KARNAVAS: I'm sorry. What was changed?  
14 Because the problem is that this doesn't have the  
15 objections in it.

16 MR. GERACI: No, yours has the objections.

17 MS. KARNAVAS: Okay. Where does this begin?  
18 (Discussion held off record.)

19 MS. KARNAVAS: Alan, do you have an updated  
20 exhibit -- exhibit list -- or, I'm sorry, a witness  
21 list?

22 MR. GERACI: Yes, I have -- I e-mailed you last  
23 night.

24 THE COURT: Do you have it, Counsel?

25 MS. KARNAVAS: Yes.

26 THE COURT: If you have two of those sets,  
27 provide it to my deputy. That would be great.

28 MR. GERACI: Your Honor --

1           THE COURT: Counsel, one moment, please. Well,  
2 okay. Yeah.

3           MR. GERACI: The exhibits are all in exhibit  
4 notebooks for both sides and I made multiple copies, one  
5 for the witness stand and one for your Honor and one for  
6 counsel and one for myself.

7           It would be my desire to keep the original  
8 exhibits in the -- in our books at the witness stand  
9 with the witnesses and provide the Court with the  
10 duplicates and counsel with duplicates. Is that  
11 satisfactory?

12          THE COURT: Sure. All right. So I've got a  
13 witness list and the exhibit list. Is there anything  
14 else in the subject of exhibits that anybody wants to  
15 bring to the Court's attention?

16          MR. BARRY: Not that I'm aware of at this  
17 point, your Honor.

18          MS. KARNAVAS: Just that.

19          THE COURT: If we need to sub and rearrange,  
20 we'll do so.

21          MS. KARNAVAS: The only thing I mention is  
22 there was one exhibit that's on the list that was never  
23 provided to us on the binder. I think Exhibit 63. I  
24 don't know if you have that.

25          MR. GERACI: Let's discuss that at break.

26          MS. KARNAVAS: We have one other housekeeping  
27 matter to discuss with your Honor as well.

28          We are filing a motion for judgment of nonsuit,

1 but I have papers for the Court.

2 THE COURT: When we have a chance -- well, if  
3 you want to provide that to my deputy, we can take a  
4 look at that when we have a chance.

5 When do you propose to have that heard?

6 MS. KARNAVAS: It is to defendant Helen  
7 Robbins-Meyer moving nonsuit as to plaintiffs' opening  
8 statement.

9 THE COURT: After opening statement?

10 MS. KARNAVAS: Yes.

11 THE COURT: Okay. Is there any issue involving  
12 the witnesses, meaning timing or accommodation, that you  
13 want to bring to the Court's attention?

14 MR. GERACI: There is one issue, your Honor,  
15 that I brought up in our meeting yesterday. We have one  
16 nonretained expert who is a professor and doctor up in  
17 Berkeley, and his academic schedule did not allow for  
18 him to be down here during this week, and so we've  
19 tentatively, with the Court's permission, scheduled him  
20 for Tuesday, Monday being a court holiday, Tuesday  
21 morning so that we can take his testimony, albeit out of  
22 order, and complete the case on Tuesday morning.

23 THE COURT: What do you think?

24 MR. BARRY: Your Honor, a couple of points.

25 First off, we received plaintiffs' expert  
26 designation that 251 on Thursday last week. The actual  
27 designation with respect to Professor Stark, I can  
28 provide a copy to the Court if you'd like, it says, "The

1 general substance of testimony. Dr. Stark has testified  
2 about mathematical models affecting broad and specific  
3 subjects, including the census in elections. He will  
4 describe the process of verification of the automated  
5 count from and explain that without verification of the  
6 entire universe there can be no verification of effect."

7 So I really have no idea from that description  
8 what it is he might be testifying to.

9 And so when we spoke yesterday, counsel  
10 indicated that Professor Stark had a difference of  
11 opinion with respect to what the word "verified" means  
12 and what we interpret. So, again, I'm not sure, if  
13 anything, we should have an offer of proof as to what it  
14 is he would be testifying to because from the  
15 description here, we can't tell, and so we are at quite  
16 a disadvantage at this point, not only with designation,  
17 but the designation was nonsensical. And so we are very  
18 much at a loss here.

19 THE COURT: Well, let's back up. When you say  
20 the designation was late, just walk me through that.

21 MR. BARRY: Well, we provided counsel with our  
22 designation more than ten days, I believe. I think it  
23 was Friday we had the TRC. And so we provided those. I  
24 realize we've been doing this in a very abbreviated  
25 schedule and I had asked at the time that I be provided  
26 with their expert designation which then I didn't  
27 receive until the following Thursday in the afternoon.

28 THE COURT: Which is last Thursday?

1 MR. BARRY: Last Thursday.

2 THE COURT: How did you all, at least your  
3 side, decide that you were going to designate when you  
4 did? I mean, remind me. Was there a court order? Was  
5 there a stipulation?

6 MR. BARRY: There was not a court order. There  
7 was not an agreement. We did as timely as we could once  
8 we determined who it was was going to be able to appear  
9 at trial and testify.

10 So, again, my understanding was that we were  
11 going to get that designation sooner than when we got  
12 it, and as I mentioned, based on the designation, it's  
13 impossible for us to determine what he would testify to.

14 THE COURT: All right. I got you. So as to  
15 timeliness.

16 MR. GERACI: The timeliness, your Honor, at the  
17 TRC, counsel met and conferred about experts and we  
18 basically said, let's send a designation pursuant to the  
19 code as if, you know, it was done in a normal schedule.

20 So I contacted Professor Stark and my client  
21 and asked them to send their CVs so that I could attach  
22 them and it took a couple of days to receive those.

23 I did receive the defendant's designation not  
24 on the Friday TRC but on the Monday, last Monday, and  
25 mine was sent out, I believe, on Wednesday or Thursday  
26 once I had the CVs. So we've been acting on this  
27 abbreviated schedule in good faith to get this matter  
28 ready and for trial.

1           As to the substance of the testimony, Dr. Stark  
2 will testify very simply about what the word  
3 "verification" means in the Election Code as to the  
4 mathematical statistical analysis of what you are doing  
5 in an election. So he is not a lawyer, he can't  
6 interpret what "all ballots cast" means from a legal  
7 sense, but he can explain all ballots in a universe of  
8 all ballots that were cast in a particular election.

9           THE COURT: Is that something that the Court  
10 will need to receive expert testimony about?

11           MR. GERACI: I believe it will be helpful to  
12 the Court to understand. Their position here, as you  
13 know, that they do not include provisional ballots and  
14 all of the vote-by-mail ballots in the universe of  
15 ballots that they do their 1 percent manual tally. From  
16 a statistical mathematical standpoint, Professor Stark  
17 will explain to the Court why that is fallacious.

18           THE COURT: Have you given them each side the  
19 CV or whatever else?

20           MR. GERACI: Oh, yes. That's what took the  
21 extra couple of days is getting the CV.

22           THE COURT: Have you identified for them what  
23 materials he considered and relied upon to form his  
24 opinions?

25           MR. GERACI: Insofar as his articles are  
26 attached to his CV and that's what he'll be relying on.

27           MR. BARRY: Your Honor, his attachment to his  
28 CV, I believe, is 128 pages.



1 MR. GERACI: It's a rather long CV.

2 MR. BARRY: Hundreds of publications that he's  
3 either been an author or co-author for.

4 THE COURT: Okay. It's exceptionally  
5 challenging. First of all, I understand why you want a  
6 clarification as to what the designation meant. I was  
7 struggling too. That's why I had to look it up. So I  
8 understand that.

9 Now you've heard from opposing counsel. Him  
10 having said what he said and you hearing me, the  
11 question that I immediately raise, nonetheless it's  
12 exceptionally challenging in a vacuum to exclude an  
13 expert from testifying. Now, that does not mean that  
14 once we get into it, either your side -- and I'm looking  
15 at the defense side -- or the Court on its own will  
16 begin to question why the information being presented by  
17 Dr. Stark is or is not helpful to the Court, why or why  
18 not it's necessary to receive that type of evidentiary  
19 information from an expert.

20 There may be additional objections, if any,  
21 that people could raise. But what I'm inclined to do is  
22 to -- if there is a request to exclude him to deny that  
23 request, again, without prejudice, though, to additional  
24 objections being raised as to the nature and scope of  
25 his testimony at the time he begins to present it, much  
26 less maybe a motion to strike if, upon reflection, I  
27 still have reservations about whether or not the  
28 information is helpful to the Court for that which falls

1 naturally into the category of an expert testimony.

2 In other words, I see lots of remedies  
3 available to the objecting party that -- that at this  
4 time -- well, lots of remedies available to you as we  
5 move down the road.

6 So Dr. Stark is not available till next  
7 Tuesday. Can you address that part of it? We have set  
8 aside these three days this week so now I'm hearing that  
9 to allow him to testify, if at all, he won't be  
10 available to next Tuesday, the 12th -- no, the 11th.  
11 I'm sorry.

12 What's your position on that?

13 MR. BARRY: Your Honor, I would agree that the  
14 Court was -- it's clear they would try to accommodate  
15 the order of witnesses within the time frames that you  
16 had allotted to us, that there wasn't a discussion that  
17 would go beyond the time frame that you had provided.

18 With respect to our witnesses, we have  
19 Mr. Dean Logan and Jill LaVine from Sacramento and  
20 Los Angeles who will be here Wednesday and who are  
21 taking time out of their busy schedules as the  
22 registrars for those counties to be here. So it's quite  
23 a burden for them to arrange to be here on those days.

24 But with respect to Dr. Stark, again, here we  
25 are the first day of trial and we are discussing the  
26 fact that there is a witness that's not available, and I  
27 think the issue should have been brought to the Court  
28 much sooner than it is now being brought to the Court.

1           THE COURT: Counsel, each of you are going to  
2 be given wide latitude to take your best shot is how I  
3 like to say it. And I don't say that critically of each  
4 side or the other.

5           Now, what I want you to do, Counsel, is if you  
6 haven't already done so, make sure that you provide  
7 specific times and ones you want to call your two  
8 experts, especially if they're coming in from out of  
9 town. Let's make sure that if we have to interrupt a  
10 witness, even important witnesses from plaintiffs'  
11 perspective, that they be interrupted so we can  
12 accommodate your two experts. We are going to hear from  
13 them on Wednesday so they can get in to San Diego and --

14           MR. BARRY: I'm sorry. Thursday.

15           THE COURT: Thursday. All right. I thought I  
16 heard you say Wednesday.

17           MR. BARRY: The third day. I might have said  
18 Wednesday.

19           THE COURT: All right. So let's -- we'll  
20 figure that out.

21           But why don't you all confer on some times that  
22 may work on Thursday. We'll do it. We'll get it done.

23           MR. BARRY: The other point I'd like to make  
24 with respect to Professor Stark and the late designation  
25 is we are really put at a disadvantage with respect to  
26 presenting any type of rebuttal evidence as to what it  
27 is he may or may not be allowed to testify to. So, you  
28 know, we won't know until Tuesday, assuming the Court

1 lets the testimony go forward, what exactly it is he is  
2 going to say and how it is we could have some type of  
3 rebuttal to that.

4 THE COURT: All right. Now, of course you're  
5 going to be given that opportunity if that's what your  
6 request may be after we've heard from Dr. Stark.

7 Let me just ask you this. Based upon your  
8 interpretation of what you now understand Dr. Stark's  
9 testimony to consist of, do you have a counter expert  
10 that you think may or could be called in rebuttal?

11 MR. BARRY: Offhand I don't.

12 THE COURT: All right.

13 MR. BARRY: He is a statistician. His  
14 expertise is in statistics.

15 THE COURT: All right. Well, there is no  
16 statute nor is there -- nor is the Court inclined to  
17 find that you all had a firm agreement that would cause  
18 me to find the designations were untimely.

19 Having said that, though, if from the defense's  
20 perspective the plaintiffs sprung Dr. Stark on you, if  
21 after we've heard from Dr. Stark the defense wants the  
22 opportunity to designate your own counter expert, you  
23 can imagine how much the latitude the Court is inclined  
24 to give you. This works both ways, Counsel. So you are  
25 not going to be stuck without a remedy --

26 MR. BARRY: Appreciate it.

27 THE COURT: -- at the conclusion of Dr. Stark's  
28 testimony next Tuesday, which means that we may need to

1 continue the evidence portion of the trial beyond next  
2 Tuesday, but that's a small price to pay to make sure  
3 everybody has a chance to be heard. Okay.

4 MR. GERACI: Just for the spirit of completion,  
5 your Honor, the issue of expert designation came up  
6 actually on Monday, September 12 at Mr. Lutz's  
7 deposition, and we verbally and on the deposition  
8 transcript record notified counsel that we would be  
9 designating Dr. Stark and actually talked about the  
10 scope of his testimony at that deposition.

11 THE COURT: All right. Thank you.

12 Okay. So are there any other issues from  
13 plaintiffs' perspective before we approach opening  
14 statements?

15 MR. BARRY: Your Honor, as I mentioned, we do  
16 have the two witnesses coming on Thursday.

17 THE COURT: Right.

18 MR. BARRY: My plan is to have Ms. LaVine go  
19 first at 9:00 a.m. and then Mr. Logan follow.

20 THE COURT: My general rule of thumb is,  
21 Counsel, try to work it out among yourselves. If you  
22 work it out, I'm good with it. If there is a problem,  
23 then bring it to my attention.

24 But, Counsel, be advised that if I err, I err  
25 on the side to try to accommodate witnesses,  
26 particularly people coming from outside the county. I  
27 understand that they can become expensive. So it will  
28 work out. But why don't you talk with each other first.

1 MR. BARRY: Sure.

2 The other one issue is with respect to, again,  
3 the order of witnesses. When I spoke with Mr. Geraci  
4 for who would be available for witnesses today, one,  
5 Mr. Vu, one mentioned Mr. Lutz, two poll workers be  
6 calling.

7 Last night in the e-mail we got from counsel  
8 around 10:40, 11:00 o'clock was telling us to put  
9 Charley Wallis, who was one of our witnesses, on standby  
10 for today.

11 Mr. Wallis is the IT person, and he is totally  
12 engrossed in trying to prepare for the upcoming general  
13 election and so it's not reasonable, I think, from that  
14 standpoint to give us 12 hours' notice that he --

15 THE COURT: I got you.

16 MR. BARRY: -- needs to be here.

17 THE COURT: Who do you propose to call today?

18 MR. GERACI: We'll be calling Mr. Vu and  
19 Mr. Lutz and one of the percipient witnesses.

20 THE COURT: Name?

21 MR. GERACI: Marie Johnson.

22 THE COURT: Is she on the list?

23 MR. GERACI: She's on your list.

24 MR. BARRY: She is as of 10:40 last night.

25 THE COURT: At least we know somebody was  
26 working hard last night.

27 All right. Do you think that will get us to  
28 the end of the day?

1           MR. GERACI: I believe so. Out of an abundance  
2 of caution so as not to run out of witnesses, in my  
3 e-mail I said if you could have Mr. Wallis on standby  
4 just in case so we don't run out of witnesses. That was  
5 my only concern.

6           THE COURT: Who do you have lined up for  
7 tomorrow? Generally give the other side at least a  
8 24-hour heads up notice so that we have something -- you  
9 know, each side has some idea. When it's the defenses  
10 turn, you happen to make sure you give plaintiffs' side  
11 a heads up.

12           So who do you have lined up for tomorrow?

13           MR. GERACI: For tomorrow we'll probably call  
14 Mr. Wallis and -- let me see my notes. And  
15 Ms. Erin Mayer.

16           THE COURT: Last name spelled M-a-y-e-r?

17           MR. GERACI: M-a-y-e-r.

18           THE COURT: Got you. Next?

19           MR. GERACI: Oh, I'm sorry. Yeah, Mayer.

20           Then Helen Robbins-Meyer, which is M-e-y-e-r.

21           THE COURT: All right.

22           MR. GERACI: And that will be probably it for  
23 Wednesday. And then perhaps, if we have additional time  
24 at the end of the afternoon, one of the other poll  
25 workers that's on the list.

26           THE COURT: All right. So Mr. Wallis, can you  
27 have him here sometime tomorrow?

28           MR. BARRY: Yes.

1 THE COURT: All right. And who's got control  
2 of Ms. Mayer? Is that a defense person?

3 MR. BARRY: She works for the registrar.

4 THE COURT: So can you produce her tomorrow?

5 MR. BARRY: Yes.

6 THE COURT: And Ms. Robbins-Meyer.

7 MR. BARRY: Yes. Helen Robbins-Meyer is the  
8 CAO for the County of San Diego. We will be making a  
9 motion to quash for her to appear. There is no showing  
10 that she has any percipient knowledge as to any of the  
11 facts in this case. And that there is case law,  
12 substantial case law, that says it's not appropriate for  
13 someone who is the head of an organization, in this  
14 instance the County, which has more than 16,000  
15 employees, who Mr. Vu does not even directly report to,  
16 to be able -- to be required to come and testify.

17 THE COURT: When do you propose that we take  
18 that up? Sometime before the end of the day?

19 MR. BARRY: Sure.

20 THE COURT: So we'll put that off at that time.

21 MR. GERACI: It sounds like it's going to come  
22 up in their nonsuit motion. So I don't mind addressing  
23 that now.

24 THE COURT: Counsel, there is no way that the  
25 Court can -- by the way, I have multiple copies of the  
26 nonsuit motion. Did you mean to give me one copy?

27 MS. KARNAVAS: I just gave you one for the  
28 clerk as well.



1 THE COURT: There is only so much that I can  
2 intelligibly evaluate by giving me a motion in  
3 anticipation of opening statement. I need some time to  
4 review some of them. So we may have to defer hearing on  
5 the motion as we proceed with the taking of the  
6 evidence. And once I've had a chance to look at it,  
7 we'll take it up.

8 All right. Anything else, Counsel?

9 MR. BARRY: I don't believe so, your Honor.

10 THE COURT: Plaintiff, anything else?

11 MR. GERACI: Nothing else.

12 THE COURT: All right. So is it counsel's  
13 request that you give an opening statement?

14 MR. GERACI: Yes.

15 MR. BARRY: Yes, your Honor.

16 THE COURT: All right. So just give me -- how  
17 long do you anticipate yours to be?

18 MR. GERACI: Ten minutes.

19 THE COURT: Counsel, how long do you estimate  
20 yours?

21 MR. BARRY: Probably ten minutes.

22 THE COURT: All right. So why don't we work  
23 our way through the opening statements, take our morning  
24 break, which we normally do about 10:30. So it looks  
25 like we may do that a little bit earlier.

26 And then as soon as we get done with opening  
27 break, plaintiff will start calling witnesses.

28 So Counsel, whenever you are ready, please give

1 your opening statement.

2 MR. GERACI: Your Honor, counsel.

3 Your Honor, this case is about -- the theme of  
4 this case is about election integrity. We bring this  
5 action basically to establish honesty in our democracy.

6 And the simple case that we are asking from  
7 this Court and its jurisdiction is to declare that the  
8 registrar, Michael Vu, followed the law that requires  
9 that he conduct a post election 1 percent manual tally  
10 of all ballots cast. And the factual dispute that we'll  
11 hear lots of testimony about, your Honor, is what is  
12 meant by all ballots cast.

13 For reason -- reasons unbeknownst to us, the  
14 defendants seem to believe that all ballots cast means  
15 only the ballots that were cast as of a certain time on  
16 election day and that anything else that was processed  
17 after election day is somehow in this vacuum of  
18 exclusion under the Elections Code from audit. And we  
19 believe that to be fallacious both as a matter of law  
20 and a matter of fact.

21 Essentially, your Honor, ballots come in two  
22 ways. People go to their polls and cast a vote on all  
23 the contests that are the subject of an election  
24 and/or -- not and/or -- or they cast their ballot by  
25 mail. The old days we called those absentee ballots;  
26 more modernly we refer to them by votes by mail.

27 One of the things that you'll hear in the  
28 testimony, your Honor, that is rather interesting is the

1 trend of the electorate to use votes by mail. In fact,  
2 more than half of the ballots cast in the June 7, 2016,  
3 primary were votes by mail. And that trend continues to  
4 go up. All of the witnesses that have been deposed and  
5 that you'll be hearing from will confirm that fact.

6           Nonetheless, this registrar refuses to audit  
7 all of the votes by mail despite the fact that the  
8 Elections Code requires him to do so. Similarly, he  
9 refuses to audit the provisionally placed ballots, which  
10 are simply, your Honor, ballots that were cast at the  
11 polling place that had some irregularity or issue that  
12 required additional verification after the ballot was  
13 cast. Those ballots are excluded from his audit  
14 process.

15           In this past election, we learned and you will  
16 hear evidence, your Honor, that approximately 10 percent  
17 of the total ballots cast in this past primary election  
18 or approximately 75,000 ballots were processed as  
19 provisional ballots. There were a total of 765,000  
20 total votes processed in this past primary election,  
21 which represented about half of the registered voters in  
22 our county.

23           Because the past election, your Honor, was a  
24 presidential primary election, California is a  
25 jurisdiction where parties are allowed to cross over if  
26 they are nonpartisan voters. If they are not registered  
27 in a particular party, California allows through its  
28 process -- the parties actually allow and the California

1 processes that decision to allow certain nonpartisan  
2 voters to designate which ballot they wish to vote on.

3           In this past election, there were four parties  
4 that were participating and allowing nonpartisan voters  
5 to cross over and vote in that primary system, the major  
6 party being the Democratic Party. Nonpartisan voters  
7 simply need to request that they wish to vote in the  
8 Democratic primary and the poll workers are to provide  
9 them with a nonpartisan Democratic crossover ballot in  
10 that scenario.

11           We found that there were all sorts of  
12 irregularities this particular election cycle whereby  
13 poll workers were not providing nonpartisan voters with  
14 Democratic nonpartisan crossover ballots and instead  
15 providing them with just the plain vanilla nonpartisan  
16 ballots which did not include the presidential selection  
17 or election for any party. Some of them wrote in the  
18 names, some of them tried to handle it in various ways,  
19 but what we have learned through the discovery of this  
20 case is that those ballots that were cast at the polling  
21 place that were provisional or crossover ballots were  
22 placed in provisional envelopes and sent to the  
23 registrar's office basically as provisional ballots  
24 thereby being excluded from the audit process that the  
25 Registrar's required to do under the Elections Code.

26           Those are the two major concerns that we have,  
27 your Honor, from both the factual and legal standpoint.

28           By leaving out -- essentially, by leaving out

1 the provisional ballots and half of the vote-by-mail  
2 ballots, because you'll learn in the evidence, your  
3 Honor, that half of the vote-by-mail ballots are  
4 received by election day, the other half arrive sometime  
5 after election day within the time frame that the  
6 Elections Code allows votes by mail to arrive. And by  
7 excluding half the votes -- vote by mail and all of the  
8 provisional ballots, the registrar basically excluded  
9 37 percent of the total votes -- ballots cast in this  
10 past election and thereby did not conduct its 1 percent  
11 manual tally audit on those 37 percent of the ballots.

12           And why is that important? Your Honor, there  
13 is a difference of opinion here, and you'll hear  
14 evidence between what we believe to be the case and what  
15 the defendants believe the case. They believe that the  
16 sole purpose of the 1 percent manual tally is to  
17 basically confirm that the machine is working, that the  
18 counter is counting. And we do not believe that that's  
19 the case. We believe that the 1 percent manual tally is  
20 intended to verify the automated count; and by verifying  
21 the automated count, you have to look at all of the  
22 discrepancies that have occurred in the voting process.

23           And if we are going to exclude 37 percent from  
24 the audit process, we are inviting nefarious conduct  
25 and/or problems whereby somebody who wishes or desires  
26 for ill motive to change an election result can do so  
27 simply by manipulating the votes that won't be audited.

28           And we've seen examples of that nationwide.

1 There are examples in this last primary election where  
2 in New York 125,000 votes just disappeared in Brooklyn  
3 and all sorts of problems that are starting to occur  
4 that people are becoming much more aware of based on the  
5 use of the automated system.

6 And we're concerned about that, your Honor,  
7 because the one tool that the citizens have to confirm  
8 that the election has integrity and that the election  
9 process has integrity is by this audit. It is a rather  
10 simple task to do the audit. We are just looking for a  
11 1 percent manual hand count of all the ballots cast as  
12 the code requires.

13 It is also essential, your Honor, that the  
14 1 percent of precincts and 1 percent of the vote-by-mail  
15 batches, you'll hear the evidence as to how the Election  
16 Code allows this 1 percent manual tally to occur, it was  
17 an evolution in the legislature as to how this happened  
18 because the legislature was responding to registrars'  
19 concerns about timing and the manpower to be able to do  
20 the 1 percent tally.

21 There was a change in the law in 2006 and 2008  
22 and 2011 which evolved to the point where there are two  
23 parts to the 1 percent manual tally. Essentially, the  
24 registrar is permitted to select 1 percent of the  
25 precincts for the purposes of the polling ballots and  
26 take batches in a process, a random process, of the  
27 vote-by-mail ballots. And by doing it in that two-step  
28 process, the registrar can and is charged with the

1 responsibility of conducting the audit and completing it  
2 within the 30 days he or she has to finish counting the  
3 votes and certifying the election results.

4           It's very important in this audit process, your  
5 Honor, that the selection process be a surprise for the  
6 simple reason that if it's not a surprise and not done  
7 randomly, we again allow and basically send an  
8 invitation out to a nefarious, ill motive hacker or  
9 person to change the results of the election simply  
10 because they know which ballots to change. And the  
11 element of surprise basically alleviates that problem if  
12 nobody knows what's going to be selected. Basically we  
13 deter the process of anybody trying to change election  
14 results and the intent and motive of the law is met.

15           Moreover, it is essential that the unofficial  
16 results of the election, which is what happens up until  
17 election day, be fixed and disclosed publicly so that  
18 there can be no changes of the reported results on the  
19 unofficial election day results while the 1 percent  
20 manual tally is occurring and before the random process  
21 of selecting all ballots cast begins. This avoids,  
22 basically, the covering your tracks problem of anybody  
23 who is inside the registrar or outside the registrar who  
24 wishes to change an election result.

25           Essentially, your Honor, these are the  
26 constraints that ensure an effective implementation of  
27 the 1 percent manual tally under the law, as it is  
28 required under the law. We are going to hear from

1 several witnesses, your Honor, including Michael Vu, the  
2 registrar of voters for this county. And Mr. Vu is very  
3 familiar with nefarious conduct. He comes from a county  
4 in Ohio, Cuyahoga County, which is the Cleveland area,  
5 where this exact scenario occurred.

6 He had two employees in the 2004 presidential  
7 election cycle between Bush and Kerry, there was a  
8 recount occurring in Cuyahoga County, and two employees  
9 basically during the recount process hand-picked ballots  
10 and -- in order to avoid the hand count and any  
11 discrepancies in the hand count that would occur so that  
12 basically it would slide through.

13 Mr. Vu was asked to resign his position after  
14 an investigation of that process and wound up here in  
15 San Diego. So he is very familiar with the fact that  
16 these audit processes are very important for citizens to  
17 be able to control and ensure election integrity.

18 We'll hear from Mr. Lutz. Mr. Lutz is the  
19 founder of Citizens Oversight. You'll hear, your Honor,  
20 about his organization and why it does what it does and  
21 what it intends to accomplish and how this particular  
22 issue arose during the election process and his  
23 observations during the election process.

24 He's got a lot of experience in watching  
25 election processes and will offer testimony concerning  
26 that.

27 We'll hear from Charles Wallis, who is the  
28 IT manager at the registrar's office. He seems to be



1 the hands-on knows everything about the automated  
2 process at the registrar, and we'll hear testimony from  
3 him concerning the number of provisional ballots that  
4 were processed this election cycle and that there was an  
5 increase and a trend of increasing the vote-by-mail  
6 process.

7 In sum, your Honor, essentially what we are  
8 going to be converging on here is the gravamen of the  
9 case, which is basically in three simple words all  
10 ballots cast. Elections Code requires this audit to be  
11 done on all ballots cast. The defendants seem to think  
12 that substantial compliance is sufficient. We believe  
13 all ballots cast means 100 percent of the universe of  
14 ballots need to be surveyed so that the election process  
15 can be confirmed and verified.

16 Thank you.

17 THE COURT: Thank you, Counsel.

18 All right. Mr. Barry, whenever you're ready.

19 MR. BARRY: Yes. Thank you, your Honor,  
20 Counsel, Mr. Lutz.

21 Your Honor, I'd like to step back a little bit  
22 and just remind the Court what specifically it is that  
23 we are dealing with here, and the issue is whether or  
24 not this Court should issue a writ of mandamus ordering  
25 the public official to perform the statutorily-imposed  
26 duty in a manner the plaintiffs believe is required by  
27 law, notwithstanding the fact that the manner in which  
28 plaintiffs proposed to conduct the manual tally would be

1 contrary to the intent and purpose of that statute.

2           And before I get too far into this, I  
3 understand the Court reserved a discussion or ruling on  
4 our motion for nonsuit with respect to Ms. Meyer so I'm  
5 not going to make that motion at this time. I just want  
6 to make sure I'm preserving that right to bring it up  
7 later.

8           Now, in his opening statement, counsel for  
9 plaintiffs made clear that if allowed to use this form  
10 in a manner in which they want, they will try to expand  
11 the scope of what, in fact, is the issue that is to be  
12 determined and what is within the pleadings in this  
13 case. And the evidence will show that Mr. Lutz, who is  
14 the principal of Citizens Oversight, holds himself out  
15 to be an expert in what elections officials are required  
16 to do in order to conduct an election and specifically  
17 with respect to what is required by the 1 percent manual  
18 tally.

19           Now, what it is telling is that while I heard  
20 counsel in his opening argument repeatedly state that  
21 the law requires all ballots or all vote-by-mail  
22 ballots, nowhere in the Elections Code, specifically  
23 Section 15 through 16, does the word "all" appear. They  
24 would have the Court read the word "all" into what the  
25 code provision requires.

26           And, in addition, I heard counsel refer to on  
27 numerous occasions the audit. This is not an audit.  
28 It's a manual tally of a certain number of randomly

1 selected ballots. It's not an audit of the results.  
2 And so the use of the word "audit" is also not found in  
3 the Elections Code provision as specifically deals with  
4 1 percent manual tally.

5 Now, while Mr. Lutz holds himself out to be an  
6 expert in the conduct of elections, he's never been a  
7 poll worker, he's never been an election worker, he's  
8 never been an election official. He's been a candidate  
9 for office on two occasions and he's a voter. And  
10 that's the extent of his expertise.

11 On the other hand, we intend to present  
12 evidence from a number of very experienced elections  
13 officials from around the state going back all the way  
14 to when the manual tally became a part of the Elections  
15 Code in 1965 and what was the purpose of the manual  
16 tally at that point in time and how has that evolved  
17 over the last 50 years to what it is today.

18 In order to prevail, the plaintiffs must show  
19 not only the registrar has or is about to fail to  
20 perform a duty in violation of the Elections Code, but  
21 they must also show that the granting of any relief will  
22 not substantially interfere with the conduct of the  
23 upcoming November election.

24 So the burden that's on the plaintiffs is  
25 twofold. They have to show that there was a violation  
26 of Elections Code that has or is about to occur and that  
27 any relief requested and granted by this Court will not  
28 interfere with the conduct of the upcoming presidential

1 general election, which, I will say, is the most  
2 complicated type of election that you can conceivably  
3 conduct.

4 In presenting our case, we'll detail the  
5 origins in history of the 1 percent manual tally. We'll  
6 present evidence regarding the intent and purpose of the  
7 1 percent manual tally. We'll detail the complexities  
8 and nuances that are involved in conducting election,  
9 and specifically in this case a presidential general  
10 election. We'll detail and explain to the Court the  
11 complicated and labor intensive process the ROV  
12 undertakes in conducting the official canvass.

13 1 percent manual -- 1 percent manual tally is  
14 but one small portion, one small cog of everything that  
15 has to happen within the 30-day canvass period after an  
16 election.

17 We'll present detailed evidence about the  
18 nuances and the complexity of having to count  
19 vote-by-mail and provisional ballots and what type of  
20 strain that puts on the system to be able to perform  
21 that requirement, count those ballots, include them in  
22 the count, certify the election within the certification  
23 period.

24 Defendants will demonstrate that the manual  
25 tally must occur during the official canvass and that  
26 the interpretation urged by plaintiffs, a 15360, raises  
27 both practical and severe limitations on the registrar's  
28 ability to certify the election within the statutorily

1 required period.

2 I think you'll find that plaintiffs' case with  
3 respect to hacking and fraud and these other allegations  
4 is built primarily, if not entirely, on speculation.  
5 It's not supported by the facts. It's not supported by  
6 the law. In fact, Mr. Lutz, I expect to testify, he has  
7 not witnessed any voter fraud or election fraud  
8 certainly in San Diego County and has not witnessed any  
9 voter fraud in any location in the state.

10 One of the things that counsel raised was that  
11 the only tool the citizens have to ensure the integrity  
12 of an election is the 1 percent manual tally. And  
13 that's completely untrue. The registrar has numerous  
14 security measures in place that are put in place and  
15 utilized both before the election on election night and  
16 during the canvass, and we will present evidence  
17 detailing what those security measures are to ensure the  
18 integrity of an election.

19 In addition, if a voter, an elector, a  
20 candidate has any doubts, any qualms about whether or  
21 not the results of a particular contest have been  
22 manipulated, this code specifically allows an elector --  
23 you don't have to be the candidate -- an elector is  
24 defined as any eligible voter in the county -- to bring  
25 an election contest or to bring an action alleging that  
26 there has been malfeasance or misfeasance in the conduct  
27 of the election and have the Court adjudicate whether,  
28 in fact, that has occurred.

1           Now, in addition to the security measures that  
2 the registrar has in place, the registrar deposits the  
3 source codes, they deposit information into escrow that  
4 are -- is maintained by a vendor approved by the  
5 Secretary of State, they provide the Secretary of State  
6 with information with respect to their computer  
7 programs. All that is maintained by a third party,  
8 either a vendor or Secretary of State.

9           It's also available to an elector if after the  
10 election there is allegations of malfeasance or  
11 misfeasance that can be compared then to the systems  
12 that are used by the county.

13           The evidence will demonstrate that the  
14 methodology used by the County of San Diego is  
15 methodology that's been in place for many years and that  
16 it is consistent with the methodology and practice of  
17 other large counties, specifically, in our case,  
18 Los Angeles and Sacramento, who will be presenting  
19 testimony here at trial, and also with the intent and  
20 the purpose of Section 15360.

21           Practice of other counties is not irrelevant as  
22 argued by the plaintiffs. The interpretation and  
23 implementation of other elections officials who combined  
24 have decades of administrative and legislative  
25 experience as they relate to elections law is relevant  
26 to show how it is that the language in the code should  
27 be interpreted -- interpreted.

28           Finally, we intend to present evidence

1 detailing the hardships that would be created by any  
2 order this Court could grant that would require the  
3 registrar to change its practice for the upcoming  
4 general election.

5 Thank you for the Court's attention.

6 THE COURT: All right. It is nearly 10:20. We  
7 are going to be in recess for approximately 15 minutes.

8 By the way, the schedule that we normally  
9 follow, we get started right away at 9:00 o'clock.  
10 Sometimes we trail a few minutes and we'll try to avoid  
11 that and start at 9:00. Take our 15-minute break at or  
12 about 10:30, go to noon, start again at 1:30, stop again  
13 at 3:00 o'clock for 15 minutes and always, always be  
14 done by 4:30.

15 So we are going to take our 15-minute break at  
16 this time.

17 (Recess taken.)

18 THE COURT: Please have a seat. Okay.

19 MR. BARRY: Your Honor, are we on the record?

20 THE COURT: We are.

21 MR. BARRY: Two items, if I may. We had  
22 taken -- we took the deposition of Julie Rodewald, who  
23 is the retired registrar from San Luis Obispo County.  
24 Because she is unavailable, she has left on an overseas  
25 vacation, and so I designated a portion of her depo  
26 transcript to read into the record at some point. I  
27 provided it to counsel with that notice. It was a short  
28 deposition so I would estimate it taking maybe 20 or 25

1 minutes to read that section in.

2           And, in addition, if we -- well, when we begin  
3 testimony if we could exclude witnesses from the  
4 courtroom.

5           THE COURT: As to the first, will you be  
6 reading excerpts from -- is it Ms. Wald?

7           MR. BARRY: Rodewald, R-o-d-e-w-a-l-d.

8           THE COURT: Oh, Rodewald. Okay. I  
9 misunderstood. Okay. All right. Will you be reading  
10 excerpts from that witness's deposition?

11          MR. BARRY: Yes.

12          THE COURT: All right. Have you had a chance  
13 to evaluate the excerpts yet?

14          MR. GERACI: Yes, your Honor.

15          THE COURT: Will there be any objections?

16          MR. GERACI: No.

17          THE COURT: All right. So we'll take that up.

18          MR. BARRY: It may be a good time filler if we  
19 need it.

20          THE COURT: Yeah. That was what I was going to  
21 say.

22                 And then the motion to exclude witnesses is  
23 granted. But, Counsel, you know people who have been  
24 identified as prospective witnesses far better than I.  
25 It's your responsibility to keep an eye out; and if you  
26 seem to identify somebody who may be in the courtroom  
27 without yet having completed testimony or been otherwise  
28 excused from testifying, talk to my deputy and we'll



1 arrange for that person to step outside until that  
2 occurs. But there is no way I can monitor for you.

3 MR. BARRY: I understand, your Honor.

4 THE COURT: All right. So -- all right.

5 MR. GERACI: Your Honor, may I approach the  
6 bench with the exhibit notebooks for your Honor?

7 There is a set on the witness stand. Those are  
8 the defendants' exhibit books you have in the white  
9 folders. These are the plaintiffs' in the black  
10 folders.

11 THE COURT: Those are for the -- okay.

12 MR. GERACI: There is a set there. Right.  
13 There is a set for the witness and a set for your Honor  
14 and a set for me.

15 THE COURT: Now, what -- I guess a total of  
16 five volumes of Court's exhibits are all duplicate  
17 exhibits that I can read and mark on and stuff like  
18 that?

19 MR. GERACI: Yes, those are your copies, your  
20 Honor. You can do with them as you please.

21 THE COURT: All right. Plaintiff, call your  
22 first witness.

23 MR. GERACI: Under 776 we call Michael Vu.

24 THE COURT: All right. Mr. Vu, if I can ask  
25 you to follow the directions of my deputy and my clerk,  
26 please.

27 THE BAILIFF: Please stand and face the clerk.

28 THE CLERK: Do you solemnly state under penalty

1 of perjury that the evidence you shall give in this  
2 matter shall be the truth, the whole truth, and nothing  
3 but the truth?

4 THE WITNESS: I do.

5 THE CLERK: Please take the stand.

6 THE BAILIFF: This way, sir. Make sure you  
7 speak into the mic. And if you need to put these down,  
8 go ahead.

9 THE WITNESS: Thank you. I need some water.

10 THE CLERK: Sir, please state your full name  
11 and spell your last name for the record.

12 THE WITNESS: It is Michael D. Vu.

13 THE CLERK: Thank you.

14 THE COURT: All right, Counsel. Whenever you  
15 are ready.

16

17 CROSS-EXAMINATION (Pursuant to EC 776)

18 BY MR. GERACI:

19 Q. Good morning, Mr. Vu.

20 A. Good morning.

21 Q. Your current position with the County of  
22 San Diego is registrar of voters, correct?

23 A. That is correct.

24 Q. And you've been in that position for how long?

25 A. I've been in that position since the end of  
26 2012.

27 Q. And what are your responsibilities as the  
28 registrar of voters for the County of San Diego?

1           A.    I am responsible for the overall direction and  
2   conduct of the elections that are held here in this  
3   county.  That includes federal, state and local  
4   elections.  Getting -- diving deeper into what that  
5   means is that includes voter registration maintenance.  
6   It includes the recruitment of nearly 7,000 to 8,000  
7   poll workers for a countywide election.  It also deals  
8   with training.  It addresses the layout and tabulation  
9   of the ballots.

10                We have a language services program under the  
11   Voting Rights Act of 1965.  That includes Spanish,  
12   Vietnamese and Chinese where we translate all voter  
13   material including the ballot as well as sample voter  
14   information pamphlet.

15                We also are responsible for campaign finance  
16   disclosure reporting that are filed with our --  
17   specifically our office.  Those are the offices as well  
18   as organizations that are required to file with the  
19   county.  Those are but a few of the items that we are  
20   responsible for, including vote-by-mail.

21           Q.    Included in your responsibilities would be to  
22   assure that procedures that your office follows are  
23   current with legal requirements, correct?

24           A.    We are responsible for the implementation of  
25   law, that's correct.

26                If I may, I'd like to clarify also my  
27   responsibilities as well, and that includes legislation,  
28   being -- participating on legislative matters,

1     testifying before the state assembly and state senate on  
2     legislative matters.

3           Q.     Before your position in San Diego, were you --  
4     did you hold a similar office in Cuyahoga County in  
5     Ohio?

6           A.     I held what is known as the director of the  
7     Board of Elections, which is the chief election  
8     officials for the county in Cuyahoga.

9           Q.     And during what years were you there?

10          A.     I was there in 2003 through 2000 -- a portion  
11     of 2007.

12          Q.     And you were there during the time of the 2004  
13     general election between Mr. Bush and Mr. Kerry?

14          A.     I was, yes.

15          Q.     Sometime after that general election, was there  
16     a request or demand for a recount?

17          A.     During the 2004 presidential election, yes,  
18     sir.

19          Q.     Yes, sir.

20          A.     There was.

21          Q.     And during that process, isn't it true that you  
22     had two employees that were investigated by the  
23     prosecutors of Cuyahoga County for dereliction of duties  
24     in how they handled the recount process in that county?

25                 MR. BARRY:   Your Honor, objection.  It's not  
26     relevant, certainly not relevant as to time.  This  
27     involved a recount.  And I would object that the  
28     question is argumentative in the sense that -- how it is

1 he has characterized it. There is no foundation.

2 THE COURT: Let me see counsel at sidebar for  
3 just a moment.

4 (Sidebar; not reported.)

5 THE COURT: Counsel, can you spell the county  
6 in Ohio that you've asked a question or two of Mr. Vu?

7 MR. GERACI: I probably can. But may I ask  
8 Mr. Vu to spell it? I know he knows it.

9 THE COURT: That's fine.

10 Mr. Vu, can you spell that county, please.

11 THE WITNESS: Yes, your Honor. It's  
12 C-u-y-a-h-o-g-a. Cuyahoga.

13 THE COURT: All right. Just give me one  
14 moment. I heard it and read it many times, but I was  
15 drawing a blank on it.

16 Now, as mentioned to counsel at sidebar, there  
17 are occasions when we have a witness on the stand that  
18 either at counsel's request or on the Court's own  
19 initiative we'll have a sidebar to have a discussion  
20 about a particular line of inquiry or two, the purpose  
21 of which is to hear counsel -- hear from counsel without  
22 trying to influence any of the testimony that the  
23 witness may be asked about while on the stand.

24 On the other hand, I don't want counsel to be  
25 of the view that you're being deprived of an opportunity  
26 to make your record.

27 The defense has objected to this line of  
28 inquiry and the Court asked for an explanation from

1 plaintiffs' counsel as to why some or all of this may be  
2 relevant.

3 In part, the Court sustains the objection on  
4 relevancy. I'm not calling it 352 yet. But in part, as  
5 discussed at sidebar, the Court is inclined to overrule  
6 the objection and permit limited inquiry which may be  
7 relevant on the ground discussed at sidebar.

8 Let me hear from defense counsel first. And  
9 again, whether it be now or at the conclusion of  
10 Mr. Vu's testimony, I want to make sure you had a chance  
11 to make a full record.

12 Is there anything else you would like to add,  
13 Counsel?

14 MR. BARRY: No, your Honor. I'm fine with it.  
15 And I think our intention is to reserve our direct  
16 testimony of Mr. Vu until our case in chief. But if  
17 perhaps at the end of the testimony today we want to  
18 have some rehabilitation we can do that then.

19 THE COURT: Absolutely. You can begin in part  
20 and reserve in part to your examination in chief.

21 Let me go to plaintiffs' counsel. Anything  
22 else you would like to put on the record about our  
23 sidebar?

24 MR. GERACI: No, your Honor.

25 THE COURT: All right. So let's continue.

26 BY MR. GERACI:

27 Q. So, Mr. Vu, you were asked to resign your  
28 position in Cuyahoga County, correct?

1 A. I was asked at one time, yes.

2 Q. And you left upon that -- being asked to  
3 resign, you resigned?

4 A. I did resign my position, but it was not as a  
5 result of the request.

6 Q. All right. And during the 2004 election, the  
7 two employees that were investigated were investigated  
8 because they were accused of secretly reviewing  
9 preselected ballots before a public account after the  
10 November 4 general election, correct?

11 A. Incorrect.

12 Q. What is your recollection of why those two  
13 employees under your supervision were investigated?

14 A. So it was not -- just to clarify the question,  
15 it was not a preselection from my memory. It was not a  
16 preselection of ballots and it was not done in secret.  
17 Staff and employees were there, from my understanding.

18 But the allegations was that they had after  
19 they -- precincts were selected, that they reviewed  
20 those ballots prior to the recount. That's what it was  
21 at issue.

22 Q. Essentially they picked out ballots on the  
23 recount that they knew would not cause any discrepancies  
24 when audited by hand, correct?

25 MR. BARRY: Objection. Assumes facts not in  
26 evidence. Misstates his testimony.

27 THE COURT: Overruled. You can answer.

28 THE WITNESS: Again, that's incorrect. There

1 was no preselection of ballots. Precinct ballots were  
2 selected. They were in -- what was at issue at that  
3 time was their preview of those ballots prior to the  
4 actual recount being conducted.

5 BY MR. GERACI:

6 Q. Preview instead of preselect. Is that your  
7 distinction?

8 A. Yes, there is a distinction between the  
9 preselection of those precincts versus the actual  
10 preview of those ballots for the actual conduct of the  
11 recount.

12 Q. Were those employees prosecuted?

13 A. They were prosecuted, yes.

14 Q. As part of your responsibilities for the  
15 registrar's position here in San Diego County, as I  
16 said, you do assure that your policies and procedures  
17 comply with legal standards, correct?

18 A. Again, my responsibility is implementation of  
19 the law and the interpretation of those laws.

20 Q. So as part of your job and responsibility, you  
21 have to keep up with changes in the law that relates to  
22 how elections are processed?

23 A. That's correct.

24 Q. Now, you're aware of Election Code Section  
25 15360 which is the subject of our lawsuit?

26 A. I am, yes.

27 Q. You underwent a deposition and I asked you  
28 questions about your process in conducting the 1 percent



1 manual tally. Do you recall that?

2 A. I do.

3 Q. And you're aware that after the 2011  
4 legislature amendment to that statute that there were  
5 two subparts of how you conduct the 1 percent manual  
6 tally, correct?

7 A. I do recall the legislature and the governor,  
8 frankly, granted the ability to do two-part manual  
9 tally, yes.

10 Q. The legislature provided a bill to the governor  
11 and the governor signed the bill into law, correct?

12 A. Correct.

13 Q. What are the two options as you understand?

14 A. The two options from my understanding is to do  
15 a 1 percent manual tally based on precincts? And then  
16 the two-part manual tally option was to do 1 percent of  
17 the precincts excluding vote-by-mail ballots and then  
18 1 percent of those ballots, vote-by-mail ballots.

19 Q. Essentially you could batch the vote-by-mail  
20 ballots and not have to do them by precinct, correct?

21 A. That's correct. Thank you for the  
22 clarification. By batch.

23 Q. And I think in your office some of the  
24 employees refer to batching as decks; is that correct?

25 A. Decks and batches are synonomous.

26 Q. Okay. So in the case of this past election --

27 THE COURT: Counsel, one moment, please.

28 MR. GERACI: Yes, sir.

1 THE COURT: All right.

2 BY MR. GERACI:

3 Q. Has your department ever conducted the  
4 1 percent manual tally using the batching method as now  
5 provided under Election Code Section 15360?

6 A. We have, yes.

7 Q. And that's pursuant to your current procedural  
8 manual?

9 A. It's current in terms of our conduct, the  
10 Elections Code, and what it says in the Elections Code.

11 Q. Would you take a look at Exhibit 4 that -- the  
12 black notebooks to your right are the Plaintiffs'  
13 exhibits.

14 A. Mm-hmm.

15 Q. The white notebooks to your left are  
16 Defendants' exhibits. It would be in Volume I of III,  
17 Exhibit 4. They should be tabbed accordingly.

18 A. Yes.

19 Q. Is that a true and correct copy of your  
20 procedural manual for conducting the 1 percent manual  
21 tally?

22 A. These are procedures that we have used to  
23 conduct the 1 percent manual tally.

24 Q. And it's a six-page document?

25 A. It appears as if it's a five-page document --  
26 well, six pages. It looks like six of five.

27 Q. The last page says page six of five. So six  
28 pages, correct?

1 A. Six pages, yes.

2 Q. And that is the procedural manual that you have  
3 followed?

4 A. Yes, to some extent, yes.

5 MR. GERACI: Okay. Your Honor, I would move  
6 admission to Exhibit 4.

7 THE COURT: Any questions -- or, I mean, any  
8 objections?

9 MR. BARRY: No objection, your Honor.

10 THE COURT: One moment.

11 Exhibit 4 will be admitted.

12 (Exhibit 4 was received in evidence.)

13 BY MR. GERACI:

14 Q. Nowhere in the procedural manual, Exhibit 4,  
15 that you're looking at does it describe how to conduct  
16 the batching of the vote-by-mail ballots to conduct the  
17 1 percent manual tally of vote-by-mail, correct?

18 A. That's correct. There is no reflection of the  
19 batch method of our procedures.

20 Q. So, in essence, the procedural manual in --  
21 following the last election was outdated?

22 A. It was -- in terms of the procedures used,  
23 actually, there are parts that were outdated. For the  
24 most part it was the same.

25 Q. But you had -- you have in the past conducted  
26 the 1 percent manual tally of vote-by-mail ballots using  
27 batching as your mode, correct?

28 A. We have, yes.

1 Q. During this past election cycle, you began the  
2 1 percent manual tally of precinct votes and 1 percent  
3 manual tally of vote-by-mail votes by using the batching  
4 method, correct?

5 A. We started to, yes.

6 Q. Okay. Would you take a look at Exhibit 1.

7 A. Yes.

8 Q. Is Exhibit 1 a true and correct copy of the  
9 public notice you gave pursuant to Election Code  
10 Section 15360 that you would be conducting a 1 percent  
11 manual tally --

12 A. No.

13 Q. -- for this past election cycle?

14 A. No.

15 Q. What is Exhibit 1?

16 A. It's the public notice that we were going to be  
17 processing mail ballots and the timelines associated  
18 with it.

19 Q. Okay. When did you become aware that your  
20 written procedures, Exhibit 4, did not -- was not  
21 reconciled with what you were practicing in conducting  
22 the 1 percent manual tally by batching?

23 A. I cannot recall when.

24 Q. Do you have a reasonable estimate of when? Was  
25 it during this particular election cycle?

26 A. It was during this election cycle, yes.

27 Q. Was it because of an objection or a concern  
28 that Mr. Lutz had raised to you?

1 A. No.

2 Q. What was the reason for your becoming aware  
3 that your policy or procedural manual did not reflect  
4 how to conduct the 1 percent manual tally of  
5 vote-by-mail ballots by batching?

6 A. I believe counsel brought it to my attention.

7 Q. Was it because of the fact that your procedural  
8 manual did not reflect a procedure to conduct a  
9 1 percent manual tally by batching vote-by-mail ballots  
10 that you changed your approach during the 1 percent  
11 manual tally cycle?

12 A. No.

13 Q. Why did you change from batching to precincts  
14 in processing the 1 percent manual tally of vote-by-mail  
15 ballots?

16 A. Because there was a complaint by the plaintiff  
17 about the 1 percent and how many ballots should be  
18 included into it, and so to sate the plaintiff, we  
19 decided to go back to a process that was -- we believed  
20 that was tried and true that would satisfy the plaintiff  
21 in that regard.

22 Q. By the plaintiff you mean Raymond Lutz sitting  
23 here in the courtroom?

24 A. That's correct. Mr. Lutz.

25 Q. Have you since updated your procedural manual  
26 to include the process of -- process of doing a  
27 1 percent manual tally of vote-by-mail ballots by  
28 batching?

1           A.    We are in the process of updating it to reflect  
2 the batch method, yes.

3           Q.    And you expect that your procedural -- your  
4 procedural manual will be updated for the purposes of  
5 conducting your 1 percent manual tally of the next  
6 election in November?

7           A.    I anticipate that it will be, yes.

8           Q.    During this election cycle when you switched  
9 from batching to precincts, did you consider staying  
10 with the batching process but only including more  
11 vote-by-mail ballots in your batching selection?

12          A.    It may have.

13          Q.    Did you just discount it and decide not to do  
14 that or was there any rationale for not continuing with  
15 what you were doing?

16          A.    Again, I think it was to satisfy a true method  
17 in what the statute had provided prior to the 2011  
18 change in 15360.

19          Q.    Would you take a look at Exhibit 19.

20          A.    Yes.

21          Q.    Is that a copy of the official results of this  
22 last election that you published on your web site after  
23 certifying the election results?

24          A.    It appears so.

25                MR. GERACI: I move admission to Exhibit 19.

26                THE COURT: Any objection?

27                MR. BARRY: No objection.

28                THE COURT: One moment. All right.

1 (Exhibit 19 was received in evidence.)

2 BY MR. GERACI:

3 Q. In this past election, there were approximately  
4 770,000 ballots cast?

5 THE COURT: One moment. Exhibit 19 will be  
6 admitted. Excuse me for interrupting.

7 MR. GERACI: I'm sorry.

8 BY MR. GERACI:

9 Q. Is that correct?

10 A. There were 775,930 ballots that were added and  
11 certified as the election results.

12 Q. And how many registered voters in San Diego  
13 County at the time of the last election?

14 A. There was 1,523,251.

15 Q. So give or take we had approximately half --  
16 50 percent turnout in San Diego County, correct?

17 A. 50.94 according to the document in front of me.

18 Q. Now, of the ballots that were cast, is it  
19 correct that approximately 292,000 were the early  
20 vote-by-mail ballots? By early, I mean submitted and  
21 received before election day.

22 A. There may have been 292,000.

23 Q. Well, on your web site you reported that there  
24 were 285,000 ballots yet to be processed as of election  
25 day; is that correct?

26 A. That's correct.

27 Q. And that would have included the vote-by-mail  
28 ballots that were received after election day and

1 provisional ballots, correct?

2 A. That would have been -- that's correct, mail  
3 ballots, provisional ballots and any other precincts  
4 damaged ballots that came in from the polling place that  
5 we couldn't scan in.

6 Q. So as of election day, you were -- switching my  
7 subject to the provisional ballots for a second.

8 The provisional ballots are ballots that are  
9 cast at the polling place, correct?

10 A. Provisional ballots are cast at the polling  
11 place, yes.

12 Q. And because there is some irregularity with the  
13 registered voter in particular, they're put into a  
14 provisional envelope for further review and inspection,  
15 correct?

16 A. That's correct.

17 Q. And those are processed after they are verified  
18 that the voter is a registered voter and was properly  
19 casting a ballot that they selected, correct?

20 A. That's correct. If I may provide one piece of  
21 clarification. There are also provisional ballots that  
22 are casted in our office. Those are known as failsafe  
23 provisional ballots. These are situations where the  
24 name and the roster -- we've already printed the roster  
25 and for the precincts, yet the voter has come in and is  
26 trying to change their address at the time of voting to  
27 get something different to what is known as failsafe to  
28 their new address.



1 Q. Okay. Thank you for that clarification.

2 This past election there were approximately  
3 68,000 validated provisional ballots that were  
4 processed, correct?

5 A. That's what I recall, yes.

6 Q. And as I recall your testimony, that was about  
7 90 percent of the total number of provisional ballots  
8 you received, correct?

9 A. I believe it was over 90 percent, yeah.  
10 91 percent.

11 Q. So by doing the math, that would make it  
12 probably -- approximately there were 75,000 provisional  
13 ballots received, correct?

14 A. Approximately 75,000, yes.

15 Q. And how many -- what was the total number of  
16 vote-by-mail ballots in this last election?

17 A. Validated?

18 Q. Yes.

19 A. That was into the count? I believe there was  
20 approximately 490,000 vote-by-mail ballots that were  
21 added to the count.

22 Q. So 490,000 of the 775,930 were vote-by-mail?

23 A. That's correct.

24 Q. Are you noticing in San Diego County a trend of  
25 increased numbers of vote-by-mail ballots?

26 A. I am.

27 Q. Does that seem to be a continuing trend --  
28 continuing trend each election cycle?

1 A. I do see that, yes.

2 Q. Of the vote-by-mail ballots that were received,  
3 half of them were received before election day and  
4 approximately half were received after election day,  
5 correct?

6 A. I believe that there was not just half. I  
7 believe that the majority of the mail ballots that were  
8 added into the count were received prior to and  
9 reflected in the -- what is known as the semi final  
10 official count.

11 Q. Now, was it your understanding that some of the  
12 polling places were taking nonpartisan voters' ballots  
13 and putting them in provisional envelopes?

14 A. That may have occurred.

15 MR. BARRY: Objection. Incomplete  
16 hypothetical.

17 THE COURT: Do you understand the question,  
18 sir?

19 THE WITNESS: Go ahead and repeat it again if  
20 you want.

21 THE COURT: The objection will be sustained at  
22 this point. Please rephrase.

23 BY MR. GERACI:

24 Q. Was it your understanding during the last  
25 election cycle that some nonpartisan voters' ballots  
26 were being placed into provisional envelopes at the  
27 polling places?

28 A. That may have occurred, yes.

1 Q. That may have occurred or you are aware that it  
2 did occur?

3 A. Well, I'm aware that it occurred. And the  
4 reason why I'm aware that it occurred is because if a  
5 nonpartisan voter selected the Republican ballot, they  
6 would have voted a provisional ballot.

7 So, again, those are situations where the  
8 political party closed off their ballots to everyone  
9 except those registered with their respective political  
10 party. And so goes the other political parties that  
11 closed it off.

12 Q. It is your office's current practice when  
13 conducting the 1 percent manual tally to not include any  
14 of the provisional ballots, correct?

15 A. That's correct.

16 Q. And that's despite the fact that those are  
17 ballots and votes of voters who voted at polling places,  
18 correct?

19 A. These are individuals that cast ballots at the  
20 polling place, yes.

21 Q. And it's also the practice of your office to  
22 exclude 50 percent of the vote-by-mail ballots when  
23 conducting your 1 percent manual tally?

24 MR. BARRY: Objection. Lacks foundation.  
25 There is no evidence.

26 MR. GERACI: I'll reask.

27 THE COURT: One moment. One moment.

28 MR. GERACI: I'll withdraw the question, your

1 Honor.

2 THE COURT: Just give me one moment, please.

3 MR. GERACI: Sure.

4 THE COURT: All right. Okay.

5 BY MR. GERACI:

6 Q. At your deposition, you explained the  
7 difference between early vote-by-mail, early received  
8 vote-by-mail and later received vote-by-mail. Do you  
9 remember that?

10 A. I do recall.

11 Q. What is the difference?

12 A. Between early vote-by-mail and late after  
13 vote-by-mail?

14 Q. Yes.

15 A. So if I understand your question correctly,  
16 these are the ballots that were added into the count as  
17 of election night, which is known as the semi final  
18 official, and then there are the vote-by-mail ballots  
19 that are counted after that night.

20 Q. And so when we discussed -- when you testified  
21 that approximately 50 percent of the vote-by-mail  
22 ballots were included in your 1 percent manual tally  
23 draw, that would have been the ballots that were  
24 received before election day, correct?

25 A. These were received as of election day and  
26 added into the count as of election night. And to  
27 clarify, as I said, again, the majority of those were  
28 mail ballots of all the universe of mail ballots that

1 were added into the count when we certified the  
2 election.

3 Q. And of the universe of vote-by-mail ballots  
4 that were received after the election day, that was  
5 approximately 50 percent of the total vote-by-mail  
6 ballots eventually processed, correct?

7 A. Again, I think it was the majority as opposed  
8 to the 50 percent, if I remember my numbers correctly at  
9 this point in time.

10 Q. Well, let's look at that real quick.

11 You testified that there were 489,610  
12 vote-by-mail ballots received and processed during the  
13 election cycle, this past election cycle, correct?

14 A. Can you refer to a document that I -- that I  
15 can look at?

16 Q. You can look at Exhibit -- I don't know if  
17 Exhibit 19 helps you. Is there a document you would  
18 like to look at to refresh your memory of your previous  
19 testimony?

20 A. Yeah, there would be two to be able to gain  
21 that information is the -- essentially the election  
22 night count that we -- the final election night count  
23 that we published, and I believe there was my  
24 declaration too.

25 Q. Okay. So for purposes of refreshing your  
26 recollection, let's look at Exhibit 33 -- I'm sorry,  
27 Exhibit 30, which is your previous declaration. Just  
28 read it to yourself.

1 A. Okay.

2 Q. My question pending is, what were the total  
3 number of vote-by-mail processed as of election day?  
4 Does that refresh your recollection?

5 A. Give me one second.

6 So, again, I'll testify the majority of the  
7 vote-by-mail ballots were into the semi officials final  
8 count.

9 Q. Which was approximately how many?

10 A. 256,685.

11 Q. And the remainder were not part of your  
12 1 percent manual tally process, correct?

13 A. That's correct.

14 Q. So if we add the vote-by-mail ballots that were  
15 not included in your 1 percent manual tally and the  
16 approximately 75,000 provisional ballots that were not  
17 included, that would compute to about 37 percent of the  
18 total ballots cast, correct?

19 A. I don't know. I'd have to get a calculator and  
20 get all the numbers associated with that amount.

21 Q. Well, do you disagree that of the ballots that  
22 were cast, of the 256,000 vote-by-mail plus 75,000  
23 provisional ballots, and if you can just simply conduct  
24 the math equation, that would be about 37 percent of the  
25 total votes cast, which was 775,930?

26 A. I'll take your word for it.

27 Q. Is it your intention in the next election cycle  
28 to conduct the 1 percent manual tally of vote-by-mail

1 ballots by using the batch method?

2 A. I will make that call because I have two  
3 options pursuant to Elections Code 15360.

4 Q. You'll make that call when?

5 A. When we publish the notice as well as when we  
6 go about doing the 1 percent manual tally.

7 Q. Is it your intention to exclude any  
8 vote-by-mail ballots received after election day?

9 A. Is it my intentions? I think part of that is  
10 going to be based off of this, but at this point in time  
11 and the direction of the Secretary of State, yes.

12 Q. Is it your intention to exclude any provisional  
13 ballots cast at polling places in conducting your  
14 1 percent manual tally?

15 A. It would be, yes.

16 Q. Now, there are circumstances when you're  
17 counting ballots or reviewing ballots where you use  
18 Wite-Out to mark on the ballots, Wite-Out tape to be  
19 specific?

20 A. Thank you. Wite-Out tape, yes.

21 Q. And what is the purpose of you using Wite-Out  
22 tape on ballots?

23 A. There are a number of situations where we would  
24 use Wite-Out tape. One of those are when we -- when  
25 there is an ineligible voter casting -- let me step back  
26 for a second here.

27 In the county, there were approximately over  
28 200 -- I believe there's 204 different ballot types in

1 the June election. What that means is that there are  
2 many different types of ballots that voters vote on  
3 depending on where they live. For example, if a person  
4 lives in Carlsbad, they don't vote on the same contest  
5 as the person that lives in the City of San Diego.

6 So if a Carlsbad voter goes to the City of  
7 San Diego's polling place and votes a ballot there and  
8 votes, let's say, for mayor, then what we would do is we  
9 would redact -- Wite-Out tape that vote because that  
10 person -- that voter was ineligible to do so.

11 For this past presidential primary election, we  
12 had to do so as well because if a voter who was a  
13 specific political party tried to select another  
14 political party's ballot, then if they cast a vote for  
15 their presidential candidate, then we had to redact  
16 those votes off of the ballot.

17 The only category of voters that could  
18 potentially vote for a presidential candidate other  
19 than -- because they were not -- or they're not  
20 nonpartisan voters, and it's because of the political  
21 parties, the political parties were the ones that said  
22 who got to vote -- who of the nonpartisan voters gets to  
23 vote on their ballot and who doesn't get to vote on  
24 their ballot. So they allowed nonpartisan voters.

25 When I say "they," I'm talking about the  
26 Democratic Party, the American Independent Party as a  
27 well as the Libertarian Party to allow nonpartisan  
28 voters, if you will, cross over and vote their



1 presidential candidate.

2 Now, for the Democratic side, it's significant.  
3 And the reason why it was significant is because the  
4 nonpartisans were able to select the Democratic ballot  
5 and vote for the presidential contest, but the political  
6 party, the Democratic political party, prohibited  
7 nonpartisan voters to select and vote on their central  
8 committee candidates. And so we had to create another  
9 type of ballot called the nonpartisan Democratic ballot.

10 Q. So essentially you are correcting or redacting  
11 the ballot so that you can actually scan the ballot  
12 correctly?

13 A. That's correct.

14 Q. Ultimately?

15 A. That's correct. And let me just add one more  
16 to that is voter intent situations where we would  
17 redact -- use Wite-Out tape so that we know that a  
18 vote -- a voter is counted in our tabulation system.

19 Q. Do you have any written procedures about how  
20 your workers use Wite-Out tape?

21 A. In terms of procedures for Wite-Out tape, there  
22 may be situations in terms of categories of remaking,  
23 yes.

24 Q. No, I'm asking, do you have any written  
25 procedures of how your workers are to use Wite-Out tape?

26 A. No.

27 Q. And in your actual procedure that you follow,  
28 is there more than one person who witnesses the

1 application of Wite-Out tape?

2 A. There isn't. There is generally a training  
3 supervisors watch after, look after; and if there is any  
4 questions of one of the staff members, then they would  
5 ask one of the supervisors.

6 Q. Do you keep any records of what ballots were  
7 whited out or redacted?

8 A. No.

9 Q. Do you create any reports that demonstrate the  
10 numbers of ballots that you remade or redacted using  
11 Wite-Out tape?

12 A. The only reports that we would have are  
13 categories where when we were verifying the outside of  
14 the provisional envelope to determine whether or not  
15 that person was eligible to vote for that specific  
16 ballot those would be the reports that we would have.

17 Q. How many ballots in this last election cycle  
18 was Wite-Out tape utilized to change or redact the  
19 ballot?

20 A. I don't know that information.

21 Q. How are citizens able to be assured that it was  
22 applied and done correctly?

23 A. In terms of that is that we -- in terms of a  
24 remake situation, there are record -- well, how the  
25 public could find out is by looking at the ballot  
26 themselves.

27 Q. And you keep the redacted or remade ballots  
28 separately so that the public can inspect them and look

1 at them and make sure they are processed fairly and  
2 accurately?

3 A. We don't.

4 MR. GERACI: No further questions.

5 THE COURT: One moment, please.

6 Is it your intention to conduct a redirect at  
7 this time or do you intend to reserve your examination  
8 and enter your case in chief?

9 MR. BARRY: I intend to reserve, but I'd like  
10 to just rehabilitate on one issue in this matter.

11 THE COURT: All right. Give me one moment,  
12 please.

13 All right. Whenever you're ready.

14 BY MR. BARRY:

15 Q. Mr. Vu, there were questions relating to the  
16 actions of a couple election workers while you were the  
17 chief elections official in Cuyahoga. Do you recall  
18 that?

19 A. I do.

20 Q. And there were allegations that they had  
21 performed -- they had done something wrong, correct?

22 A. That's correct.

23 Q. And prior to the time that they took the action  
24 that allegedly occurred, were you aware of that?

25 A. I was not aware of it, no.

26 Q. And after -- and how long had you been the  
27 chief elections official for Cuyahoga County at the time  
28 that occurred?

1 A. Less than a year.

2 Q. And is it your understanding that that practice  
3 had been in place before you became chief elections  
4 official in Cuyahoga?

5 A. Can you repeat that question?

6 Q. Yeah. The practice that was followed by the  
7 elections worker that was found to be alleged to be  
8 improper, was that a practice that had been in place  
9 before you became the chief elections official?

10 A. Yes, yes. That practice, my understanding, was  
11 in place when they introduced the punch card system into  
12 the county.

13 Q. And the two election workers were prosecuted.  
14 Is that your understanding?

15 A. Yes.

16 Q. And do you know whether they were convicted?

17 A. They were convicted, but then it was  
18 overturned.

19 Q. Overturned on appeal?

20 A. That's correct.

21 Q. And were they re-prosecuted?

22 A. No, not that I'm aware of.

23 MR. BARRY: No further questions, your Honor.

24 I would, again, move to strike the testimony  
25 relating to the issue in Cuyahoga with respect to the  
26 election workers. It's not something he had any  
27 knowledge of, was a practice that had been in place  
28 before he was there and that, in fact, the two election

1 workers that were convicted had their convictions  
2 reversed and they weren't tried.

3 THE COURT: Do you have any recross with Mr. Vu  
4 at this time?

5 MR. GERACI: Just follow-up on the question he  
6 was asked.

7 THE COURT: Well, I'm going to hear argument in  
8 just a moment. But do you have any recross of Mr. Vu?

9 MR. GERACI: Oh, no.

10 THE COURT: All right. So subject to recall,  
11 Mr. Vu, you can step down.

12 THE WITNESS: Thanks. Thank you, your Honor.

13 THE COURT: Counsel, let me just note that  
14 though the language that you are using comes to you as  
15 easily as it does, please bear in mind the Court is  
16 playing catch up right now. I will catch up with you,  
17 but it's not flowing quite as easily as it may be for  
18 you.

19 So you've got a motion to strike some, if not  
20 all, of Mr. Vu's testimony on the controversy that  
21 occurred while he was in a position in a particular  
22 county in Ohio.

23 Let me go to plaintiffs' counsel. Your  
24 response?

25 MR. GERACI: Your Honor, it's simply -- it's  
26 simply relevant on his credibility. He was asked to  
27 resign after this investigation, and thus it involved  
28 employees handling recount and hand picking ballots for

1 the purposes of basically securing the hand tallying,  
2 which is identical to the duties and responsibilities  
3 that occur here in San Diego. Even though it was a  
4 recount election versus an audit 1 percent manual tally  
5 process that we have, it involves the same sort of  
6 conduct that we're concerned about.

7 THE COURT: Just give me a moment.

8 All right. The motion to strike is denied for  
9 the following information. I note that on the TRC  
10 report that the County has -- well, one or more of the  
11 defendants have identified Mr. Vu as both a percipient  
12 and an expert witness. At this point, I have no idea  
13 about the nature and scope of the testimony that will be  
14 elicited by Mr. Vu in his capacity as an expert.

15 I can easily imagine testimony being elicited  
16 that will establish his qualifications to serve as an  
17 expert witness. But his past experience, though, in  
18 dispute, may reflect upon his qualifications and  
19 ultimately go to the weight, if any, that a court  
20 assigns to Mr. Vu's testimony.

21 So the motion to strike will be denied for that  
22 reason.

23 All right. One moment.

24 Next witness, Plaintiff.

25 MR. GERACI: Plaintiffs call Raymond Lutz.

26 THE COURT: All right. Mr. Lutz, may I ask  
27 that you follow the direction of my deputy and my clerk,  
28 please.

1 THE WITNESS: Yes.

2 THE BAILIFF: Please stand and face the clerk.

3 THE CLERK: Please raise your right hand.

4 Do you solemnly state under penalty of perjury  
5 that the evidence you shall give in this matter shall be  
6 the truth, the whole truth, and nothing but the truth?

7 THE WITNESS: Yes, I do.

8 THE CLERK: Please take the stand.

9 Sir, please state your full name and spell your  
10 last name for the record.

11 THE WITNESS: Raymond Clark Lutz, L-u-t-z.

12 THE CLERK: Thank you.

13 THE COURT: Give me one moment here, Counsel.  
14 Whenever you're ready.

15 MR. GERACI: Thank you, your Honor.

16

17 DIRECT EXAMINATION

18 BY MR. GERACI:

19 Q. Good morning, Mr. Lutz.

20 A. Good morning.

21 Q. Are you a citizen and voter in the County of  
22 San Diego?

23 A. Yes, I am.

24 Q. Are you also the founder of an organization  
25 called Citizens Oversight Projects?

26 A. Yes, I am.

27 Q. What's Citizens Oversight Projects?

28 A. Citizens Oversight is a 501(c)(3) nonprofit

1 organization, nonpartisan. It's based in Delaware with  
2 offices in California. Its primary mission is to  
3 encourage civic engagement of citizens, and one of its  
4 projects is to encourage citizens to provide oversight  
5 of elections.

6 Q. When was it founded?

7 A. It was founded originally as an unincorporated  
8 association in about 2006, and then it was incorporated  
9 in 2011.

10 Q. So as part of its functions, you have been  
11 overseeing election processes here in San Diego County?

12 A. Yes, we started that project in about 2006 and  
13 did an extensive about a two-year project investigating  
14 San Diego processes, trying to understand how they did  
15 their work.

16 Q. What is your educational background?

17 A. I have a master's degree in electronics  
18 engineering with a minor in computer software, computer  
19 science, San Diego State University. I got my  
20 bachelor's degree in bachelor's of science in 1981 and I  
21 got my master's degree in 1984.

22 Q. And what is your occupational background?

23 A. I worked in various capacities both for the  
24 Naval Ocean Systems Center and the Navy sector as well  
25 as in the private sector. I worked in -- and with  
26 respect to this, a lot of document imaging companies,  
27 specifically in the printer, scanner, fax, copier type  
28 or product area. So I was aware of document imaging



1 technologies, document handling; and, therefore, when I  
2 became more politically inclined, I thought it would be  
3 a good fit for me to try to understand what was being  
4 done in the elections arena.

5 Q. Would you take a look at Exhibit 58. I believe  
6 that to be in Volume II of the black binder.

7 THE COURT: Fifty-eight, Counsel?

8 MR. GERACI: Fifty-eight.

9 THE WITNESS: Fifty-eight is in Volume III of  
10 mine.

11 BY MR. GERACI:

12 Q. Okay. Volume III.

13 A. Okay. I'm looking at that.

14 Q. Is that a true and correct copy of your CV?

15 A. Yes, it is.

16 Q. Does it correctly outline all of the  
17 experiences that you've had in your occupation, both  
18 with and without Citizens Oversight Projects?

19 A. For the most part, yes. There is many projects  
20 that we conducted that I did not cover in this document.  
21 I just tried to cover the high points.

22 Q. You were a candidate for U.S. Congress in 2010?

23 A. That's right.

24 Q. Did you run for office in any other election  
25 cycle?

26 A. Yes. I ran for state assembly district against  
27 Joel Anderson in the 77th District, East County  
28 San Diego.

1 Q. Are you -- do you know Mr. Vu?

2 A. Yes.

3 Q. Have you met him before?

4 A. Yes, I have.

5 Q. And when did you become interested in reviewing  
6 the election process in San Diego County by overseeing  
7 the election process that Mr. Vu conducts after  
8 elections?

9 A. Well, this first started when one of our  
10 projects, which was against Blackwater Worldwide in  
11 East County, they were setting up a mercenary-style  
12 training facility near the town of Potrero and many  
13 people were interested in that and I helped the  
14 community there at least understand that they might be  
15 able to recall the planning group that had voted to  
16 actually approved that project.

17 They went through the process of actually an  
18 unprecedented move, which was to have a special election  
19 to recall all of the voters there that had -- or the  
20 planning group members that had approved it, and then I  
21 actually went into the registrar of voters -- this is  
22 when Deborah Seiler was the registrar and Michael Vu was  
23 an assistant of some kind -- and they hand counted the  
24 ballots for that election.

25 And I was able to video record all of them and  
26 verify that they were all there, and then that led to my  
27 proposal for what I call the open canvass proposal where  
28 all the ballots were imaged.

1           And so at that point, I said, well, I want to  
2 see how things are done and see if this proposal would  
3 work, and then I started to really review and try to  
4 understand how they conducted these elections in  
5 San Diego.

6           Q.    Over the years of working with the San Diego  
7 County registrar, have you and Mr. Vu developed a  
8 working relationship?

9           A.    I think it's been pretty cooperative with our  
10 requests generally. We had some requests regarding  
11 getting a specific file that we needed to watch the  
12 manual tally process. What I found in my report that  
13 was published in 2010 was that it was very, very  
14 difficult to make sense of the manual tally because we  
15 didn't have the data file that was used to compare it  
16 with. All we had was the final results. And it turns  
17 out that the manual tally that they conduct is on a  
18 subset of the votes of the ballots. And so that subset  
19 we've gone to call a snapshot.

20           And at that time, it was explained to me that  
21 they conduct the tally on this snapshot or sometimes  
22 they call it the -- either the unofficial canvass or  
23 sometimes they call it the semi final canvass. There  
24 are many terms that are used. But it's the data file  
25 that basically represents all of the precincts and the  
26 results of each precinct what the count of votes are for  
27 that precinct.

28           We want that in advance of them selecting the

1 random precincts so that we have the data file for all  
2 of the precincts and what the results are broken down by  
3 precinct, by ballot type, and then and only then after  
4 we have that file in our hands, then they would choose  
5 the random precincts that they are going to be hand  
6 tallying such that we could then compare this file with  
7 the final result of the manual tally.

8 MR. GERACI: Your Honor, I would move to admit  
9 Exhibit 58.

10 THE COURT: Any objection?

11 MR. BARRY: No, your Honor.

12 THE COURT: One moment, please. All right.

13 (Exhibit 58 was received in evidence.)

14 BY MR. GERACI:

15 Q. In your role as citizens' advocate, when did  
16 you become aware that Mr. Vu's office was not conducting  
17 the 1 percent manual tally pursuant to the Election  
18 Code?

19 A. We didn't really understand that, that is, I  
20 and the other people that were helping me do this  
21 observation, didn't understand how the vote-by-mail  
22 ballots were actually being dealt with in the 1 percent  
23 manual tally. We were told that there was this first  
24 snapshot, which was the precincts and the first batches  
25 of vote-by-mail ballots, but we couldn't get any report  
26 of the batches, and we assumed that they were continuing  
27 to do all of them because that's what the law we  
28 understood said, that they were supposed to incorporate

1 all of the ballots within the set of ballots that they  
2 select from.

3           But we really couldn't understand that. And  
4 until this year, this election in June, we did go in  
5 with our video cameras and we watched them do the  
6 selection, and at that time I asked the people there,  
7 "How many are you selecting?" And they said, "Well,  
8 there's 730 batches and we are picking eight," that's  
9 1 percent rounded up, and that accounts for if you  
10 multiply it by the average size of the batch, which is  
11 400 ballots, you get 292,000 ballots in the set that  
12 they were going to manually select or choose from.

13           And we knew that on the web site they said they  
14 still have 285,000 ballots to go. That was published  
15 after election night.

16           So I asked them, are you going to select some  
17 more for the 292,000 -- or 285,000 ballots that are  
18 left?

19           And they said that is in our procedure.

20           We looked into their procedure document. The  
21 people who were there said, "We are following our  
22 procedure, and if you want to take up the issue, you  
23 have to talk to Michael Vu if you don't like our  
24 procedure."

25           And I said, "Well, let's look at the procedure.  
26 Where in your procedure document does it ever discuss  
27 batches?" Turns out it's not in there at all.

28           Q. I'm sensitive to the Court's wanting to learn

1 some of this nomenclature.

2 What's your understanding of what a batch is?

3 THE COURT: Counsel, that was tactfully put.

4 THE WITNESS: Well, a batch is by the  
5 definition in the Election Code is mixed precinct group  
6 of -- that is, let's go back a little bit more.

7 San Diego County has 1522 precincts. Those are  
8 geographically based areas. And generally people go  
9 down to their local store or, I guess, house or, you  
10 know, school perhaps, and that's their local precinct  
11 and they vote there. It's based on an area.

12 Usually when they vote, these precincts have  
13 anywhere from a few hundred to maybe five or 600 ballots  
14 at the most that they process at a precinct.

15 Batches, on the other hand, are mixed  
16 precincts. They could be of any precinct. I understand  
17 that in San Diego, however, they have a sorting machine.  
18 And as these vote-by-mail ballots come in, they can sort  
19 them -- they could sort them down to the precinct, but  
20 they choose to sort them down to the City Council  
21 District. And I understand from our talking with  
22 Charley Wallis, it's 32 areas.

23 So within those 32 areas where they have it  
24 sorted down, they have these batches. And within a  
25 batch, there are a number of -- there can be precincts  
26 from anywhere within the area that we are talking about.

27 The Election Code says that a batch has to have  
28 a report so that you can check what's in the batch. So

1 when you're manually tallying a batch, you need to have  
2 a computer report on one side and the people tallying it  
3 by hand on the other side, keep them apart, and then  
4 have the manual tally people figure out what the ballots  
5 actually say and compare it with the computer report.

6 Same with precincts. They do the same thing.  
7 They have all the ballots over here, the computer report  
8 over there, people manual tallying, and you see if it  
9 matches the computer report. You don't want the people  
10 to know in advance necessarily exactly what the report  
11 says. They might try to make it -- get there, you know,  
12 without actually tallying perhaps. But, you know, they  
13 are honest people.

14 Now, the batches, according to Election Code,  
15 has to have a report. So when each time I've gone up to  
16 them and said, registrar of voters, Michael Vu, I would  
17 like to get this snapshot file, a report of all the  
18 precincts that you might choose ahead of time and all  
19 the batches that you might choose ahead of time, I want  
20 that computer report in my hands.

21 They've never been able to produce the batch  
22 file report. They still have not done it.

23 So you ask me has he been cooperative, pretty  
24 well, except I have never got a batch report.

25 And so we were in that meeting asking for the  
26 additional batches that we anticipated that they would  
27 choose to fill out all of the ballots that did come in  
28 for vote-by-mail, and I asked -- since they said, you'll

1 have to take this up with Michael Vu, I said, fine.  
2 Michael Vu, it looks like you are not selecting enough,  
3 you are only picking eight, it looks like you should  
4 pick another six or eight more, and he said, no, I'm not  
5 going to do it, respectfully.

6 BY MR. GERACI:

7 Q. So you're referring to a meeting. Was this the  
8 meeting where -- what was this meeting?

9 A. Okay. The meeting I'm talking about, yeah. So  
10 they have a meeting, which is a public process of  
11 choosing the random precincts and/or batches. This  
12 occurred on June 8th at 3:00 p.m.

13 Q. In this last election cycle?

14 A. In the last election.

15 Q. And you attended that meeting?

16 A. We attended, we video recorded it and we have  
17 the transcript in the pile of evidence that we have here  
18 of a portion of the meeting. We didn't do every -- what  
19 they do is they -- in order to choose randomly, they  
20 take sets of ping-pong balls and they have ten ping-pong  
21 balls in the units bin and ten in the tens and ten in  
22 the hundreds, and then just two in the thousands.

23 And then they choose, have somebody pick out  
24 balls from each one to get to 16 different numbers that  
25 are chosen randomly somewhere within those 1522  
26 precincts, and then they went on to choose eight within  
27 the 730 batches. At that time, they said that they were  
28 processing the vote-by-mail ballots by batch.



1           MR. BARRY: Your Honor, I'm going to object  
2 with respect to what supposedly they said.

3           THE COURT: On what basis?

4           MR. BARRY: Hearsay.

5           THE COURT: The objection is sustained.

6           One moment, please.

7           Okay. Continue on.

8 BY MR. GERACI:

9           Q. So while you were at this meeting to determine  
10 the random selection of the precincts and the random  
11 selection of the batches of vote-by-mail ballots, did  
12 you discover that the registrar was not including all of  
13 the vote-by-mail ballots?

14          A. Yes.

15          Q. And did you raise that objection or concern  
16 with the people in attendance at the meeting?

17          A. Yes, we did.

18          Q. Did they instruct you to speak with Mr. Vu  
19 about that procedural issue?

20          A. Yes.

21          Q. And it was that -- they responded to you that  
22 he would not include additional batches to account for  
23 the vote-by-mail ballots that were excluded from the  
24 batching process and the 1 percent manual tally?

25          A. Well, I sent him an e-mail. I think it's  
26 represented here in one of the --

27           MR. BARRY: Objection. Nonresponsive to the  
28 question. Calls for a yes-or-no answer.

1 THE COURT: The question is sustained.

2 THE WITNESS: What was the question again?

3 BY MR. GERACI:

4 Q. Did you object?

5 A. Yes.

6 Q. And what mode did you object? You sent them an  
7 e-mail?

8 A. I sent them an e-mail.

9 Q. Okay. And in your e-mail, what were you asking  
10 Mr. Vu to do?

11 A. In the e-mail, from my memory, I remember  
12 saying that it looked like they needed to choose another  
13 eight batch numbers to account for the remaining 285,000  
14 ballots that were represented on their web site as being  
15 still uncounted.

16 Q. Could you look at Exhibits 12, 13 and 14, which  
17 are e-mail -- which basically is an e-mail thread  
18 between June 10th, 2016 and June 13th, 2016 between you  
19 and Mr. Vu; is that correct?

20 A. Yes, that is.

21 Q. Is it Exhibit 13 that raise -- you raise the  
22 objection concerning the incomplete sample of  
23 vote-by-mail ballots for batching?

24 A. Yes, in the first -- in the original message  
25 portion of that document.

26 Q. And did -- is it Exhibit 14 in which Mr. Vu  
27 responds to your objection?

28 A. I guess so. That's -- actually, it looks

1 identical to me, but it's highlighted that you're  
2 referring to, I guess, the lower portion of the page in  
3 13; and then 14, it's highlighted that a separate  
4 portion of the page. Is that how I should look at that?

5 Q. As I recall, Exhibit 13 is showing the  
6 June 10th, 2016 e-mail as part of the thread and  
7 Exhibit 14 is showing June 13 response as part of that  
8 same thread.

9 A. Okay. Yes, I see that.

10 MR. GERACI: Okay. Move to admit Exhibits 12,  
11 13 and 14.

12 THE COURT: Any objection?

13 MR. BARRY: No, your Honor.

14 THE COURT: One moment, please.

15 Exhibits 12, 13 and 14 are admitted.

16 (Exhibits 12, 13 and 14 were received in evidence.)

17 BY MR. GERACI:

18 Q. And Mr. Lutz, would you look at Exhibits 2 and  
19 3. Well, let's look at them separately.

20 Look at Exhibit 2.

21 A. Yes.

22 Q. Is that actually a photograph of the document  
23 of the list of precincts drawn for the 1 percent manual  
24 tally?

25 MR. BARRY: Your Honor, counsel is leading the  
26 witness pretty substantially, like what is that  
27 document.

28 THE COURT: The objection is sustained.

1 BY MR. GERACI:

2 Q. What is Exhibit 2?

3 A. Exhibit 2 is a photograph -- basically a  
4 photocopy of a photograph that we took of the actual  
5 document that was provided by the registrar of voters  
6 listing the selected sequence numbers, which is the  
7 manner in which they select the precincts and then the  
8 number which they call a consolidation, which is the  
9 precinct number, but some of them have been combined.  
10 In fact, quite a few of them have been combined into one  
11 consolidation.

12 So this six-digit number is the precinct number  
13 and the sequence number ranges from one to 1522 with no  
14 gaps, so they can choose ping-pong balls and pick those  
15 sequence numbers and then they refer it over to a  
16 precinct number. That's what that document is.

17 BY MR. GERACI:

18 Q. The 1522 represents the total number of  
19 precincts in San Diego County?

20 A. Yes.

21 Q. And what is Exhibit 3?

22 A. Exhibit 3 is the same type of a document that  
23 is actually a photograph that we made a photocopy of  
24 which was their document showing the batches that they  
25 chose. They chose eight batches. There is a sequence  
26 number, which is -- they assigned batches and they're  
27 sequential so there shouldn't be any gaps.

28 And they chose originally these eight batches,

1 and then there was a communication in the e-mail that we  
2 just looked at where they said that the one of the  
3 batches, 718, is not an existing mail batch, and so then  
4 they propose to redraw a different batch.

5 Q. At some point in that process did you learn  
6 that the registrar was not going to proceed with the  
7 1 percent manual tally of batching vote-by-mail ballots?

8 A. Not within the dates of those e-mails. Those  
9 e-mails and the dates that you're referring to so far,  
10 we were under the impression that they were proceeding  
11 with batches and that's why I had asked them for the  
12 data file, which was the batch-oriented file, snapshot  
13 file, which would be batch by batch with totals. I  
14 wanted to get that file even though from our oversight  
15 protocol we need to have that file first before they do  
16 the draw.

17 I wasn't able to get it first, so we didn't get  
18 cooperation from Mr. Vu with regard to that request, and  
19 I never have seen the batch file even though we asked  
20 for it throughout this discovery process. There doesn't  
21 seem to be one.

22 Q. So you never received that?

23 A. We never received the batch mode file and it  
24 doesn't seem like they can even make one.

25 Q. When did you learn that Mr. Vu's office was  
26 going to basically abandon their 1 percent manual tally  
27 of vote-by-mail ballots by batch and instead do the  
28 1 percent manual tally of vote-by-mail ballots by

1 precinct?

2 A. I'm trying to think of exactly when it was.

3 You know, I can't think.

4 Q. Approximately when was it?

5 A. It was a couple weeks down the road. I believe  
6 they actually -- from what I've been able to ascertain,  
7 they actually did start tallying the batches. It would  
8 be a question maybe we can ask them if they did. I'm  
9 not sure if they did, but I believe that they had time  
10 to tally them to some extent and maybe wasted a whole  
11 lot of time.

12 MR. BARRY: Your Honor, objection. The  
13 question was --

14 THE COURT: What's the objection?

15 MR. BARRY: The objection is it's nonresponsive  
16 to the question. The question called for are you aware  
17 of when the change --

18 THE COURT: The objection is sustained.

19 BY MR. GERACI:

20 Q. Was it sometime in June?

21 A. Yes.

22 Q. And for clarity, that's June of 2016?

23 A. Yes.

24 Q. Upon learning that Mr. Vu was not going to  
25 conduct the 1 percent manual tally of all the ballots  
26 cast both at the precinct, vote-by-mail and provisional  
27 ballots, did you bring this lawsuit?

28 A. Yes, I did.

1 Q. Were you ever aware if Mr. Vu's office  
2 presented or posted or published a modified public  
3 notice that he was going to be conducting the 1 percent  
4 manual tally in a different way than he began?

5 A. No.

6 Q. Did you question his office about that?

7 A. We attempted to get as much information as we  
8 could about what they were doing.

9 MR. BARRY: Your Honor, again, it's  
10 nonresponsive to the question. It calls for a yes or  
11 no.

12 THE COURT: It's been sustained.  
13 One moment, Counselor.

14 Counsel, it's nearly 12:00 o'clock noon. We  
15 are going to stop at this time. We are going to be in  
16 recess until 1:30.

17 Let me ask everybody to return by 1:20 so if  
18 there's some additional issues we need to address we can  
19 do so before we resume with the examination of Mr. Lutz.

20 So we'll be in recess now until approximately  
21 1:20.

22 Feel free to step down.

23 MS. KARNAVAS: Your Honor, if I may, would we  
24 be able to address the nonsuit motion after lunch?

25 THE COURT: Let me ask plaintiffs' counsel.  
26 Will you be prepared to address the motion at that time?

27 MR. GERACI: I haven't read the papers yet so  
28 it's hard for me to know exactly what the grounds are.

1 THE COURT: All right. Why don't we do this.  
2 If not before we resume at 1:30, we'll do so before the  
3 end of today.

4 MS. KARNAVAS: Okay. Thank you.

5 THE COURT: Either way, plaintiff has his work  
6 cut out for him, meaning you have to do some reading  
7 between now and then, as does the Court.

8 So we'll be in recess until then.

9 (Lunch recess taken.)

10 THE COURT: Okay. Counsel, thank you for  
11 returning so promptly. It doesn't always happen that  
12 way, I can assure you.

13 All right. Before we resume with the  
14 presentation of the evidence, let me go to plaintiffs'  
15 side. Did you have a chance to review the defendants'  
16 motion for judgment of the nonsuit on behalf of  
17 defendant Helen Robbins-Meyer?

18 MR. GERACI: I did look at it, your Honor.

19 THE COURT: Your response?

20 MR. GERACI: Reviewed is probably the correct  
21 word.

22 Essentially, you know, they're objecting to  
23 continuing the case against her because she's not  
24 involved with day-to-day operations and the procedures  
25 at the registrar's office. She is the chief  
26 administrative officer for the County and is responsible  
27 for all of the administration of the County, which, of  
28 course, would include the registrar's office.



1           Insofar as there is the declaratory relief  
2 being requested that will provide enforceable order on  
3 the County of San Diego, it would be the chief  
4 administrative officer that implements those changes.

5           So the reason she is in the lawsuit is not  
6 because she is the day-to-day operations person at the  
7 registrar. We realize that's Mr. Vu's responsibility  
8 and role. But she is basically the person for the  
9 County that reports to the supervisors, the County  
10 supervisors who are the policy makers. So these things  
11 have to work up a chain of command and she is the top of  
12 the chain.

13           THE COURT: Your response?

14           MS. KARNAVAS: Where is the foundation for any  
15 of that argument? Mr. Vu was just on the stand. Did  
16 they ask him one question about who he reports to or  
17 what Helen's role might be if a writ of mandate were  
18 issued?

19           No, they didn't, because she has no involvement  
20 in this at all. Did you hear any testimony today that  
21 indicated that Helen Robbins-Meyer was going to be the  
22 one that is implementing policy charges over at the  
23 registrar's office? What I heard today is Michael Vu  
24 talking about how that's in his ambit of responsibility.

25           The fact of the matter is there is not one  
26 allegation in that complaint that has anything to do  
27 with Helen Robbins-Meyer. There is absolutely no  
28 evidence that has been presented. He is off the stand

1 now as far as their case goes. There has been no  
2 foundation for anything that counsel just argued and  
3 there is no basis to keep her in as a defendant.

4 THE COURT: Well, let's step back. The motion  
5 for nonsuit was presented based upon representations  
6 made by counsel in the opening statement. It's not  
7 based upon the evidence. And there was no mention of  
8 Ms. Robbins-Meyer during their opening statement,  
9 Mr. Geraci.

10 Let me go to the defense.

11 If -- and it's a huge if -- but if the Court  
12 were to agree with the plaintiff -- let me rephrase it.  
13 If the Court were to agree with the defendant and  
14 dismiss Ms. Robbins-Meyer at this point but ultimately  
15 agree in whole or in part with plaintiffs' theory, would  
16 the absence of Ms. Robbins-Meyer as a defendant create a  
17 bases or reason for the County not to implement the  
18 relief the Court directs?

19 MS. KARNAVAS: No.

20 THE COURT: I was hopeful you were going to say  
21 something like that.

22 Now, let me go back to plaintiffs' counsel. It  
23 seems to me that if Ms. Robbins-Meyer were as integral  
24 as I would expect somebody who is a named defendant to  
25 be, you would have said something about her during your  
26 opening. I would have expected you to inquire in some  
27 additional depth with Mr. Vu about her.

28 I'm just not seeing any reason, especially now

1 given defense counsel's representation that you don't  
2 need her to proceed with the relief that you're seeking,  
3 so why -- you're going to have to give me more for her  
4 to continue being a defendant in this case.

5 MR. GERACI: Well, she is a named party and  
6 she's going to be testifying as a witness, and we  
7 haven't heard from her yet. You know, I realize it's a  
8 nonsuit motion and you're basing it on my opening  
9 statement, but the full scope of the opening statement  
10 was that the procedures of the registrar's office are  
11 not complying with the law.

12 If ultimately it's Ms. Robbins-Meyer's  
13 responsibility to implement those changes and/or through  
14 the board of supervisors to implement changes by way of  
15 change of policy and if Ms. Robbins-Meyer is also the  
16 person that is evaluating and reviewing Mr. Vu's  
17 performance, then she would be the appropriate person to  
18 whom the enforcement action would be directed, so...

19 MS. KARNAVAS: If I may, your Honor.

20 THE COURT: Well --

21 MR. GERACI: To respond to the Court's inquiry,  
22 my opening statement broadly was against County and  
23 County officials at large that are responsible for the  
24 registrar's office. If the representation is that she  
25 has no involvement in the registrar's policy or  
26 procedures or changes, which is what I just heard,  
27 changes of procedure --

28 THE COURT: No, I didn't hear that. What I

1 heard is that she is not a necessary party for the  
2 County to implement with the relief, if any, that the  
3 Court agrees with you and directs them to do so, she is  
4 not a necessary party.

5           So, I mean, if I were to accept your argument  
6 when you make reference to Ms. Robbins-Meyer and/or the  
7 Board of Supervisors, there is a whole bunch of people  
8 that could have been named as defendants who aren't  
9 named. So at some point in time, we get to the end of  
10 the line and it seems to me that the end of the line in  
11 this case is Mr. Vu. He seems to be enough for you to  
12 proceed without being prejudiced.

13           MR. GERACI: Certainly the County is named as a  
14 party as well.

15           THE COURT: But we are not focusing on the  
16 County. It's only Ms. Robbins-Meyer. I'm not trying to  
17 beat you up arbitrarily. If there is a reason, I would  
18 give you leave to reopen your opening statement. That's  
19 what the motion is directed to. But you're not giving  
20 me right now a reason for me to give you that latitude.

21           MR. GERACI: And I -- I hear what you're  
22 saying, your Honor. My only comment about that is she's  
23 named as a defendant for the sole purpose that she's the  
24 chief administrative officer and that's her function.

25           THE COURT: All right. Thank you.

26           MS. KARNAVAS: Your Honor, if I may, just one  
27 more thing.

28           Just so you know, this isn't the first time

1 this issue has come up. So in conjunction with the TRC,  
2 I actually raised the issue of dismissal of  
3 Robbins-Meyer when we were preparing that document. And  
4 what counsel told me is that he agreed and he understood  
5 that she was not a necessary party. But, in short, he  
6 was having client control issues. So Mr. Lutz --

7 THE COURT: Well, Counsel, you know --

8 MR. GERACI: Objection, your Honor.

9 THE COURT: -- this might be one of those  
10 occasions where you're ahead and you don't need to say  
11 quite as much as you need to right now.

12 MS. KARNAVAS: That may be.

13 THE COURT: This may be a good time just to  
14 submit.

15 MS. KARNAVAS: Thank you.

16 THE COURT: The Court grants the motion and in  
17 part -- in part based upon defense counsel's  
18 representation that she is not a necessary party to this  
19 litigation, Ms. Robbins-Meyer will be dismissed as an  
20 individual defendant.

21 All right. Pursuant to the motion for nonsuit  
22 after plaintiffs' counsel opening statement.

23 Now, I think that there is a companion or  
24 related motion that has -- was mentioned earlier this  
25 morning that may be connected or remerge out of the  
26 Court's ruling. As I understand it, plaintiff has  
27 requested and maybe served Ms. Robbins-Meyer with a  
28 subpoena directing that she appear.

1           MR. BARRY: No, your Honor. The only notice  
2 we've received is the notice of adding her name to the  
3 witness list as of 10:40 last night. So there's been no  
4 subpoena. There's been no notice to appear. That would  
5 have had to have been done under Section 1987 of the  
6 Code of Civil Procedure ten days in advance of trial.

7           THE COURT: I got you. I got you. So in the  
8 absence of the defense being served, much less  
9 Ms. Robbins-Meyer being served with anything compelling  
10 her attendance, how are you -- even if you -- I mean,  
11 how do you get past that threshold issue?

12           MR. GERACI: Of her being here as a witness?

13           THE COURT: Right.

14           MR. GERACI: It was my understanding that the  
15 County was cooperating with producing the parties and  
16 witnesses and that we wouldn't need to do subpoenas or  
17 notices to appear. We've been having that kind of  
18 relationship as far as getting this matter heard and  
19 tried.

20           MR. BARRY: Your Honor, if I may just speak to  
21 that for a brief --

22           MR. GERACI: The Court can be mindful that this  
23 was an expedited proceeding and almost all of the usual  
24 time constraints of the Code of Civil Procedure have  
25 been relaxed and modified for the purposes of bringing  
26 this to trial in less than a month.

27           THE COURT: Well, that be the case,  
28 notwithstanding that be the case, there are certain

1 rules that both sides are required to follow,  
2 particularly if there happens to be an objection. And  
3 there is an objection.

4 Without there being either a request that  
5 Ms. Robbins-Meyer be produced pursuant to 1987 notice or  
6 subpoena served upon her, she is under no obligation to  
7 appear. Now, for the moment let's assume that plaintiff  
8 commissioned a process server to serve Ms. Robbins-Meyer  
9 tonight at home or some other location. I understand,  
10 though, the defense is still objecting --

11 MR. BARRY: Yes, your Honor.

12 THE COURT: -- that she be required to appear  
13 and testify as a witness.

14 So let me go back to plaintiff. We have now  
15 crossed for the moment the threshold issue of you having  
16 served her with some piece of paper requiring her to  
17 appear unless excused from doing so pursuant to a court  
18 order. I understand they're making an oral motion to  
19 quash --

20 MR. BARRY: Yes, your Honor.

21 THE COURT: -- something that's not yet been  
22 served. So it's amazing how we work our way through  
23 these things rationally, isn't it?

24 MR. GERACI: Now that's expedited.

25 THE COURT: Yeah, expedited. Now -- but,  
26 Counsel, why do you need her?

27 MR. GERACI: Your Honor, I think we can -- the  
28 Court's ruled on the nonsuit motion. I think we can

1 table it for now.

2 THE COURT: Why do you need her to testify?  
3 Now, that may be a different analysis. I'm not trying  
4 to short-circuit your case.

5 MR. GERACI: Given -- given the representation  
6 in court of that that be -- that the only reason would  
7 be enforcement, the enforcement mechanism of judgment.  
8 If indeed they have made a statement on the record that  
9 she is not a necessary party for the purposes of  
10 enforcement we should recover and gain the relief that  
11 we've prayed for, then she is not needed as a witness.

12 THE COURT: All right. One moment.

13 All right. So given the totality of what's  
14 before me, Ms. Robbins-Meyer will not be appearing to  
15 testify at the trial in this matter.

16 All right. Now, before we -- is there anything  
17 else from plaintiffs' side? Mr. Geraci, anything else  
18 from plaintiffs' side?

19 MR. GERACI: Nothing, your Honor.

20 THE COURT: How about the defense?

21 MR. BARRY: No, your Honor.

22 THE COURT: All right. Is it plaintiffs'  
23 intention to resume with Mr. Lutz?

24 MR. GERACI: Yes.

25 THE COURT: All right, Mr. Lutz. May I ask you  
26 to follow the directions of the deputy and retake the  
27 stand, please.

28 THE BAILIFF: Go ahead.



1 THE COURT: You understand you are still under  
2 oath, sir?

3 THE WITNESS: Yes, I am. Thank you.

4 THE COURT: Thank you very much.

5 All right. Whenever you are ready, Counsel.

6 MR. BARRY: Your Honor, if I could just raise  
7 one point.

8 THE COURT: Sure.

9 MR. BARRY: During Mr. Lutz's testimony, he  
10 often refers to "we." And I'm not sure who the royal  
11 "we" is perhaps. And so it's difficult for me to tell  
12 whether he's giving testimony based on hearsay or  
13 something based on his personal knowledge.

14 So to the extent that occurs, I would be making  
15 hearsay objections unless we can arrive at some  
16 foundation for his knowledge.

17 MR. GERACI: I can ask him, your Honor. I  
18 believe he's referring to the Citizens Oversight Project  
19 as he --

20 THE COURT: All right. You all may be hearing  
21 something that I was not necessarily hearing. But,  
22 again, my usual admonition is let's take up each  
23 question -- or each objection on a question-by-question  
24 basis and the Court will rule upon the information  
25 before it at that time. So thank you both for your  
26 contributions and now let's move ahead.

27 Counsel.

28 MR. GERACI: Thank you, your Honor.

1 BY MR. GERACI:

2 Q. Mr. Lutz, in your history as a citizens  
3 advocate, have you had the opportunity to study and  
4 review the processes of the registrar at San Diego  
5 County registrar's office in prior elections?

6 A. Yes.

7 Q. Specifically in 2008?

8 A. Yes, 2008 to 2010.

9 Q. What did you do in 2008?

10 A. I and some other volunteers that are friends of  
11 mine and interested in election integrity took it upon  
12 ourselves to try to understand the elections process  
13 being used at the San Diego County registrar of voters  
14 in a fairly extensive process.

15 This process included going in and taking a  
16 5 percent sample of precincts, which were 85 precincts,  
17 and we accessed the scanner tapes from the individual  
18 scanners that they use at the central office, so when  
19 the ballots come in, they run them -- they first do a  
20 zero, zero it out and a little tape that comes out that  
21 says zero, and then they run the ballots through for the  
22 precinct; and at the end, they get a total, a tape which  
23 has all the totals on it and that is actually put into a  
24 little envelope.

25 And so we went in to this area where there were  
26 many of these envelopes and we pulled out 85 of them and  
27 scanned them using a scanner, putting them into our web  
28 site, and then volunteers that are associated with

1 Citizens Oversight went into page by page, looked over  
2 the scanners and entered the values into our web site.

3 As a result, we were able to get the total  
4 number of ballots that were scanned by those scanners so  
5 that we could compare it with the central tabulator  
6 numbers.

7 And then we also, as a second round, went into  
8 all of the sign-in rosters that they have at each  
9 precinct. They have a set of paperwork that the voters  
10 come in and sign their name when they are voting, and we  
11 are not able to copy those because of the signatures of  
12 the voters so what we did is we -- we being the  
13 volunteers from Citizens Oversight -- we would go in and  
14 review those 85 sets of paperwork and put in the values  
15 into our spreadsheet so we can get an idea of how many  
16 people signed at the precinct and then how many ballots  
17 were scanned and then how many ballots were actually put  
18 into the central tabulator and then how many ballots  
19 were eventually tallied in the manual tally process. We  
20 are trying to follow the process all the way through.

21 Q. That would include the 1 percent manual tally  
22 process as you just said?

23 A. Yeah, we did a report on what our -- we have  
24 a -- we did develop a report and part of that report was  
25 on the manual tally process itself.

26 Q. Let me draw your attention to Exhibit 62, which  
27 is the third volume.

28 A. Okay.

1 Q. This is a 79-page report. Is this the  
2 review -- is this the summary of the review that you  
3 performed back in 2008?

4 A. Yes, I actually wrote this.

5 Q. Did you present it to the San Diego County  
6 registrar of voters?

7 A. Yes, I did.

8 Q. And the section concerning the 1 percent manual  
9 tallies within at page 60?

10 A. Yes, these were our observations of the  
11 1 percent manual tally that I then drafted into this  
12 report.

13 Q. What were your observations in 2008?

14 A. We summarized the procedure and we mentioned  
15 that we thought the sample size was insufficient to  
16 verify the vote. We thought 1 percent wasn't enough.

17 MR. BARRY: Your Honor --

18 THE WITNESS: We thought that the --

19 MR. BARRY: Your Honor --

20 THE COURT: Yes?

21 MR. BARRY: Relevance. We've objected to this  
22 document as hearsay. Lacks foundation. Again, if he  
23 has an independent recollection as to what the report  
24 says, he can probably testify to that. But he's  
25 actually just reading the report.

26 THE WITNESS: I can do it by memory.

27 MR. GERACI: His prior experience is the  
28 foundation for his testimony as to what happened in this

1 election.

2 THE COURT: One minute.

3 Mr. Lutz, I'm going to ask if you can step out  
4 for just a moment. We're going to have an argument -- I  
5 mean hear from counsel on this.

6 All right. Let's take the objections one at a  
7 time. The first one, which is foundation.

8 MR. BARRY: Correct, your Honor.

9 THE COURT: And the aspect of foundation that  
10 you want me to focus on is?

11 MR. BARRY: Well, I guess actually, your Honor,  
12 the foundational question is it's not something you can  
13 take judicial notice of. It's apparently something he  
14 prepared outside of the presence of the Court so the  
15 objection is hearsay. It's -- I suppose you can  
16 authenticate it as to what the actual report is.

17 But if he's going to testify, he should be  
18 testifying as to his own personal knowledge. And if he  
19 can't, I suppose he can refresh his recollection from  
20 his report.

21 And as my co-counsel points out, it's from the  
22 2008 November election so it's really fairly remote in  
23 time.

24 THE COURT: Why is a report prepared by  
25 Mr. Lutz involving the 2008 election not hearsay?

26 MR. GERACI: Well, the objection is premature.  
27 I haven't even offered the report as evidence.

28 THE COURT: Well, but to the extent that he's

1 referring to the -- or putting the contents of the  
2 report before the Court, he is testifying hearsay.

3 MR. GERACI: He's designated as an expert  
4 witness. The study and the review and the preparation  
5 of the report is foundational for his testimony as to  
6 what's occurring now in 2016. This is a cumulative  
7 project that has resulted in this lawsuit; and, you  
8 know, his experience in what he observed and reviewed in  
9 2008 leads us to today. And so he is just simply going  
10 to explain that.

11 THE COURT: Now, I'm looking at the TRC report  
12 and I see no designation of Mr. Lutz as an expert. It  
13 says party.

14 MR. GERACI: In the TRC, he's on the  
15 designation of experts that we exchanged last week,  
16 along with his CV and the scope of his testimony.

17 THE COURT: Well, at least to that limit.  
18 Whether you agree he is or is not an expert, whether  
19 he's qualified to be an expert, do you agree you've got  
20 a piece of paper that says he's been designated as an  
21 expert?

22 MR. BARRY: We do. We did on Thursday  
23 afternoon.

24 Again, if they're going to attempt to qualify  
25 him as an expert, we should be able to ask him questions  
26 regarding his expertise.

27 THE COURT: I'm not going to put any -- well,  
28 there is nothing about our current discussion that

1 should be perceived as me being -- placing any limits on  
2 cross-examination. The Court in one side or the other  
3 establishing the qualifications or the foundation for an  
4 expert to testify routinely hears an expert about what  
5 he or she has done in the subject area. It's rare if  
6 there is an objection that the contents of the report  
7 prepared by the same expert that was presented to the  
8 trier of fact.

9 MR. GERACI: I can simply ask him about the  
10 review, your Honor, without referring to the content of  
11 the document.

12 THE COURT: So the objections to Mr. Lutz  
13 testified to the contents of the report much less the  
14 report itself being admitted are sustained on hearsay.  
15 I'm not saying right now, particularly given the  
16 clarification that he's been designated an expert, that  
17 the work he has done involving this issue is not  
18 relevant. We'll cross that bridge as we proceed  
19 further.

20 All right. So, Madam Deputy, can I ask you  
21 retrieve Mr. Lutz.

22 THE BAILIFF: Yes, your Honor.

23 MR. GERACI: Thank you.

24 THE COURT: All right. Welcome back, Mr. Lutz.

25 THE WITNESS: Thank you.

26 THE COURT: All right. Please continue,  
27 Counsel.

28 ///

1 BY MR. GERACI:

2 Q. So, Mr. Lutz, please describe the review you  
3 did in 2008 concerning the 1 percent manual tally.

4 A. Well, at that point we were just getting to  
5 know what they were doing and we were trying to make  
6 some observations about how we could more effectively  
7 be -- provide oversight as to the public trying to  
8 observe and provide -- do our job as the public to  
9 provide oversight to their process.

10 Q. What observations did you make in 2008 about  
11 the 1 percent manual tally that was conducted?

12 A. Well, that's when we basically learned that we  
13 needed this snapshot file, that it was very difficult to  
14 compare their results of the 1 percent manual tally to  
15 anything because we didn't have the file, and we had to  
16 have that particular file that compared with the result  
17 that they were going to get and preferably get the file  
18 before they did their random draw so they didn't know up  
19 front which precincts were going to be included.

20 Q. And did that objection and concern recur in  
21 2016?

22 A. Well, we then tried to get the file. We asked  
23 them for the file in advance. And generally, as I said,  
24 Mr. Vu was cooperative with us, gave us the file to the  
25 extent that we could get it, which turned out it was  
26 only part of what we needed, but it was -- we'll take  
27 part of -- we'll take the first half, you know, and try  
28 to do our best with that and then work from there. That



1 was our point of view.

2 Q. Did you conduct any further reviews in 2014?

3 A. We did. We -- actually at that point, we  
4 decided to send a similar request to all counties in  
5 California and get the snapshot file. Because it was so  
6 critical for review of their manual tally process, we  
7 figured it was going to be the same in all counties. It  
8 turns out some counties are so small.

9 MR. BARRY: Your Honor, again, he is referring  
10 to "we." And to the extent it's within personal  
11 knowledge, if he says "I did this, I did that," I'm fine  
12 with that. But "we," I don't know who that person is,  
13 what their knowledge was, how it is he came upon the  
14 knowledge that someone else might have done something.

15 THE COURT: All right.

16 MR. GERACI: Mr. --

17 THE COURT: Well, one moment, Counsel. I  
18 understand your concern, but from the Court's  
19 perspective, what I'm hearing Mr. Lutz present this  
20 testimony, I'm attributing it solely to him at this  
21 point.

22 MR. BARRY: That's fine, your Honor. I think  
23 that would be --

24 THE COURT: Unless and until it's clarified  
25 otherwise, that's how I'm going to treat his testimony.

26 MR. BARRY: That's fine, your Honor.

27 THE COURT: All right. Just give me one  
28 moment.

1 All right, Counsel. Please continue.

2 BY MR. GERACI:

3 Q. So before that clarification, when you refer to  
4 "we," to whom are you referring?

5 A. Well, Citizens Oversight is an organization.  
6 It is -- it attempts to represents its members. I am  
7 the national coordinator for Citizens Oversight. These  
8 actions were performed under the umbrella of Citizens  
9 Oversight. They were performed on Citizens Oversight  
10 letterhead. They were performed within my capacity at  
11 Citizens Oversight, with -- and the actions that were  
12 taken were under -- with consultation with other members  
13 and people that I consult with about what we should --  
14 could do.

15 And so when decisions are made, they are not  
16 necessarily just my decisions, they are decisions of the  
17 collective group. Some of them might be my decisions  
18 because of short of time.

19 And in these cases, I did sign the letters, I  
20 did draft the letters, and I gathered the information  
21 for the other counties and I signed them all. And so I  
22 did sign them, I sent them to all the counties, and I  
23 attempted to follow-up as best I could with them.

24 Since then, we had many volunteers step forward  
25 that are helping us in all these counties because it's  
26 too much work to provide the oversight of the registrars  
27 in each and every county. So it's very much a  
28 collective effort. I do what I can as a person. I'm

1 just a volunteer here, you know. This is not something  
2 that I get paid for, so...

3 MR. BARRY: Your Honor, I think we are going  
4 way beyond the scope of the question.

5 THE COURT: Counsel, what's your objection?

6 MR. BARRY: Objection. No question pending.

7 THE COURT: I'm going to interpret that to be  
8 nonresponsive and sustain the objection.

9 Next question.

10 BY MR. GERACI:

11 Q. So back in 2014, what was the additional study  
12 you conducted?

13 A. In 2014 we sent a letter to San Diego County  
14 registrar of voters and the other counties in the state.  
15 At that time we did it to all the counties. By "we,"  
16 again, Ray Lutz was the person who signed it but with  
17 consultation of other members of Citizens Oversight.

18 I'd like to be able to shorten that. Whenever  
19 I say "we," it means that it is in consultation with  
20 other people and members of Citizens Oversight and so,  
21 therefore, I can use the word "we" or maybe there is  
22 some other designator that can be used here so the Court  
23 will understand and the defendants will understand what  
24 "we" means.

25 But that in every case, unless I specify  
26 otherwise, "we" will mean the members of Citizens  
27 Oversight and other people that consult with me making  
28 these decisions, if that's okay.

1 MR. BARRY: Your Honor, if that's the  
2 definition we are going to use, then I have an issue  
3 with the term "we." Again --

4 THE COURT: One moment, Counsel. The objection  
5 is sustained. Let's move forward.

6 Do you have the last question in mind, sir, or  
7 Counsel?

8 MR. GERACI: I'm just making a note, your  
9 Honor.

10 THE COURT: All right.

11 MR. GERACI: Thank you.

12 BY MR. GERACI:

13 Q. Mr. Lutz, can you explain why -- well, do you  
14 believe -- do you think that the San Diego County  
15 registrar is complying with Section 15360 of the  
16 Elections Code?

17 MR. BARRY: Objection. Lacks foundation, your  
18 Honor. Asks for expert opinion and it calls for a legal  
19 opinion as qualified.

20 THE COURT: That particular objection is  
21 overruled. I may have heard enough from Mr. Lutz to  
22 conclude he may be qualified to express one or more  
23 opinions in the capacity as an expert witness. But,  
24 Counsel, as framed, why doesn't that call for a legal  
25 opinion? Isn't that my job?

26 MR. GERACI: Indeed.

27 THE COURT: So -- and I would be no more  
28 inclined to let your side testify to it as I would the

1 defense. But I mean, you're asking somebody to opine  
2 whether what the county is doing complies with the law.  
3 That's why I'm here.

4 So all objection -- I'm sorry, any opinion,  
5 regardless of which side attempts to elicit it from any  
6 expert, will be sustained on that basis. You are asking  
7 him to express a legal opinion. Sustained.

8 BY MR. GERACI:

9 Q. Mr. Lutz, the San Diego County registrar  
10 conducts a 1 percent manual tally without review of all  
11 the vote-by-mail ballots, correct?

12 A. That's what I understand, yes.

13 Q. And you have communicated to the San Diego  
14 County registrar that you believe that that's  
15 noncompliant with Election Code Section 15360?

16 A. Yes, I read the law and I think that it does  
17 say that they need to include the rest of them.

18 MR. BARRY: Objection. It calls for a  
19 yes-or-no answer.

20 THE COURT: The objection is sustained.

21 One moment, please.

22 BY MR. GERACI:

23 Q. Do you have an opinion as to what you believe  
24 the purpose of Election Code Section 15360 is?

25 A. Well, it actually doesn't state the purpose in  
26 that code section. It's stated in Section 336.5, the  
27 definition for the 1 percent manual tally, and they say  
28 it is to verify the automated count. So it comes down

1 to what the word "verified" means.

2 Q. And what do you believe the word "verified"  
3 means?

4 MR. BARRY: Objection. Lacks foundation.  
5 Calls for expert opinion testimony.

6 THE COURT: Well, at this point it may -- it  
7 may lack -- it does lack foundation. I'm not clear  
8 myself on the context of verify. So let's back up and  
9 lay some foundation. And then if there are additional  
10 objections, we'll take it up at that point.

11 BY MR. GERACI:

12 Q. In the context of doing a particular audit  
13 and/or review of an election process, do you have an  
14 opinion as to what "verified" means?

15 MR. BARRY: Objection. Vague and ambiguous.  
16 Incomplete hypothetical.

17 THE COURT: Again, Counsel, I'm not clear on  
18 the context. Sustained. I'm not clear on the context  
19 of verified. Just give me some context.

20 BY MR. GERACI:

21 Q. Okay. Explain, Mr. Lutz, what your  
22 understanding of the process by which the registrar of  
23 voters is conducting the 1 percent manual tally.

24 A. Okay. The registrar of voters has a selection  
25 meeting, which they conducted the day after the  
26 election. And, as I described, we attended that  
27 meeting, video recorded, even made it a transcription,  
28 portions of it, and then in my experience of the

1 meeting, I was wondering -- well, let me not get into  
2 that.

3           How they do it, they select the precincts and  
4 then in that case also batches. In the case of the  
5 precincts, what they're doing is when they changed their  
6 process, they went to precinct only. And my  
7 understanding is that for the ballots that came in the  
8 polls, these are already in boxes, grouped by precincts.

9           And to manually tally those, they just call up  
10 for those boxes, open them up, have the people count up  
11 what's on each ballot and they put it on the tally  
12 sheets and they then compare with the computer report  
13 which the IT manager generates.

14           In the case of the vote-by-mail ballots, those  
15 have already been grouped into batches, so they have to  
16 go in apparently and pull out manually ballots from  
17 these batches that are attributed to each precinct that  
18 they are going to be tallying, so it takes somebody --  
19 they are not isolated. It has to have somebody go in  
20 there, hunt down the correct batches, leaf through them  
21 manually, pull out the ballots that are attributable to  
22 precinct, then group them together and then have the  
23 people tally them. So there is a lot more hand work  
24 involved.

25           Had they stayed with batches, I understood that  
26 what would be happening is they're in boxes for batches  
27 so they wouldn't have to do that manual step of pulling  
28 the ballots out. They could just run the batches

1 through the computer, get the report and then manually  
2 tally them from the boxes.

3 Q. Did you -- let me draw your attention to  
4 Exhibit 64. That should be in the third volume.

5 THE COURT: My exhibit list is blank as to  
6 Exhibit 64.

7 MR. GERACI: That, your Honor, was one of the  
8 added pages that I provided counsel this morning.

9 THE COURT: So why don't you describe it for  
10 me, please.

11 MR. GERACI: San Diego registrar of voters  
12 manual tally schedule review.

13 THE WITNESS: That's on -- if you turn the  
14 projector on, you can put it on the screen.

15 MR. GERACI: Not yet.

16 THE WITNESS: Okay.

17 THE COURT: Is there a date with that?

18 MR. GERACI: October 2, 2016.

19 THE COURT: Okay. Before we proceed any  
20 further, are there any objections from the defense?

21 MR. BARRY: Your Honor, we haven't been able to  
22 review these for purposes of trying to determine why it  
23 is they would want to use this information. I  
24 believe --

25 THE COURT: Sounds like we are about to hear  
26 that part of it. But be that as it may, regardless of  
27 the purpose, what objections -- I think this is one of  
28 those objections, but this is one of those documents



1 that weren't presented to you until very late.

2 MR. BARRY: Correct --

3 THE COURT: Are there any objections to this  
4 document being referred to?

5 MR. BARRY: Yes, there is, because not  
6 knowing -- first off, not having seen it and analyzed  
7 it, but it appears to be something that was prepared by  
8 Mr. Lutz Sunday. It's dated October 2nd.

9 THE COURT: So it's not one of your documents?

10 MS. KARNAVAS: No.

11 MR. BARRY: It's not one of our documents.

12 THE COURT: It wasn't created by the defense?

13 MR. GERACI: It's a demonstrative exhibit, your  
14 Honor. It's intended for the purposes of facilitating  
15 his testimony. He can describe what it is and what  
16 conclusions he drew as a result of it.

17 THE COURT: All right. So --

18 MR. BARRY: There is no foundation relevant to  
19 what the basis of this information is.

20 THE COURT: I know. Maybe no foundation yet,  
21 but I was trying to anticipate maybe more than I should  
22 have. But now I'm hearing it's not going to be  
23 admitted. It's going to be used, if at all, for  
24 demonstrative purposes.

25 Let's think through this for just a moment.

26 If counsel wanted Mr. Lutz to go to a white  
27 board and do -- and do it the old-fashioned way and  
28 start writing notes on the bulletin board to illustrate

1 a point, he can probably be given the latitude like any  
2 witness to do that.

3           Instead, here he's prepared a report that may  
4 save us a whole ton of time for us to be able to look  
5 at. So it's not going to come into evidence in and of  
6 itself, but it may be helpful as a demonstrative aid.

7           Now, so any further objections at this point?

8           MR. BARRY: Again, the underlying documents, we  
9 don't know what it was that he relied on in preparing  
10 this summary and we don't know what the foundation is  
11 for those documents. There is also -- there is opinions  
12 stated in here with respect to his observations and  
13 conclusions.

14           THE COURT: All right. Well, the Court is not  
15 going to prohibit the examination by either party of  
16 Mr. Lutz on Exhibit 64, but I also do not expect the  
17 contents of the document to be presented until after an  
18 adequate foundation has been laid or other objections to  
19 it. So let's move forward.

20 BY MR. GERACI:

21           Q. Okay. Mr. Lutz, what is Exhibit 64?

22           A. This is a graphical representation of the  
23 1 percent manual tally report from the registrar of  
24 voters in terms of the start and stop times of each one  
25 of those teams processing a given precinct and if  
26 wherever the 1 percent manual tally report is the  
27 spreadsheet that the County published.

28           Q. Cross reference. Please look at Exhibits 50,

1 51 and 52, which are the spreadsheets provided by the  
2 San Diego County registrar's office for the 1 percent  
3 manual tally. Are those the spreadsheets?

4 A. Yes, in particularly item number 50 -- let's  
5 see, 50 is the spreadsheet.

6 Q. Exhibit 50.

7 A. Exhibit 50. And I don't know what I did with  
8 my glasses, but it's very fine print.

9 But you see along the top, "they," meaning the  
10 registrar of voters, has a date out, time out, date in,  
11 time in, so the date out and time out is when they  
12 started that manual tally process and the date in and  
13 time in is when they finished it.

14 What we did -- what I did was I took this date  
15 out, date in, time in and simply put that into a  
16 graphical representation so that I could see when each  
17 one of these precincts was started throughout that month  
18 so I could see if they were effectively using their  
19 time, when did they do the -- start each group of  
20 ballots.

21 Q. So this chart illustrates and synthesizes the  
22 data that was provided to you by the County for the  
23 1 percent manual tally spreadsheet that they provided?

24 A. Right. It's not my data at all. It's their  
25 data but put into the form that I could see visually  
26 when things were being done versus in a table I couldn't  
27 tell when they were being done.

28 MR. GERACI: Okay. Your Honor, may I put it up

1 on the screen?

2 THE COURT: Any objection?

3 THE WITNESS: Just you've got to press the  
4 power button on the --

5 THE COURT: Well, one moment. Any objection  
6 from the County or from the defense?

7 MR. BARRY: Yes. First off, the demonstrative  
8 exhibit is not really reflective of his testimony. It's  
9 what his analysis was of records that are not currently  
10 before us.

11 It isn't necessarily a graphical representation  
12 because it gives various opinions in the document  
13 itself.

14 And given to us late production, we really have  
15 not had the ability to confirm what the information is  
16 on here, and the black-and-white copies that we have I  
17 can't even read what the information is on the document.

18 So I have -- and again, I'm not sure where we  
19 are going to go beyond what's already been testified to.

20 THE COURT: All right.

21 MR. GERACI: Your Honor, as an offer of  
22 proof --

23 THE COURT: Let me just stay with defense  
24 counsel for a moment.

25 You all are asking the Court to absorb a lot of  
26 data; and if I don't have access to something that one  
27 or both sides have summarized, it's going to make my job  
28 exceptionally challenging. So please bear that in mind

1 going forward.

2 I understand from the witness's testimony that  
3 the source of this report, or let's call it Exhibit 64,  
4 is Exhibits 50, 51 and 52.

5 MR. GERACI: Which I would offer are stipulated  
6 exhibits.

7 THE COURT: Are there any objections to the  
8 admission of Exhibits 50, 51 and 52?

9 MR. BARRY: No objection to 50, 51 and 52.

10 THE COURT: All right.

11 MR. GERACI: And your Honor, we could add 49 to  
12 that because that's the summary of the three exhibits  
13 that follow.

14 MR. BARRY: Or 49.

15 THE COURT: All right. Is there any objection  
16 to the admission of 49?

17 MR. BARRY: No, your Honor.

18 THE COURT: All right. So give me one moment,  
19 please.

20 Exhibit 49, 50, 51 and 52 are admitted.

21 (Exhibits 49, 50, 51, and 52 were received in  
22 evidence.)

23 THE COURT: Will the defense be providing an  
24 expert witness who will be talking about his or her  
25 interpretation of the data reflected in Exhibit 49  
26 through 52?

27 MR. BARRY: Expert or -- our expectation would  
28 be testimony regarding the fact that the County prepares

1 reports and provides those reports to the Secretary of  
2 State.

3 THE COURT: And who at this point do you  
4 anticipate providing that testimony?

5 MR. BARRY: I think Mr. Vu.

6 THE COURT: All right. And you're going to be  
7 recalling him during your case in chief?

8 MR. BARRY: Yes.

9 THE COURT: I'm going to overrule the objection  
10 at this point and allow testimony to be presented based  
11 upon source data reflected in Exhibit 49 through 52.

12 All right. Proceed.

13 Do you need me or the Court to dim the lights?

14 MR. GERACI: I don't think so. Let's see.

15 THE COURT: Now, but I did hear defense counsel  
16 say the copy you gave him is not legible. Let's make  
17 sure.

18 MR. GERACI: It will be on the screen as a  
19 color version of it. It will be easier to see. It's on  
20 eight and a half by 11 paper so it's hard to see.

21 THE COURT: Counsel, if the roles were reversed  
22 and you were handed something that you didn't consider  
23 to be all that legible, wouldn't you feel handicapped?

24 MR. GERACI: I don't think it's illegible, your  
25 Honor. I can read it.

26 THE COURT: I accept counsel's representation  
27 at face value, and they are telling me that what they  
28 saw was not all that legible. So, you know, there are

1 limits to how much you can expect the other side not to  
2 be able to work with.

3 MR. GERACI: I'll hand him my copy if that  
4 helps.

5 THE COURT: All right.

6 MR. BARRY: Your Honor, there is two parts of  
7 this exhibit. There is the data that's been entered  
8 into the chart and then there is opinions. And so,  
9 again, I think the Court can see the data that's been  
10 entered in here based on the representation that that's  
11 the data.

12 THE COURT: Your eyes have to be a heck of a  
13 lot better than mine. I can't see a whole lot other  
14 than I do see the colors.

15 MR. BARRY: But with respect to where it says  
16 "observations," again, this is essentially hearsay.

17 THE COURT: All right. Well, Counsel, if I  
18 can't see it, so -- and I'm not looking at a hard copy  
19 right now. All right.

20 MR. GERACI: Your Honor, I'll ask --

21 THE COURT: Let's just move forward because I  
22 did hear the witness say that he has created a graphical  
23 depiction of data that was contained in Exhibit 49  
24 through 52. Let's focus on the summary.

25 BY MR. GERACI:

26 Q. Mr. Lutz, can you describe what Exhibit 64 is,  
27 what's on the screen?

28 A. Yes, thank you. Just focus your attention on

1 the lower half, which is the graphical part. There are  
2 dates along the top, Monday, Tuesday, Wednesday,  
3 Thursday, Friday, if you can see those, and then 13, 14  
4 and 15. Those are the dates starting -- yeah, that's  
5 better if the lights are off. So those are the days and  
6 I split them in morning and afternoon.

7 And then you see the yellow that refers to  
8 those areas, that's when polls, ballots, those are the  
9 ballots from the precincts, were being manually tallied.

10 And then I have orange and sort of dark and  
11 lighter orange, which are just different colors so you  
12 could tell them apart, because otherwise it would be  
13 hard to see when one started and the other stopped.  
14 Those are the vote-by-mail ballots, and those, you can  
15 see, were started on the 27th of June.

16 And the purplish color are the early voting  
17 touch screen machines which are required to be  
18 100 percent tallied, and those started on Tuesday, the  
19 21st of June.

20 And there is some -- the parts that are white  
21 are when apparently nothing was going on because,  
22 according to their report, they did not disclose any  
23 tallying processing going on on those days.

24 Q. So the 1 percent manual tally on the  
25 vote-by-mail process didn't start until when?

26 A. Until the 27th of the month. They started the  
27 portion of the vote-by-mail ballots they did tally,  
28 which were a little bit more than half of the total



1 number, and that proceeded until approximately the 29th.

2 We see one outlier out there, a yellow dot way  
3 out there on the 5th, and that was one of the difficult  
4 polls ballots that they were retallying a few times, and  
5 that was finally done on the day before -- well, two  
6 days after they had to certify.

7 Q. Did you discern any information in any of the  
8 data that you reviewed why they started the 1 percent  
9 manual tally so late?

10 MR. BARRY: Objection. I'm a bit at a loss.

11 THE COURT: Counsel, I really do need you to  
12 give me an evidentiary objection.

13 MR. BARRY: They started it when they started  
14 it, his characterization --

15 THE COURT: All right. So the objection -- I  
16 think I'm hearing argumentative and maybe lack of  
17 foundation. That objection will be sustained.

18 BY MR. GERACI:

19 Q. Did you discern any information as of the date  
20 you reviewed why the manual tally was started in the  
21 third week of June?

22 A. We couldn't tell why from this data, why it was  
23 done that way.

24 Q. Did it have something to do with the change  
25 from batching to precincts?

26 A. Perhaps.

27 MR. BARRY: Objection. Calls for speculation.

28 THE COURT: Sustained. One moment. Sustained.

1 Next question.

2 BY MR. GERACI:

3 Q. What conclusions did you draw from review of  
4 this data?

5 A. The conclusions that I drew were that there was  
6 a lot of white space here and that it seemed that the  
7 registrar perhaps could have reordered these and could  
8 have been more efficient with their use of time, and  
9 especially the purple section, which is 100 percent  
10 required to be tallied doesn't even need to wait for the  
11 random selection process to be done, that could be  
12 started immediately and, you know, maybe to expedite the  
13 process.

14 So I think there was some -- I thought some  
15 improvement that could be made. But this very, very  
16 late start by vote-by-mail ballots was unexplainable to  
17 me. I don't know why they didn't start that earlier  
18 right after the polls ballots.

19 Q. So, in your opinion, did the registrar of  
20 voters have enough time to conduct a manual tally of all  
21 the ballots cast?

22 MR. BARRY: Objection. Calls for speculation.  
23 Lacks foundation. Incomplete hypothetical.

24 THE COURT: At this point, sustained.

25 BY MR. GERACI:

26 Q. Mr. Lutz, did you -- after the election, did  
27 you do an analysis of the election process and tally?

28 A. Yes, we did quite an extensive review.

1 Q. What did you do?

2 A. We did what's called a roster review. Teams of  
3 people went in to the registrar's office; and similar to  
4 what I did in 2008, we took a look at the actual sign-in  
5 rosters and counted up how many signatures there were,  
6 and then also, we took note of how many crossover  
7 ballots there were, how many provisionals there were,  
8 and we did a sample of approximately 5 percent of the  
9 precincts.

10 And we also looked at the vote-by-mail raw  
11 numbers of ballots that were processed comparing that  
12 with the snapshot file that we did get.

13 Q. And what were the results?

14 A. Well, there is, I think -- what is the exhibit  
15 here?

16 Q. Exhibit 67?

17 A. Sixty-seven, yes.

18 THE COURT: All right. My exhibit list does  
19 not have a description. What's the description, please,  
20 of Exhibit 67?

21 MR. GERACI: Sixty-seven, your Honor, is the  
22 summary roster review.

23 THE COURT: And the date which is -- if there  
24 is one?

25 MR. GERACI: It's not dated.

26 THE COURT: All right. Continue on.

27 BY MR. GERACI:

28 Q. So, Mr. Lutz, what were the results?

1           A.    Well, this -- to describe this a little bit,  
2    this is just the summary page of a very big spreadsheet  
3    with many sheets.  Each one of the sheets was data  
4    collected from one precinct.  Volunteers went in and, as  
5    I said, counted the signatures.

6                    Each line item here is a summary of one of  
7    those sheets.  And then what I did was I took all of the  
8    line items from all the sheets to get an idea of the  
9    sample to get an idea of what happened in the election  
10   in terms of how many crossover votes there were, how  
11   many provisionals there were and whether they were  
12   reflected in the snapshot totals of the scans, for  
13   example.

14          Q.    Did you compare it with the vote-by-mail  
15   ballots?

16          A.    There is a -- there is a section out here at  
17   the end which are -- where we did just the vote-by-mail.  
18   But since we didn't have anything to count, they don't  
19   have sign-in registers for the vote-by-mails.  The only  
20   thing that we had was the snapshot file and the results  
21   of the 1 percent manual tally, how many ballots were  
22   processed.

23          Q.    Okay.  What conclusions did you draw?

24          A.    Well, we were --

25                   MR. BARRY:  Objection.  Lacks foundation.  
26   Calls for expert opinion testimony.  And again, this is  
27   one of the documents that were produced yesterday  
28   evening, and it's a hearsay document that was prepared

1 outside the court based on other documents that he  
2 prepared which we don't have the benefit of having seen.

3 THE COURT: All right. The objection on  
4 foundation --

5 MR. GERACI: Was the objection on his testimony  
6 or on the document? I'm not clear.

7 THE COURT: One moment. Counsel, what's the  
8 foundation that's missing?

9 MR. BARRY: He said he and other members of his  
10 organization compiled information. It's not that he  
11 compiled this information or he's basing on this chart  
12 information that's provided by others and we don't know  
13 what the procedure was for gathering that information,  
14 for tabulating that information and for assimilating  
15 that information on to this sheet.

16 MR. GERACI: He just explained that, your  
17 Honor.

18 THE COURT: Well, I'm not so sure he got that  
19 much in depth. I made note of what I could, but --

20 All right. The objection on foundation will be  
21 overruled. I'm not so sure I am hearing hearsay right  
22 now. But if he's been designated as an expert, he's  
23 entitled to, once the foundation been laid, express an  
24 opinion about that.

25 What else did you want to bring to my  
26 attention? That this was presented to you last night at  
27 10:42?

28 MR. BARRY: 10:40. I understand, your Honor.

1 THE COURT: No, no, no.

2 MR. BARRY: I understand your frustration.

3 THE COURT: No, no, no. Don't get me wrong.  
4 I understand why you are -- I understand the objection.  
5 Counsel, how can you expect the other side to respond  
6 when you are -- I'm not trying to be pejorative here.

7 But you're dumping what your side, I think,  
8 considers important information at a late hour the night  
9 before trial is supposed to start and now you are  
10 putting the witness -- and that information before me on  
11 the witness stand the next day. I mean, there is an  
12 accumulation of prejudice that I am seeing from the  
13 defense side.

14 MR. GERACI: Your Honor, when we met, I  
15 explained to counsel that we had demonstrative exhibits  
16 that I hadn't yet added to the exhibit list and that I  
17 would when I returned to my office, and that's what I  
18 did. I would have been happy to meet again if it is  
19 necessary, but these are just demonstrative exhibits.

20 THE COURT: Well, you are going beyond -- I  
21 mean, these are -- there is a reason that you are asking  
22 Mr. Lutz to express his opinions and put them into the  
23 record, so --

24 MR. GERACI: Well, the alternative, your Honor,  
25 is to introduce raw data that is of no use unless one  
26 synthesizes and analyzes it and that's -- that's the  
27 purpose of -- Mr. Lutz was deposed and --

28 THE COURT: Did he express these opinions at

1 his deposition?

2 MR. GERACI: He wasn't asked.

3 MR. BARRY: At his -- at his deposition, he was  
4 in the process of still reviewing the information.

5 THE COURT: One moment.

6 Mr. Lutz, I'm going to invite you to step  
7 outside for a few moments.

8 Okay. When was Mr. Lutz deposed?

9 And the record should reflect he has now  
10 stepped outside.

11 MR. BARRY: September 9th and again on  
12 September 12th.

13 MR. GERACI: That's a Friday and a Monday.

14 THE COURT: And as of that point in time --  
15 well, did you examine him in the capacity -- let me  
16 rephrase. Did you elicit opinion testimony from him?

17 MR. BARRY: He wasn't designated as an expert.  
18 I asked him -- I mean, I asked him his opinions on  
19 things.

20 THE COURT: Do you have the transcripts?

21 MR. BARRY: I do.

22 THE COURT: How voluminous are they?

23 MR. BARRY: The first one is 212 pages and the  
24 second one is 213 pages.

25 THE COURT: You are looking at the mini  
26 scripts?

27 MR. BARRY: Yes. 45 pages.

28 MR. GERACI: Here is Volume I, your Honor.

1           MR. BARRY: The point being, though, is at the  
2 time I took his deposition, he, I believe, was either  
3 still in the process of reviewing the records upon which  
4 this information was based, and certainly the report  
5 that he -- or the spreadsheets and things that this  
6 report is based on were not yet prepared and assimilated  
7 into this chart.

8           Now, the other thing, I hear him mention the  
9 1 percent manual tally, but this review isn't of the  
10 precincts that were included in the 1 percent manual  
11 tally. This has nothing to do with the manual tally or  
12 the mechanics of how that's conducted.

13           This has to do -- again, we are going way  
14 beyond what the scope of complaint is. We are going to  
15 issues regarding how he thinks the registrar should  
16 conduct an election and how when they review these  
17 precincts if there is variances in these results how are  
18 they to be explained.

19           That's not the issue here. So, in addition to  
20 the other objections, there is a relevance objection.

21           MR. GERACI: The 1 percent manual tally, your  
22 Honor, is designed to spot these deficiencies and fix  
23 them as part of the overall election canvass, and you  
24 are leaving out 37 percent of the ballots. This is the  
25 problem. So these charts help illuminate the scope of  
26 the problem, what's being missed.

27           THE COURT: Well, the objection on relevancy is  
28 overruled. I can see relevancy.



1           But let me go to the defense side. You're  
2 going to call at least a couple of experts, as I  
3 understand it. Are there any materials that you intend  
4 to have marked, if you haven't already done so, that you  
5 have not yet provided to plaintiff?

6           MR. BARRY: No, I don't believe so.

7           THE COURT: And when did you get all of this  
8 stuff created by your witnesses for the other side?

9           MR. BARRY: When did we provide -- well, we had  
10 it ready to go last week per the trial clerk's order.

11          THE COURT: Right.

12          MR. BARRY: But we provided it to them  
13 yesterday when we met in -- because Mr. Geraci wasn't  
14 able to meet until yesterday.

15          THE COURT: Well, I understand that something  
16 came up with his family, but...

17          MR. BARRY: Your Honor, that was after we met  
18 yesterday. We reached out numerous times within the  
19 last week and a half to set up a time to meet to go over  
20 the exhibits and we were put off time and time again  
21 until Monday was the last day possible, and we  
22 originally scheduled it for 10:00 and he didn't get  
23 there until 11:00.

24          So, you know, it's not our fault that we didn't  
25 exchange the exhibits. And we provided them with a list  
26 of the exhibits at the trial readiness conference and we  
27 supplemented those and we provided them with that  
28 information.

1 THE COURT: What information did you  
2 supplement?

3 MR. BARRY: I would say mostly demonstrative  
4 type evidence or exhibits.

5 THE COURT: And that's what you ended up giving  
6 him yesterday?

7 MR. BARRY: Yes. Now --

8 THE COURT: Now, Counsel, let me just --

9 MR. GERACI: Your Honor, if I may.

10 THE COURT: One moment. One moment.

11 I cannot begin to tell you how much easier it  
12 is to say no and sustain than to overrule and permit,  
13 but if the Court sustains the defendants' objections and  
14 does not allow the plaintiff to proceed with anything  
15 you got late last night, I'm going to turn around and  
16 sustain the same objections by plaintiffs to what you  
17 gave him yesterday.

18 MR. BARRY: Why would that be, your Honor? We  
19 did not facilitate the delay in the exchange of  
20 documents.

21 THE COURT: Counsel, this works both ways.

22 MR. BARRY: But it's not our fault.

23 THE COURT: I understand that's your position  
24 and maybe there is some -- some contemporaneous merit to  
25 the original documents. But I think you -- I think I  
26 heard you say that since you had the original set of  
27 documents available you have added supplemental  
28 documents.

1 MR. BARRY: Let me also point out that when we  
2 met yesterday, Mr. Geraci had supplemental documents  
3 that he had added to the list --

4 THE COURT: My only point is --

5 MR. BARRY: -- and which we did not object to  
6 as far as exchanging those. It's the -- only these six  
7 or seven exhibits that were given to us at 10:40 last  
8 night that we are objecting to.

9 MR. GERACI: Your Honor, counsel is leaving out  
10 a very important fact in this discussion. We had made a  
11 request for production of documents three weeks ago.

12 MR. BARRY: Oh, yeah.

13 MR. GERACI: We didn't receive the production  
14 of documents that we requested until last week. So all  
15 we've done is synthesize, analyze and prepare some  
16 demonstrative exhibits from the data we received.

17 I realize that this expedited schedule is hard  
18 and it's frustrating and leaves a little bit for  
19 unpreparedness that one might not be used to, but we all  
20 agreed that the expedited schedule was important for the  
21 purposes of getting a decision before the next election,  
22 so here we are and --

23 THE COURT: Well, let me stop you. So  
24 apparently there was a meeting yesterday at which there  
25 was, at least what the defense, was a full exchange or a  
26 complete exchange on each of you.

27 MR. GERACI: No.

28 THE COURT: One moment. Each of you gave what

1 you had at that time.

2 MR. GERACI: Yes.

3 THE COURT: And then you supplemented it  
4 several hours later.

5 MR. GERACI: No. At the meeting, I described  
6 and explained to them I have several demonstrative  
7 exhibits that I haven't yet copied and put in the book  
8 and that I will -- when I get back to my office, I will  
9 send them to you.

10 THE COURT: What time was the meeting?

11 MR. GERACI: At 11:00 a.m.

12 And the intervening facts here is I had to rush  
13 to the hospital and deal with my mother and didn't get  
14 back to my office until 9:00 p.m.

15 MS. KARNAVAS: I thought you said she was  
16 admitted on Sunday.

17 MR. GERACI: She was.

18 MS. KARNAVAS: Okay. It's Tuesday.

19 MR. BARRY: Your Honor, if I may make one  
20 point. With respect to the production of documents,  
21 this action was filed on June 16th. The request for  
22 production of documents was served within the last three  
23 weeks. And the actual time to respond to that  
24 production isn't even -- the date for responding isn't  
25 until next week.

26 So as a courtesy, notwithstanding the fact we  
27 are preparing for trial, we have a client who is  
28 preparing for a presidential primary -- or general

1 election, we scurried around and got the documents to  
2 them as a courtesy within all about two weeks after the  
3 production request had been made.

4           So I don't have a lot of sympathy about  
5 Mr. Geraci's inability to get his exhibits together when  
6 we are put to the task of even as a matter of courtesy  
7 to getting these things to him out of professional  
8 courtesy.

9           THE COURT: All right.

10           MR. BARRY: Now, the other thing I might say is  
11 if this is going to come in and we are going to talk  
12 about what each of the variances are on each of these  
13 75 or 85 precincts and I have to call a person then to  
14 refute what the variances is, why the variance existed,  
15 we are going to be here for days.

16           THE COURT: All right. After having heard from  
17 both counsel -- and Counsel, recognizing that my general  
18 approach to the presentation of evidence, particularly  
19 when it's to the bench without a jury, is to give each  
20 side as much latitude as is possible. Usually, not  
21 always, but usually counsel are grateful for that much  
22 latitude.

23           But, in this instance, again, I empathize with  
24 the defendants' frustration at getting materials late in  
25 the night as last night, then having to be put in a  
26 position to cross-examine the relevant witness, which  
27 happens to be Mr. Lutz, the next day.

28           To the extent that you all exchanged documents

1 during your meet and confer earlier in the day  
2 yesterday, you'll be allowed to proceed with those  
3 materials. But to the extent that the plaintiff  
4 supplemented that production late in the day last night,  
5 the objections will be sustained.

6 At this point I see prejudice outweighing  
7 mitigation or an explanation why those materials weren't  
8 provided sooner.

9 Now, Counsel, that is not to suggest that I'm  
10 not -- I'm questioning the representation of what you're  
11 going through with your circumstances, but I'm trying to  
12 balance the inference of both sides.

13 Now, having said that, though, though the  
14 materials will not be received, I am not intending to  
15 put a limitation on the scope of testimony. So it may  
16 be that testimony which is otherwise reflected in those  
17 materials which will not be referred to or admitted, but  
18 information on those materials may be presented to a  
19 witness.

20 Do we have a verdict?

21 THE BAILIFF: No. A question.

22 THE COURT: All right. Counsel, I wish we were  
23 moving at a faster pace and I do need to address the  
24 question from a jury at this point.

25 So let's do this. Let's take our afternoon  
26 break a little early, and hopefully I can keep it to  
27 something in the neighborhood of 15 minutes. But in  
28 addition to doing this work on this note, I've got to

1 get my staff a little bit of a break too.

2 So, please, we are going to get through this  
3 verdict at some point in time, but until then, we may  
4 have to interrupt on occasion. So we are going to be in  
5 recess approximately 15 minutes or so.

6 MR. GERACI: Do we need to clear out desks?

7 THE COURT: No, you can remain where you are  
8 and I'll have -- if I have to talk to counsel on the  
9 other case, we'll work around your materials.

10 MR. GERACI: So be back at what time?

11 THE COURT: Let's start with 15 minutes.

12 MR. GERACI: Okay.

13 (Recess taken.)

14 THE COURT: All right. To finalize the Court's  
15 ruling before we adjourned, the Court will grant the  
16 defendants' request for the reasons previously discussed  
17 to exclude further reference to the documents provided  
18 by plaintiff to defendant sometime late last night at or  
19 about 10:40.

20 Recognizing, though, with the Court having  
21 being unfamiliar with those documents, it's possible as  
22 the trial proceeds that they may be -- that plaintiff  
23 may renew its request of the Court that they should be  
24 used, I should say, for legitimate -- I want to be  
25 careful I say this correctly -- for other reasons not  
26 yet discussed, for example, impeachment.

27 So there you go. So Mr. -- and again, I  
28 apologize to everybody for the interruption. It took us

1 this long to answer all the questions of the jury that's  
2 out.

3 So, Mr. Geraci, please continue with your  
4 direct examination of Mr. Lutz.

5 MR. GERACI: Thank you, your Honor.

6 BY MR. GERACI:

7 Q. Mr. Lutz, did you review the 1 percent manual  
8 tally results with your process of getting the snapshot  
9 file you described?

10 A. Yes, we did.

11 Q. What did you do?

12 A. We took a look at the content of the snapshot  
13 file which was provided the day after the election just  
14 before they did the random selection, we compared that  
15 with the report that they generated at the end of doing  
16 the 1 percent manual tally.

17 Q. And what did you find?

18 A. We found that in -- the interesting thing that  
19 we found was that the count of ballots that were  
20 processed in the mail -- 1 percent manual vote-by-mail  
21 ballots did not match the count of ballots in the  
22 snapshot file about half of the time, so they picked 16  
23 precincts and they had a count of ballots in those  
24 16 precincts in the snapshot file, and that count  
25 differed from the count computer report that they used  
26 when they compared the results of the snapshot -- of the  
27 1 percent manual tally.

28 These numbers were off by one, two, three



1 ballots, but it raised concern in our minds of where did  
2 they get this other computer report that they apparently  
3 used when they compared the vote-by-mail section. And  
4 that's something that we don't have the answer to just  
5 yet.

6 Q. Based upon your experience and training in  
7 observing and analyzing these election processes,  
8 including the 1 percent manual tally, what kind of  
9 errors do you believe the 1 percent manual tally would  
10 detect?

11 A. Well, the 1 percent manual tally does provide a  
12 means to check for simple tabulator errors such as  
13 misfeeds. Sometimes they feed in one ballot extra or  
14 two few, sometimes the worker will accidentally feed in  
15 the same ballot twice. Sometimes the machine will, you  
16 know, pull two ballots at a time.

17 Other errors are that sometimes the machine  
18 will misread the bubble if it's not darkened in  
19 correctly, either maybe it's an X instead of a bubble  
20 then it might not detect the vote. If there is a  
21 extraneous mark on the ballot, that might detect a vote  
22 that isn't supposed to be there.

23 In addition to that, we believe that our  
24 process of looking at the snapshot file and comparing it  
25 with the 1 percent manual tally will allow us to detect  
26 central tabulator hacks, such as if you had perhaps a --  
27 either a compromised employee or outside hacker that  
28 somehow gained access to the central tabulator moving

1 maybe 10,000 votes from one candidate to another.

2 That's a pretty big difference.

3 MR. BARRY: Objection, your Honor. Lacks  
4 foundation. Speculation.

5 THE COURT: Well, I would have expected that  
6 objection to be interposed earlier than it is. So,  
7 Counsel, I'm going to overrule those objections.

8 You've finished answering the question,  
9 Mr. Lutz?

10 THE WITNESS: Almost.

11 THE COURT: Why don't you do so.

12 THE WITNESS: So if we did have someone either,  
13 as I said, a compromised employee or an outside hacker  
14 that somehow gained access to the central tabulator and  
15 could shift 10,000 votes maybe across a thousand  
16 precincts, we only have a chance of hitting that, we  
17 only have 16 precincts that they are sampling. If they  
18 know in advance what 16 they are going to be, those  
19 hackers will just avoid them.

20 If they didn't know in advance and they could  
21 change the snapshot -- or the computer results, then  
22 they will just unfix the ones that they fixed. That's  
23 why we need the snapshot file in advance.

24 So in that case, if that ever did happen, our  
25 protocol, our methodology, which we call the snapshot  
26 protocol, will allow us to detect that. And that's why  
27 we put it in place so we have something that goes a  
28 little bit beyond what they claim is the only reason for

1 the 1 percent manual tally is just to detect those other  
2 types of errors. By giving that snapshot file and  
3 giving a close observation, our oversight protocol  
4 allows us to detect such a hack.

5 MR. GERACI: Your Honor, I would move to admit  
6 Exhibit 59.

7 THE COURT: Fifty-nine?

8 MR. GERACI: Or actually I would ask the Court  
9 to take judicial notice of Exhibit 59. It's legislative  
10 intent documents that were provided by the Secretary of  
11 State.

12 THE COURT: All right. One moment. Let me  
13 just -- so you're asking the Court to take judicial  
14 notice of Exhibit 59?

15 MR. GERACI: Yes.

16 THE COURT: All right.

17 MR. GERACI: It's 54 pages.

18 THE COURT: So let me hear from the defense.

19 MR. BARRY: Your Honor, from my review of  
20 Exhibit 59, it appears to be a compilation of many  
21 documents relating to several different bills and which  
22 I think are not entitled -- many of which -- there is a  
23 few here that's probably entitled to judicial notice,  
24 but they lack foundation.

25 For the most part, what's here would not be  
26 appropriate for taking judicial notice. We can spend a  
27 lot of time. I think there is 17 to 20 documents within  
28 this packet, and we can go through each one, we can make

1 objections as to each one and have you rule on those,  
2 but as a packet it doesn't -- it's not --

3 THE COURT: There is nothing unusual or  
4 inappropriate for either side to ask that the Court take  
5 judicial notice of the legislative history of the  
6 statute at issue. So, to that extent, there is nothing  
7 that is troubling to the Court. I'm accustomed to  
8 notice being served before an examination of a party  
9 begins to take place. So notice is a bit of an issue.

10 But let me ask you this. I seem to recall that  
11 one or both sides presented the Court with legislative  
12 history before the last hearing. Am I misrecalling  
13 that?

14 MR. GERACI: No, that's correct, your Honor.  
15 And some of those documents are contained in this  
16 package that was received directly from the legislative  
17 history section of the Secretary of States's office.

18 THE COURT: So I don't mean to foreclose the  
19 defense from being able to make sure that the  
20 legislative history which the Court is inclined to take  
21 judicial notice of is not complete and you haven't had a  
22 chance to contribute to it, so...

23 MS. KARNAVAS: Your Honor, if I may, I was the  
24 one handling the review of the exhibits for purposes of  
25 preparing the evidentiary objections that are in the  
26 joint exhibit list.

27 And what I will say is that, as counsel has  
28 mentioned, this is sort of a compilation of a variety of

1 different things. So, for example, there is a bill in  
2 here that has nothing to do with Elections Code 15360  
3 which we don't think would be appropriate, it's not  
4 relevant, so we don't think that would be appropriate  
5 for judicial notice.

6           There is also a case, although I don't have it  
7 with me, I would like the opportunity to present to the  
8 Court's attention which kind of goes over the documents  
9 that are appropriate legislative history documents that  
10 are appropriate for judicial notice and things like  
11 letters to the governor are not, and those are types of  
12 things -- the things that are judicial notice are really  
13 things that were presented to the -- that can  
14 demonstrate were presented to the entire legislature,  
15 things that were considered on the floor, things like  
16 letters -- individual letters to the governor or one  
17 individual person's view of the bill is not necessarily  
18 appropriate legislative history for judicial notice.

19           So, in the event of time, I would like the  
20 opportunity just for purposes of time to ask the Court  
21 to delay ruling on the admission of this and I can  
22 actually provide the Court with the case.

23           THE COURT: Well, I think at least in part  
24 that's well taken. What I -- what I'm inclined to do is  
25 to grant the request, not receive anything at this time,  
26 but to direct both sides to meet and confer to make sure  
27 that whatever you want to have included in what either  
28 or both of you characterize as legislative history be

1 included.

2           We don't have to take it -- I certainly don't  
3 have to look at it today. So -- but before the case is  
4 submitted, which could be as late as next Tuesday,  
5 counsel are directed to make sure that whatever is  
6 presented to me is as complete as the either one of you  
7 hope that it be. And if there are specific objections  
8 to what you all want to have included, I'll take a look  
9 at those before we adjourn or before I take the matter  
10 under submission.

11           Now, let me ask you this. So plaintiff put  
12 together a compilation of what you're calling the  
13 legislative history of 15360. Has the defense put  
14 anything together on that same subject?

15           MR. GERACI: Yes.

16           MS. KARNAVAS: We do have a variety. Again,  
17 it's within plaintiffs' compilation. There are a number  
18 of -- there's discussion of bills that don't have  
19 anything to do with 15360. But yes, we have also  
20 provided and marked in our exhibits various versions of  
21 the bills as they were adopted and amended over time and  
22 things of that nature.

23           THE COURT: All right. So it would be --

24           MR. GERACI: And I don't object to those.

25           THE COURT: All right. So I'm going to defer  
26 any further discussion on the specific contents of what  
27 the Court would take judicial notice. You've got some  
28 parameters to work your way through this. So please do

1 so.

2 So just give me one moment.

3 Counsel, we are going to continue going until  
4 another counsel appears in this case with the  
5 outstanding jury. The jury has a verdict so I'm going  
6 to have to interrupt you. But at least we know we can  
7 be done with that and further interruptions from that  
8 case once you return tomorrow morning.

9 Okay. So let's continue to -- all right. So  
10 why don't you continue, Mr. Geraci.

11 MR. GERACI: Thank you, your Honor.

12 BY MR. GERACI:

13 Q. Mr. Lutz, did you request from the Secretary of  
14 State these various documents that we've been discussing  
15 that are marked as Exhibit 59?

16 A. Yeah, I talked directly to the Secretary of  
17 State's archive division and asked them for the complete  
18 record of all documents related to SB 1235, which was  
19 the Senate bill that related to the initial enhancement  
20 of 15360 back in 2006.

21 Q. And these are the 54 pages that were provided  
22 to you by the archive division?

23 A. Actually, I received about 207 pages. I found  
24 that many were duplicates because they were in files,  
25 they had the author's file, the Assembly file, the  
26 Senate file, and I tried to fairly take just single  
27 copies of each one and boil it down to the key documents  
28 that reflected the history of the -- of this bill.

1 Q. Did you consider these documents and the  
2 legislative history in formulating your opinions  
3 concerning the Election Code Section 15360?

4 A. Yes.

5 Q. And what was the purpose of analyzing these  
6 documents as part of your assignment?

7 A. I just wanted to find out how -- whether or not  
8 the legislature intended to include vote-by-mail and  
9 provisional ballots in the 1 percent manual tally.

10 Q. Okay. Did you discern that information in your  
11 research?

12 A. Yes, yes.

13 Q. What did you discover?

14 MR. BARRY: Your Honor, calls for a legal  
15 conclusion.

16 THE COURT: The objection is sustained.

17 One moment, please.

18 Okay. Next question. The Court will  
19 ultimately take a look at the --

20 MR. GERACI: I understand, your Honor.

21 THE COURT: And I'll decide for myself whether  
22 it was meant to be there or not.

23 MR. GERACI: I appreciate that.

24 With that, your Honor, I have no further  
25 questions.

26 THE COURT: Cross-examination.

27 MR. BARRY: Your Honor, we were requested to  
28 have Mr. Wallis here this afternoon. Rather than defer



1 him over two days, we asked Ms. Erin Mayer, who is also  
2 a witness that was requested by Mr. Geraci, to be here.  
3 I believe her testimony will be short and so we have her  
4 available to testify.

5 THE COURT: Okay. How long -- how long do you  
6 anticipate on -- are you going to call Ms. Mayer under  
7 776?

8 MR. GERACI: Yes, your Honor. My request was  
9 for tomorrow.

10 THE COURT: Okay. So what are you saying with  
11 Mr. Lutz, though? He's on the stand.

12 MR. BARRY: Well, I could begin my cross,  
13 conclude it tomorrow, or we could have Ms. Mayer  
14 testify, conclude her testimony today and begin my cross  
15 tomorrow.

16 THE COURT: Now, given the -- what I am about  
17 to do to interrupt the proceedings of this trial, I  
18 should say, because -- to take the jury verdict, there  
19 is no guarantees we will be able to get as far as  
20 completing Ms. Mayer today.

21 MR. BARRY: I understand. I'm just --

22 THE COURT: So -- and you were saying how long  
23 would it take you with Ms. Mayer?

24 MR. GERACI: About 20 minutes to a half hour.

25 THE COURT: Well, I'm confident that we are  
26 going to be interrupted before 20 minutes. So do you  
27 want to start your cross-examination of Mr. Lutz now?

28 Let's do this, though. If Ms. Mayer and

1 Mr. Wallis, if they want to leave for the day and plan  
2 on coming back tomorrow, that's fine. They are not  
3 going to be needed this afternoon.

4 MR. BARRY: We did not have Mr. Wallis come  
5 down today because she was in lieu of him. So we have  
6 the witness.

7 THE COURT: So you want Ms. Mayer to return  
8 tomorrow morning?

9 MR. GERACI: Yes.

10 THE COURT: Is Ms. Mayer in the Court?

11 MR. GERACI: She's outside.

12 THE COURT: She's outside? Okay. Well, if  
13 somebody wants to give her a head's up she can leave  
14 now, that's up to you all.

15 So cross-examination.

16 MR. BARRY: Thank you, your Honor.

17

18 CROSS-EXAMINATION

19 BY MR. BARRY:

20 Q. Mr. Lutz, you've never been a poll worker,  
21 correct?

22 A. That's correct.

23 Q. And you've never attended any type of poll  
24 worker training?

25 A. Not in-person training, no.

26 Q. And you've never been an election worker,  
27 correct?

28 A. Not for the registrar of voters, no.

1 Q. And you've never been an election official  
2 either, have you?

3 A. No, I haven't been.

4 Q. Other than as a voter, as an election observer  
5 or as a candidate, you don't have any experience in  
6 conducting an election, correct?

7 A. I wouldn't say that's correct.

8 Q. What would be correct?

9 A. I have significant experience in reviewing the  
10 conduct of elections.

11 Q. Okay. Now, you're a vote vote-by-mail voter?

12 A. Currently I am.

13 Q. So when was the last time you went to your  
14 poll?

15 A. I believe the last time I went to the poll was  
16 in 2014.

17 Q. And you mentioned earlier that you've been a  
18 candidate for public office on two occasions, correct?

19 A. That's correct.

20 Q. Was one time for Congress?

21 A. Correct.

22 Q. What district was that?

23 A. At the time it was District 52, it's now been  
24 renamed to District 50.

25 Q. And I assume you weren't successful in the  
26 contest?

27 A. No.

28 Q. Now, also over the years you've been engaged in

1 various business ventures and enterprises, I understand  
2 that you had an entity called Creative Minds, Inc., that  
3 you started in 1989; is that correct?

4 A. Yes, that's when it -- it wasn't incorporated  
5 then, it was incorporated in 1992, but we had a business  
6 running at that time.

7 Q. So the business started in '89, was  
8 incorporated later on in '95, correct?

9 A. Actually it's 1992. I checked the date.

10 Q. Okay. And that is a Montessori school that  
11 your wife operates.

12 A. That's a Montessori school, yes.

13 Q. And you worked part time in the business as a  
14 bookkeeper and administrative, correct?

15 A. That's correct.

16 Q. You've also been involved in a business called  
17 Cognisys, C-o-g-n-i-s-y-s; is that correct?

18 A. That's right.

19 Q. And that business was incorporated in '89?

20 A. I believe that's when it was incorporated, yes.

21 Q. And what was that business?

22 A. That was an engineering consulting software  
23 programming, did consulting for Rockwell, Incorporated  
24 for quite an extended period of time doing fax -- boards  
25 and fax equipment, and then we worked with other  
26 companies in the printer, scanner, fax, copier area.

27 Q. Were you a principal in that business?

28 A. Yes.

1 Q. And then you had another venture Multifunction  
2 Product Association; is that correct?

3 A. Yes, it was originally the Multifunction  
4 Peripheral Association. We changed it. Still MFPA.

5 Q. And that operated under the umbrella of  
6 Cognisys?

7 A. No, that was a separate association, a mutual  
8 benefit corporation, so not a 501(c)(3). I think it was  
9 a 501(c)(10) or something. It's a mutual benefit  
10 number. It's not -- you can't take deductible  
11 contributions.

12 Q. And then you were also a principal in the  
13 corporation called Adaptra [phonetic] corporation?

14 A. Right.

15 Q. And when was that?

16 A. That was in about 1995 or so, and that  
17 company -- oh, that's your answer. 1995. So --

18 Q. Was that a corporation?

19 A. That was, yes, a C corporation.

20 Q. And do you know when it was incorporated?

21 A. Offhand I think it was around 1995. I would  
22 have to check on that subject to check.

23 Q. And at some point in time, did that business  
24 stop doing business?

25 A. Yes, it did.

26 Q. And that was 2006?

27 A. Or thereabouts, yes.

28 Q. And that was about the time that you started

1 the Citizens Oversight organization?

2 A. Approximately, sure.

3 Q. And so that initially was an unincorporated  
4 association for a number of years?

5 A. It was.

6 Q. And it worked through or with East County  
7 Democratic Party?

8 A. It was East County Democratic Club, which was  
9 also when I incorporated the association and it was  
10 designated as a nonpartisan subcommittee for a while.

11 Q. And in 2011 you incorporated Citizens  
12 Oversight?

13 A. Yes.

14 Q. And that's a 501(c)(3) corporation?

15 A. Correct.

16 Q. So that corporation is able to accept  
17 donations?

18 A. Tax deductible, yes.

19 Q. And you're the only officer or director of that  
20 corporation, correct?

21 A. As I was allowed in Delaware, yes.

22 Q. And you're the only member of that association,  
23 correct, or that corporation?

24 A. By "member," what do you mean?

25 Q. By "member" is the corporation would have -- in  
26 the case of a nonprofit, doesn't have shareholders, they  
27 have members, correct?

28 A. Well, we have members that are members of

1 the -- of the association, yes, but they are not -- they  
2 do not have any control function. So if you join, you  
3 become a member and you are regarded as what we used to  
4 call a nonmember member.

5 Q. But there is no dues that a member would have  
6 to pay to become a member, correct?

7 A. Yeah, you have to pay dues or volunteer.

8 Q. Or volunteer? Which one is it?

9 A. Well, you -- either. You have to do one or the  
10 other to be a member. You can't just do nothing. But,  
11 basically, if you say I want to volunteer to do some  
12 work and I can't afford the dues, but we do have a due  
13 schedule and we expect people to pay their dues.

14 Q. Now, the Citizens Oversight does not have any  
15 employees, correct?

16 A. No, we don't.

17 Q. And so you're the sole operator/manager of that  
18 entity; is that correct?

19 A. That's true.

20 Q. And without your involvement, Citizens  
21 Oversight would not likely exist, correct?

22 A. I did start it.

23 Q. Now, what is your understanding as to what an  
24 audit is, just a general definition of audit?

25 A. It's a historical review of something that  
26 happened.

27 Q. And are there certain steps that should be  
28 followed when conducting an audit?

1 A. Yes, they need to be laid down in advance.

2 Q. Are you familiar with the regs that were  
3 adopted by then Secretary Debra Bowen related to  
4 expanded manual tally after each election?

5 A. What are you speaking of?

6 Q. I'm asking you if you are familiar with those.

7 A. I'm familiar with a number of things that were  
8 done by Debra Bowen, yes.

9 Q. Would that be one of them?

10 A. She did work on that, yes, in several respects.

11 Q. Do you have an understanding as to what those  
12 regulations require?

13 A. Specifically she worked on Senate Bill 1235,  
14 which was --

15 MR. BARRY: Objection. Nonresponsive, your  
16 Honor.

17 BY MR. BARRY:

18 Q. The regs, sir, are separate from the Senate  
19 bill.

20 THE COURT: One moment, Counsel. Do you want a  
21 ruling?

22 MR. BARRY: Senate bill was also passed --

23 THE COURT: Counsel, do you want a ruling?

24 MR. BARRY: Yes.

25 THE COURT: The objection is sustained. Was  
26 there a couple -- was there a motion to strike? I don't  
27 see a motion to strike.

28 MR. BARRY: Move to strike, your Honor.



1 THE COURT: Motion to strike is granted.  
2 Continue on.

3 THE WITNESS: I don't know what I'm --

4 THE COURT: One moment, Mr. Lutz. Next  
5 question.

6 THE WITNESS: All right.

7 BY MR. BARRY:

8 Q. So you do have some familiarity with the post  
9 election manual tally requirements that were adopted as  
10 regulations by then Secretary of State Debra Bowen?

11 A. Specifically, what are you speaking of?

12 Q. Specifically, I'm talking about the regulations  
13 that required elections officials to perform an expanded  
14 manual tally in the event based on the semi official  
15 canvass results that were within a certain percentage  
16 required elections officials to perform an expanded  
17 manual tally.

18 Are you familiar with those?

19 A. I might be. Can you point me to a document  
20 that refers to those?

21 Q. Sure.

22 Well, I'll move on for right now. I'll find it  
23 in a minute.

24 So do you have an understanding as to what was  
25 required by those regulations?

26 A. By "those regulations," what are you referring  
27 to?

28 Q. I'm referring to the post election PMT

1 regulations.

2 A. Is that Election Code 15360 that you're  
3 referring to?

4 Q. No. I'm referring to regulations that were  
5 adopted outside of the Election Code.

6 A. Okay. Then, no, I'm not familiar with those.

7 Q. I ask you to look at Exhibit 109.

8 A. (Witness complies.)

9 Q. Did you find that document?

10 A. Yes, I do.

11 Q. And can you tell me what that document appears  
12 to be?

13 A. This is -- has to do not with the 1 percent  
14 manual tally itself but with the post election manual  
15 tally which would occur end of the case for my  
16 understanding if the race was really close.

17 Q. Okay. So you do have an understanding with  
18 respect to the requirements of these regulations?

19 A. Yeah, these are not the 1 percent manual tally  
20 regulations, though. This is a close race post election  
21 manual tally as opposed to the 1 percent manual tally.  
22 Two different things.

23 Q. I would agree.

24 Now, if you look at the second page of  
25 Exhibit 109, it's entitled, "Notice of Approval of  
26 Emergency Regulatory Action."

27 Do you see that?

28 A. Yes, I do.

1 Q. Okay. And the next document appears to be a  
2 notice of publication. I can't read the words after  
3 that.

4 Do you see that?

5 A. No, I don't see what you mean. On page two  
6 still of this?

7 Q. No. Page three, the next page.

8 A. Okay. It says "emergency" at the top?

9 Q. Yes. And then if you could go to the next page  
10 where it says "text proposed emergency regulations."

11 A. Okay. I see those.

12 Q. Do you remember reviewing these at your  
13 deposition?

14 A. Yeah. But, again, these have nothing to do  
15 with the 1 percent manual tally. This is the post  
16 election manual tally, which is a different thing.

17 Q. And I would say that whiting out ballots has  
18 nothing to do with post election manual tally --

19 MR. GERACI: Objection. Argumentative. Move  
20 to strike.

21 THE COURT: Objection is sustained. Move to  
22 strike is granted.

23 BY MR. BARRY:

24 Q. I'm not asking you whether this has to do with  
25 1 percent manual tally. I'm asking do you recall  
26 reviewing these regulations at your deposition?

27 A. I believe so.

28 Q. And as we pointed out at your deposition, these

1 regulations that were adopted by the Secretary of  
2 State's office referenced the semi final official  
3 canvass, correct?

4 MR. GERACI: Your Honor, I'm going to object.  
5 It's beyond the scope of direct.

6 THE COURT: At this point, sustained.

7 MR. BARRY: Your Honor, he offered testimony  
8 with respect to --

9 THE COURT: Well, one moment, Counsel.

10 So far all I've heard is that he saw these and  
11 at his deposition. So I understand his capacity as an  
12 expert, but you're going to need to step back and lay  
13 some foundation before you can go much further.

14 BY MR. BARRY:

15 Q. Okay. So do you have an understanding as to  
16 whether or not these regulations were applicable to the  
17 registrar of voter in San Diego County?

18 A. I believe there was a dispute about these. I'm  
19 missing my glasses, but I can't tell which version this  
20 is, but I know that there was a legal dispute over this  
21 and San Diego was successful in getting some changes  
22 included, if I'm remembering right.

23 THE COURT: Counsel, I'm going to have to stop  
24 you. I'm trying to do too many things right now and we  
25 are struggling to assemble everybody to take the verdict  
26 and I do need to make sure we take it before 4:30.

27 So we are going to stop at this time.

28 And is it your intention to resume with

1 cross-examination of Mr. Lutz tomorrow or are you going  
2 to interrupt him to do something else? You know, I  
3 don't care. Counsel, talk among yourselves, figure it  
4 out. Why don't you be here by a quarter to 9:00  
5 tomorrow. Let me know what you're going to do without  
6 interruption once we begin tomorrow morning at 9:00.

7 And before we adjourn, anything else from the  
8 defense side?

9 MR. BARRY: I don't believe so.

10 THE COURT: How about the plaintiffs' side?

11 MR. GERACI: No, your Honor. Thank you.

12 THE COURT: All right. We will be in recess.  
13 You can leave your materials where they are. We will  
14 figure out a way to work around them when we bring the  
15 jury in.

16 Mr. Lutz, you can step down.

17 THE WITNESS: Thank you.

18 (Proceedings adjourned at 4:08 p.m.)

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REPORTER'S CERTIFICATE

COUNTY OF SAN DIEGO, )  
STATE OF CALIFORNIA, )

I, Kristy A. Montalban, Certified Shorthand Reporter licensed in the State of California, License No. 13551, hereby certify that the foregoing proceeding was reported by me and was thereafter transcribed with Computer-Aided Transcription; that the foregoing is a full, complete, and true record of said proceeding.

I further certify that I am not of counsel or attorney for either or any of the parties in the foregoing proceeding and caption named or in any way interested in the outcome of the cause in said caption.

In witness whereof, I have hereunto set my hand this day: August 11, 2017



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Kristy A. Montalban  
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