

Citizens' Oversight Projects (COPs)

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Governor Gavin Newsom
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CC:

Secretary of State Alex Padilla
Elections Division
1500 11th Street
Sacramento, CA 95814

(Submitted via <https://www.sos.ca.gov/administration/contact-information/email-administration/>)

Voting Modernization Board

YMB@sos.ca.gov

Assemblymember Marc Berman, Chair
Assembly Elections and Redistricting Committee
Legislative Office Building
1020 N Street, Room 365
Sacramento, CA 95814

(Submitted via: <https://lcmspubcontact.lc.ca.gov/PublicLCMS/ContactPopup.php?district=AD24>)

Senator Thomas J. Umberg, Chair
Senate Standing Committee on Elections and Constitutional Amendments
State Capitol, Room 2203
Sacramento, CA 95814

(Submitted via: <https://sd34.senate.ca.gov/contact>)

Dear Governor Newsom:

Your work in protecting the public health in these difficult times has made us proud you are our governor. As we face the challenge of the upcoming General Election during a lingering pandemic, our group of election integrity activists, representing various organizations with histories of work on our issues, requests your further support related to election audits, voter confidence in the result, and transparency.

Your executive order on VBM ballots:

On May 8, 2020, you signed an executive order¹ that requires that each county's elections officials send vote-by-mail (VBM) ballots for the 2020 General Election to all registered voters. Secretary of State Alex Padilla (SOS) issued a memo outlining the same issue also on that day². This was followed up by AB-860 which codified the change³. You also stated that your administration will continue to work with the Legislature and the Secretary of State to determine how requirements for in-person voting opportunities and other election details will be implemented to preserve public health while avoiding voter and poll worker confusion that might increase provisional voting.

We support your decision to institute statewide VBM with continued options for in-person voting.

We are concerned about the federal administration's unfounded attacks on VBM as "unsafe" and "the scandal of our time," fomenting distrust in the whole process of voting by mail. By law, California has some of the highest standards of election integrity. Counties must meet and maintain these standards, without any shortcuts or omission of ballot batches for expediency or to meet certification deadlines. The processing, scanning, and audit of California's mail ballots will be the fulcrum for proof of this decisive election. It must be all-inclusive and transparent.

Problem 1: California audits exclude many or most VBM ballots

Many counties *do not audit any VBM ballots that have not already been processed by election night*. Expanded VBM per AB-860 increases this audit "blind spot" from troublesome to potentially catastrophic. Typically, about 55% to 60% of the valid VBM ballots are processed after election night, as many VBM ballots are returned at the last opportunity. Although VBM comprises about 66% of votes cast in recent elections, we can safely expect, with COVID-19 fears very much alive, 90% or more of votes cast as VBM ballots this fall, meaning 55% -- a majority -- of ballots *may not be included* in the 1% Manual Tally audit process. Our state would go from best to worst in accountability and transparency standards and thus reduce voter confidence, and would hand the federal administration a clear basis for claiming that the election cannot be trusted.

Therefore, it is essential that you issue an executive order and work with the legislature to mandate that

All or nearly all VBM ballots shall be included in the 1% Manual Tally audit.

This issue was not addressed in the executive order, the SOS Memo, or AB-860.

Although California Election Code does provide that the 1% Manual Tally to confirm machine accuracy, Citizens' Oversight has found that many counties improperly implement these audits. They do not produce the reports required for oversight in a timely manner, and if they find discrepancies in a batch, they may inappropriately correct that batch instead of reporting the discrepancy. This leads to a clean audit, but removes evidence of what might be an underlying tabulation problem.

¹ <https://www.gov.ca.gov/wp-content/uploads/2020/05/05.08.2020-EO-N-64-20-signed.pdf>

² <https://elections.cdn.sos.ca.gov/ccrov/pdf/2020/may/20091ap.pdf>

³ https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB860

Problem 2: California fails to utilize its ballot images

Secretary Padilla took an important step last year by decertifying existing voting equipment and moving to the next generation voting machines. These new machines facilitate production of the reports required for oversight, and also create "ballot images," high-resolution digital pictures of each ballot in the election⁴. These images can increase voter confidence when independently reviewed to ensure that the election tabulation is correct, even if officials may not execute their internal audits perfectly.

San Francisco has made all ballot images available, as is true to some extent for counties in Colorado, Florida, and Wisconsin. By auditing the ballot images, we do not rely on the batch reports that officials claim are impossible to produce, we avoid the hazard of seeking a clean audit, and we can ensure that all ballots, including the later VBM ballots, are covered in an independent audit using those images.

Secretary Padilla's May 8 "Memorandum to all Clerks/Registrars #20090"⁵ reminded them that state and federal law mandates retention and preservation of ballot images. This is a great step in the right direction.

Unfortunately, the SOS also recently advised⁶ that ballot images and the cast-vote records "shall not" be made public. The SOS rationale equates ballot images and cast-vote records with voter registration cards, which must remain private. Neither law nor code nor current practice supports this SOS opinion. Ballot images do not contain any personal information by law and are not excluded from disclosure under the California Public Records Act (Cal Code 6250 et seq). Retaining without releasing foils their established value for verifying California elections by independent auditing.

Therefore, we further request that you specify in your executive order that

Ballot Images and Cast Vote Records shall be treated as public records that must be disclosed.

One-Minute History

The need for election auditing arose when the first electronic voting machines were introduced in the early 1960s. Election Code Section 15360⁷ established the 1% Manual Tally audit. Initially, it provided that paper ballots from 1% of precincts, originally counted on computer scanners, would be hand-tallied and compared with the computer result. In 1962, only 2.63% of ballots were VBM (then called "absentee"); they weren't included in the audit.

No-excuse permanent VBM voting was approved in the late 1990s. By 2005, 40% of ballots cast were VBM, yet they were still excluded from scrutiny in the mandatory 1% Manual Tally audit.

SOS Debra Bowen recognized that no class of ballots should be excluded from the audits.

In 2006, Secretary of State Debra Bowen reviewed this situation and sponsored SB-1235⁸, which provided that, in addition to polling-place ballots, "the tallied ballots include the absent voter's [sic] ballots, provisional ballots, and ballots cast at satellite locations." It also provided for reimbursement to counties of expenses related to implementation of this mandated program.

⁴ Typical ballots images are scanned at 200 pixels per inch, with one bit per pixel.

⁵ <https://elections.cdn.sos.ca.gov/ccrov/pdf/2020/may/20090sl.pdf> "Voting Systems: OVSTA Monthly Update – May 2020"

⁶ <https://elections.cdn.sos.ca.gov/ccrov/pdf/2020/march/20070jl.pdf> "Requests for Ballot Images"

⁷ At that time, the election code numbering was different, as it was reorganized in the late 1990s.

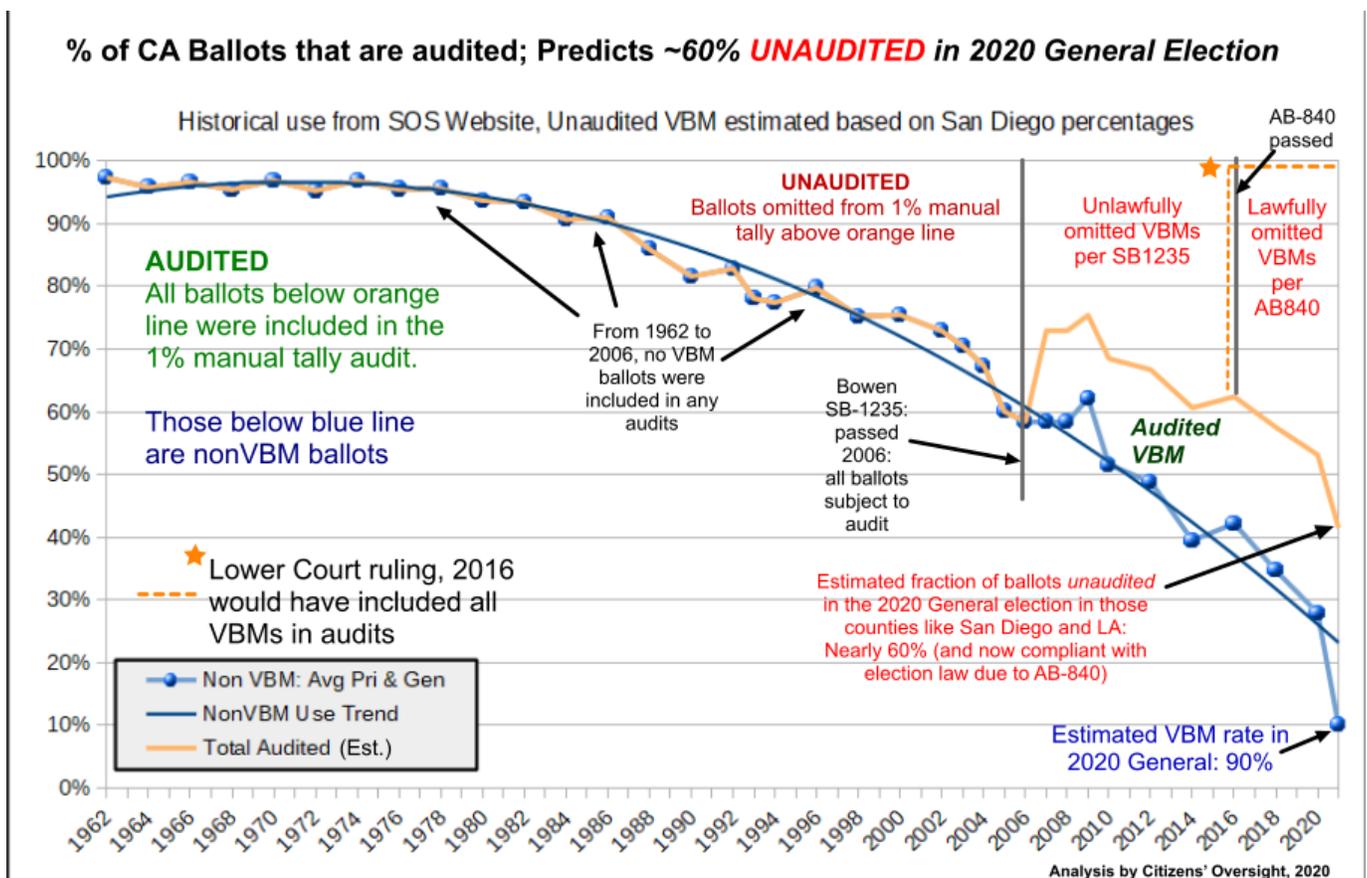
⁸ https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=200520060SB1235

Bowen's SB-1235 passed. Gov. Schwarzenegger signed it into law in September, 2006. Its plain reading is clear: All ballots should be included in the 1% Manual Tally audit prescribed by Election Code Section 15360. Exemptions of large numbers of ballots ruins the mathematical efficacy of random sampled audits, and hackers could possibly modify the tabulation of the large set of unaudited VBM ballots.

Secretary Bowen's audit law was still not fully implemented ten years later.

In the 2016 primary election, Citizens' Oversight discovered that San Diego omitted some 285,000 ballots from the random batch selection for the audit. These "later" VBM ballots were received in time to be considered validly cast, but were not fully processed by closing of the polls. San Diego Registrar of Voters Michael Vu declined to follow the law as written and to honor the request by Citizens' Oversight to include an additional eight batches randomly selected from the otherwise excluded later VBM ballots.

We sued, and mostly prevailed.⁹ All VBM ballots must be in the audit. The court did not, however, support our contention that provisionals should also be audited. Existing law was not clear enough on that point to allow the court to side with our position on that point.



The chart above is in color. To view a color image, see <https://copswiki.org/Common/M1947>.

Judgment circumvented by legislative action

San Diego County appealed their loss. We also appealed, so as to apply the ruling to all counties. Then, Secretary of State Alex Padilla, Los Angeles Registrar Dean Logan and other members of the California

⁹ <https://copswiki.org/Common/M1658>

Association of Clerks and Elections Officials (CACEO)¹⁰ lobbied the Legislature to modify Election Code Section 15360 to make inclusion of the "later" VBM ballots in the audit optional. Very late in the legislative calendar, without adequate hearings and consideration, the change was piggybacked as an amendment to 2017-AB-840¹¹, a bill originally about signatures on provisional envelopes. We pressed back with citizen lobbying and dozens of letters. Sadly, the appeals court then not only declared our case moot, but went on to hold that the law excluded those VBM ballots from the audit all along, thereby reversing the decision of the lower court and disallowing our court costs.

2017-AB-840 covered the short-cutting by elections officials, but was neither mathematically sound nor policy prudent. Some 40% of the ballots cast are left out of the audit in a typical CA election in counties (like Los Angeles and San Diego) that routinely omit the later VBM ballots from the audit.

The 1% Manual Tally audit originally drafted in the early 1960s aimed to catch programming and machine errors. But soon thereafter, computer viruses and the specter of malicious hacking became commonplace. The outlook for the 2020 General election will likely allow omitting more than half the ballots from the audits. More than *six million ballots* will be exposed to possible error or malicious attack with no chance of detection.

The current situation as codified by AB-840 is a worst-case scenario: a massive set of ballots that are *identifiable as a set in advance* are not audited at all. All a hacker or compromised insider must do is "flip" the votes of records in the tabulation of ballots, to flip the margin the other way. A rule of thumb is that the number of ballots that must be modified is the margin of victory (in ballots). And in 2020, the number of ballots in that set will likely be a majority.

For example, in the 2016 primary election in San Diego, 285,000 ballots comprised the "later" VBM and provisional ballots which were not audited. In that election the official results had Clinton prevail against Sanders by a margin of ~16,000 votes. Since it was a primary, only about half the ballots in the later VBM set included this contest, but of those, if 16,000 were flipped, then Sanders could have been the true winner by the same margin of 16,000 votes. Clearly, among 285,000 ballots, those 16,000 could be modified (assuming access to the tabulation) without raising any suspicion, given that no audit is performed. Auditing even one batch from this identifiable set is better than doing none at all, but AB-840 allows all such ballots to be excluded. The two largest counties in the state, Los Angeles and San Diego, both omit *all* the later VBM ballots from the audit. Obviously, if fewer ballots than the margin of victory are left out, then a contest cannot be flipped without otherwise raising suspicion. So *all* VBM ballots need not be included, but *nearly all* should be included to guarantee that no insider or hacker can modify contests without any risk of detection, of course assuming that the other aspects of the audit are executed properly.

2020 includes a very consequential presidential contest. Even though California is not considered a "battle-ground state" in terms of the electoral college, we note that after the last general election, the popular vote was still an important factor in public discourse and there were accusations of millions of fraudulent votes cast in California. If the later VBM ballots continue to be unaudited, now rising to a majority of the ballots cast, the audit is so weak that any contest could be reversed due to computer error or hacking, no matter what the margin, including local and state contests that are certainly consequential for California.

¹⁰ <https://www.caceo58.org/>

¹¹ https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201720180AB840

With no court cases in process, please take a fresh look and correct this situation immediately. We note the hopeful sign that the Secretary of State and the Legislature recently recognized that risk limiting audits must include all ballots in the universe of ballots from which random samples are drawn. We ask that your administration work with the SOS and the Legislature to apply this same principle to the 1% Manual Tally audits on a permanent basis.

THEREFORE:

We ask that you issue an executive order and pursue legislation so that

1. Election Audits include all, or nearly all vote-by-mail ballots.
2. Ballot Images and Cast-Vote Records shall be made available as public records

We thank you for your kind assistance in these important matters.

Sincerely,



Raymond Lutz
Executive Director
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