COURT OF APPEAL, STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT, DIVISION ONE

CITIZENS OVERSIGHT, INC,. a Delaware non-profit corporation; RAYMOND LUTZ, an individual, Plaintiffs and Cross-Appellants, v. MICHAEL VU, San Diego Registrar of Voters, HELEN N. ROBBINS-MEYER, San Diego County Chief Administrative Officer, SAN DIEGO COUNTY, a public entity; DOES 1-10, Defendants and Appellants.	4th Civil No. **D071907** (San Diego Superior Court Case No. 37-2016-00020273-CL-MC-CTL)

Appeal from a Judgment of the Superior Court,
State of California, County of San Diego
Honorable, Joel R. Wohlfeil, Judge Presiding

APPELLANTS' OPENING BRIEF

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TO BE FILED IN THE COURT OF APPEAL

APP-008

COURT OF APPEAL FOURTH APPELLATE DISTRICT, DIVISION ONE	COURT OF APPEAL CASE NUMBER: D071907
ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NO: 89019 NAME: TIMOTHY M. BARRY, Chief Deputy FIRM NAME: County of San Diego STREET ADDRESS: 1600 Pacific Highway, Room 355 CITY: San Diego STATE: CA ZIP CODE: 92101 TELEPHONE NO: (619) 531-6259 FAX NO: (619) 531-6005 E-MAIL ADDRESS: timothy.barry@sdcounty.ca.gov ATTORNEY FOR (name): Appellants	SUPERIOR COURT CASE NUMBER: 37-2016-00020273-CL-MC-CTL
APPELLANT/ PETITIONER: MICHAEL VU, San Diego Registrar of Voters, HELEN N. ROBBINS-MEYER, San Diego County CAO, SAN DIEGO COUNTY, a public entity; DOES 1-10, RESPONDENT/ REAL PARTY IN INTEREST: CITIZENS OVERSIGHT, INC., a Delaware non-profit corporation; RAYMOND LUTZ, an individual.	

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

(Check one): [X] INITIAL CERTIFICATE [ ] SUPPLEMENTAL CERTIFICATE

Notice: Please read rules 8.208 and 8.488 before completing this form. You may use this form for the initial certificate in an appeal when you file your brief or a prebriefing motion, application, or opposition to such a motion or application in the Court of Appeal, and when you file a petition for an extraordinary writ. You may also use this form as a supplemental certificate when you learn of changed or additional information that must be disclosed.

1. This form is being submitted on behalf of the following party (*name*): County of San Diego and Michael Vu, Registrar of Voters

2. a. [x] There are no interested entities or persons that must be listed in this certificate under rule 8.208.
   b. [ ] Interested entities or persons required to be listed under rule 8.208 are as follows:

Full name of interested entity or person	Nature of interest (*Explain*):
(1)	
(2)	
(3)	
(4)	
(5)	

[ ] Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: October 5, 2017

Timothy M. Barry, Chief Deputy
(TYPE OR PRINT NAME)

(SIGNATURE OF APPELLANT OR ATTORNEY)

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INTRODUCTION

Citizens Oversight, Inc. and Raymond Lutz ("Cross-Appellants") sought declaratory and injunctive relief and a petition for writ of mandate ordering the Registrar of Voters for the County of San Diego ("Registrar") to change the way he performs the "1 percent manual tally" of randomly selected precincts during the official canvass period following an election. After a three-day bench trial, the trial court ruled in favor of the Registrar and the County of San Diego ("Appellants") on Cross-Appellants' claim that Elections Code[1] section 15360 requires that the Registrar include "provisional" ballots in the 1 percent manual tally. (Volume 3, Clerk's Transcript ("3CT"), 561.) But the trial court ruled against Appellants on the claim that section 15360 requires that the Registrar include **all** Vote-by-Mail (VBM") ballots from the selected precincts. The court ordered issuance of a writ directing the Registrar to include all VBM ballots in the 1 percent manual tally in all future elections to which section 15360 applies. (*Ibid*.)

The trial court erred in construing section 15360 because that section does not require the inclusion of "all" VBM ballots but instead gives the Registrar discretion regarding the timing of the 1 percent manual tally. The Registrar exercised his discretion and conducted the tally based on the votes included in the "semifinal official canvass," which by definition may include "some but not all" VBM ballots. (§ 353.5.) The trial court thus erred in issuing a writ of mandate because the Registrar did not have a duty to include all VBM ballots in the 1 percent manual tally. Accordingly, the trial court's ruling in Appellants' favor must be reversed, as well as the order awarding them attorney fees as the prevailing party.

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[1] Unless otherwise stated, all references are to the Elections Code.

RELEVANT ELECTION LAW AND LEGISLATIVE HISTORY[2]

A. The Post-Election Manual Tally.

The Registrar is required to complete the "official canvass" and certify election results to the Secretary of State's office no later than 30 days after an election.[3] (Section 15372.) As part of the official canvass, Section 15360(a) directs the Registrar to conduct a "public manual tally of the ballots tabulated by [the vote tabulating system], including vote by mail ballots" using one of two approved methods. Section 15360(a)(1) directs elections officials to complete a manual tally of the ballots, including VBM ballots, cast at 1 percent of the precincts chosen at random and, for each race not included in the initial group of precincts, one additional precinct. Alternatively, elections officials may opt to conduct a two-part manual tally that includes the ballots cast in 1 percent of the precincts on election-day, excluding VBM ballots, and 1 percent of the VBM ballots cast in the election in batches randomly selected by the elections official. (Section 15360(a)(2).) The purpose of the manual tally is to verify the accuracy of the voting systems that are used to count the ballots. (Section 336.5; Volume 2, Reporter's Transcript ("2RT"), 219:13-220:16; 2RT, 225:17-226:1; 3RT, 379:2-19; 3RT, 523:17-20; Exh. 196, 7:7-11.) It is not a recount of election results. (2RT, 222:25-223:16; 3RT, 379:20-22; 3RT, 419:7-15.)

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[2] Cross-Appellants appeal the trial court's ruling on the issue of whether provisional ballots must be included in the 1 percent manual tally. (3CT, 792-794.) Appellants will address the facts and legal arguments relating to that issue when they respond to Cross-Appellants' brief.

[3] 28 days for persons voted for at the presidential primary for delegates to national conventions and for results for presidential electors. (§ 15375(c) and (d).)

B. Legislative History of the 1 Percent Manual Tally.

In 1965, with the introduction of electronic vote tabulating systems, the California Legislature enacted Section 15417. (Stats. 1965, ch. 2040.) Section 15417 required elections officials to conduct a public manual count of 1 percent of randomly selected ballots within 15 days after an election, the purpose of which was to verify the accuracy and reliability of the software used to count the ballots. Section 15417 was repealed, reenacted, amended and renumbered several times over the next 23 years, which amendments are not relevant to the present controversy.[4]

In 1998, the Legislature amended and renumbered the previous iteration of the statute containing the manual tally as new section 15360. (Stats. 1997-1998, ch. 1073, § 31.) As enacted, section 15360 clarified that the process required a "manual tally" and not a recount of the ballots tabulated by the devices cast in 1 percent of the precincts. (2RT, 223:17-224:10.) In addition, at that time, the Legislature repealed the term "semi-official canvass," and added sections 335.5, 336.5, and 353.5 defining "the official canvass," "1% manual tally," and "semifinal official canvass,"[5] respectively. (See, Stats. 1997-1998, ch. 1073, §§ 3, 4, and 5.)

In 2006 two competing bills worked their way through the legislative process. SB 1235 was introduced by then State Senator Debra Bowen. SB 1235 was purportedly introduced in response to "anecdotal reports that some counties routinely exclude absent voters and provisional

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[4] See Stats. 1976, ch. 246, Stats. 1978, ch. 847; Stats. 1986, ch. 1277; and Stats. 1993-1994, ch. 920, § 2.

[5] The "semifinal official canvass" "is the public process of collecting, processing, and tallying ballots and, for state or statewide elections, reporting results to the Secretary of State on election night. The semifinal official canvass may include some or all of the vote by mail and provisional ballot totals." (§ 353.5.)

ballots from the one percent manual tally process and may not be choosing the relevant precincts in a truly 'random' manner." (Request for Judicial Notice ("RJN"), Attachment ("Attch.") 11, p. 100.)[6] **As introduced**, SB 1235 proposed to amend the first sentence of section 15360 to expressly provide as follows:

> During the official canvass of every election in which a voting system is used, the official conducting the election shall conduct a public manual tally of the ballots tabulated by those devices ***including absent voter's*** **[sic] ballots, *provisional ballots and ballots cast in satellite locations***, cast in 1 percent of the precincts chosen at random by the elections official. (Emphasis added.)

(Exh. 100.)

In addition, SB 1235 proposed to add language requiring election officials to use either a random number generator or other method specified in regulations to be adopted by the Secretary of State to randomly choose the initial precincts to be included in the manual tally. (*Ibid*.)

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[6] At the time SB 1235 and AB 2769 were introduced and enacted, Los Angeles and Sacramento counties did not include any VBM ballots in the 1 percent manual tally. (3RT, 380:20-381:5; 3RT, 426:7-12.) San Diego included those VBM ballots that were included in the semifinal official canvass. (2RT, 236:8-237:10; 3RT, 530:13-28.) San Luis Obispo only included those VBM ballots that were already included in the count as of the date of the random selection. (Exh. 196, 10:22-11:10.)

Prior to the enactment of SB 1235 and AB 2769 none of the counties referenced above included any provisional ballots in the 1 percent manual tally. (3RT, 381:6-11; 3RT, 424:18-21; Exh. 196, 11:15-19; 3RT, 530:6-9.) After the enactment of SB 1235 and AB 2769, all of the counties continued to exclude provisional ballots from the 1 percent manual tally. (3RT, 385:10-12; 3RT, 424:23-425:1; Exh. 196, 12:11-20; 3RT 529:24-530:21.)

After the enactment of SB 1235 and AB 2769 Los Angeles and Sacramento counties adopted the practice utilized by San Diego and included the VBM ballots that were included in the semifinal official canvass in the 1 percent manual tally. (3RT, 384:5-11; 3RT, 424:12-22.)

There is nothing in the Legislative History or in the language of the statutes that indicates that the purpose of this legislation was to compel the counties to change the practices that they followed both before and after the enactment of SB 1235 and AB 2769 other than to require that VBM ballots be included in the 1 percent manual tally.

AB 2769 was introduced by Assembly Member John Benoit and sponsored by then Secretary of State Bruce McPherson. As introduced, AB 2769 focused on the timing and notice requirements for the manual tally; the reporting requirements for reporting the results of the manual tally to the Secretary of State; and the establishment of uniform procedures for the manual tally by the Secretary of State's office. (RJN, Attch. 6, p. 18.) **As introduced**, AB 2769 also provided that: "[t]he manual tally shall include **all** ballots cast by voters in each of the precincts selected, including absentee, provisional, and special absentee ballots" but when amended on May 26, 2006, this language **was deleted**. (Exh. 180.)

On August 7, 2006, SB 1235 was amended expressly **deleting** the reference to "*provisional ballots, and ballots cast at satellite locations".* As amended, proposed Section 15360(a) read:

> During the official canvass of every election in which a voting system is used, the official conducting the election shall conduct a public manual tally of the ballots tabulated by those devices *including absent voter's* [sic] ballots, ~~*provisional ballots and ballots cast in satellite locations,*~~ cast in 1 percent of the precincts chosen at random by the elections official." (Emphasis added.)

(Exh. 101.)

Eventually both SB 1235 and AB 2769 were amended so that the language of each bill substantially mirrored the other. (RJN, Attach. 8, p. 46.) The Governor subsequently signed both bills into law but because AB 2769 (Stats. 2006, ch. 894) was chaptered after SB 1235 (Stats. 2006, ch. 893) AB 2769 "chaptered out" SB 1235, and became the operative amendment going forward. (RJN, Attach. 7, p. 40; 2RT 235:2-13.) **As enacted** by AB 2769 section 15360, subdivision (a) provided that:

> During the official canvass of every election in which a voting system is used, the official conducting the election shall conduct a public manual tally of the ballots tabulated by those devices including absent voters' ballots, cast in 1 percent of the precincts chosen at random by the elections official.

(Exh. 104.)

This sentence was amended in 2007 but only to change "absent voters' ballots" to "vote by mail voters' ballots." (Stats. 2007, ch. 508 (AB 1243), § 105.) Then in 2011, this sentence was again amended to change "vote by mail voters' ballots" to "vote by mail ballots" and to add the phrase "using either of the following methods" at the end. (Stats. 2011, ch. 52 (AB 985), § 1.)

CONDUCTING THE ELECTION AND COMPLETING THE OFFICIAL CANVASS

Conducting a Presidential General Election in a county the size of San Diego requires a "Herculean" effort. (3RT, 461:23-25.) While the process for casting a ballot has been made easier for voters, the same cannot be said for the obligations and duties imposed on election officials in conducting an election. (3RT, 494:2-496:6.) The duties and obligations imposed on election officials have increased significantly over the years, increasing the pressure on elections officials to be able to certify elections within the "official canvass". (2RT, 300:12 – 23.)

A. Election Day.

In order to conduct the election in November 2016, the Registrar hired more than 7,000 poll workers to man 1,552 voting precincts throughout the County. (2RT, 300:10-14; 3RT, 459:5-7; 3RT, 462:23-24.) In addition to the Registrar's permanent staff of 65, the Registrar planned to hire and train an additional 800 to 900 seasonal election workers. (3RT, 472:11-25.)

The Registrar's office printed 623 ballot types in five different languages for the November 2016 Presidential General Election. (2RT, 340:21-24; 3RT, 459:11-14.) Each ballot type is coded so that the devices used to tabulate the ballots can recognize each ballot type and properly count the ballots. (2RT, 336:11-24.) Each ballot type must be correctly distributed to one or more of the 1,552 voting precincts and more than 1300

physical polling locations. (3RT, 459:5-14.) Due to the high number of contests (184), including a historical number of statewide propositions and local measures (52) that appeared on the ballot for the November 2016 Presidential Primary, the Registrar for the first time was required to print a two-card ballot for every registered voter within the County. (3RT, 459:21-460:4; 3RT, 460:28-461:12.)

More than 1.65 million San Diego County residents were registered to vote at the time of the November Presidential General Election. There were 489,576 poll ballots cast on election-day and 856,937 VBM ballots cast in the election. Because of the two-card ballot, the Registrar had to manually process more than 1.7 million VBM ballot cards during the official canvass. (http://www.sdvote.com/content/dam/rov/en/archive/201611cvpdf.zip, "FEDERAL-PRESIDENT-VICE PRESIDENT.pdf, page 143.) In addition, the Registrar manually processed more than 115,000 provisional ballots (more than 230,000 ballot cards) during the official canvass. https://www.eac.gov/assets/1/6/EAVS_2016_Final_Data_for_Public_Release_v4_xls1.zip,)

B. The Official Canvass.

The term "official canvass" is defined as "the public process of processing and tallying all ballots received in an election, including, but not limited to, provisional ballots and vote by mail ballots not included in the semifinal official canvass. The official canvass also includes the process of reconciling ballots, attempting to prohibit duplicate voting by vote by mail and provisional voters, and performance of the manual tally of 1 percent of all precincts." (§ 335.5.) As indicated above, with limited exceptions the Registrar must complete the official canvass and certify the election results to the Secretary of State no later than 30 days after an election. (Section 15372.) The official canvass includes, but is not limited to, the following:

"(a) An inspection of all materials and supplies returned by poll workers.

(b) A reconciliation of the number of signatures on the roster with the number of ballots recorded on the ballot statement.

(c) In the event of a discrepancy in the reconciliation required by subdivision (b), the number of ballots received from each polling place shall be reconciled with the number of ballots cast, as indicated on the ballot statement.

(d) A reconciliation of the number of ballots counted, spoiled, canceled, or invalidated due to identifying marks, overvotes, or as otherwise provided by statute, with the number of votes recorded, including vote by mail and provisional ballots, by the vote counting system.

(e) Processing and counting any valid vote by mail and provisional ballots not included in the semifinal official canvass.

(f) Counting any valid write-in votes.

(g) Reproducing any damaged ballots, if necessary.

(h) Reporting final results to the governing board and the Secretary of State, as required."

(§ 15302.)

C. <u>The Processing of VBM Ballots</u>.

The Registrar may begin processing VBM envelopes beginning 29 days before an election and may begin processing (i.e. counting) VBM ballots on the 10th business day before an election. (§ 15101(a) and (b).)

The Registrar has extensive procedures for processing VBM ballots. (Exhs. 146, 146.38-146.80 and 177; 3RT, 474:5-19.) The procedures for processing VBM ballots are both complicated and time consuming. (*Ibid*.) Each VBM ballot envelope is manually reviewed by the Registrar's staff. (Exhs. 146 and 177; 3RT, 477:6-12.) VBM ballot envelopes must be scanned, sorted, and signature checked against the records on file with the Registrar's office before the ballots are extracted from the envelopes and

tabulated. (Exh. 177; 3RT, 477:23-485:17.) New legislation has further complicated the processing and handling of VBM ballots.

As of June 2016, the Registrar's office accepted and processed all VBM ballots that are received within three days of the election provided they were postmarked as of election day. (§ 3020(b).) In addition, voters who failed to sign their VBM ballot envelope now have up to eight days after the election to provide the Registrar's office with their signature. (§ 3019.) If there are any anomalies in the envelope or the ballot, the Registrar's staff will further review the ballot/envelope and liberally construe any defects in the envelope/ballot in favor of the voter. (Exh. 146, 146.58, 146.68-146.75; 2RT, 323:2-19.) The review and verification of the VBM ballots requires tens of thousands of man hours to complete. (3RT, 475:27-428:2; 3RT, 503:15-24.)

In San Diego, VBM ballots are tabulated using optical scanners that are maintained in a secure room and hard wired to the County's GEM's tabulating system.[7] (2RT, 334:2-335:9; Exh. 153.) At no time are these devices connected to the internet or an outside server. (2RT, 309:12-23; 3RT 499:6-8.) The process of tabulating VBM ballots begins 10 business days before an election (3RT 485:18-25) continues through the end of the official canvass. (3RT, 432:18-433:2; 3 RT 503:15-24.)

[7] Ballots cast at the polls on election day are transported from the polls back to the Registrar's central office where they are run through optical scanners. (2RT, 318:15-25; Exh. 152.) These optical scanners are not hard wired to the GEMS tabulating system but rather have memory cards. (2RT, 319:10-28; 3RT, 498:1-11.) After the ballots from a precinct are run, the memory card is removed from the scanner and taken directly to a secure room where the data from the memory card is uploaded to the GEMS system. (2RT, 326:4-8; 2RT 333:14-334:1; Exh. 155.)

PROCEDURAL HISTORY

Raymond Lutz filed his original complaint for declaratory relief in pro per on June 16, 2016, naming Appellants and Helen Robbins-Meyer as defendants. (1CT, 17-32.) After filing a substitution of counsel, Lutz filed his first amended complaint for declaratory and injunctive relief on June 23, 2016, and added Citizens Oversight, Inc., a non-profit corporation controlled by Lutz, as a plaintiff. (1CT, 47-73.)

On July 25, 2016, the court issued a Minute Order denying Cross-Appellants' request for a preliminary injunction requiring Appellants to redo the 1 percent manual tally conducted during the canvass of the June 2016 Presidential Primary election. (1CT, 264-266.) On August 11, 2016, Cross-Appellants filed their Second Amended Complaint for Declaratory Relief and Mandamus (2CT, 276-303) and the court issued a Minute Order setting the matter for a three-day bench trial beginning October 3, 2016. (2CT, 274-275.) Appellants filed their answer to the second amended complaint on August 19, 2016. (2CT, 304-313.)

Trial commenced on October 4, 2016. Appellants filed a motion for non-suit with respect to defendant Helen Robbins-Meyer on October 4, 2016 (2CT, 399-402), which was granted by the court that same day. (2CT, 375; 1RT, 93:16-20.) On October 11, 2016, at the close of trial, the court directed counsel to file closing briefs by October 21, 2016. (2CT, 414.)

On October 26, 2016 the court issued a Statement of Intended Decision (2CT, 455-489) and set a Status Conference for December 1, 2016. (2CT, 454.) Cross-Appellants (2CT, 490-497) and Appellants (2CT, 498-516) each filed their objections to the Statement of Intended Decision on November 8, 2016.

At the Status Conference, which was continued to December 2, 2016, counsel submitted a stipulation regarding the objections each party filed relating to the Statement of Intended Decision. (2CT, 519-522.) On

December 19, 2016, the court filed its Statement of Decision (2CT, 524-557) and set a Status Conference to resolve objections, if any, to the Court's Statement of Decision for January 27. 2017. (2CT, 558.) The court entered judgment on January 10, 2017. (3CT, 560-597.) The court subsequently entered an order awarding attorney fees to Cross-Appellants. (3CT, 811-816.)

STATEMENT OF APPEALABILITY

The judgment of the superior court is final and is appealable pursuant to Code of Civil Procedure § 904.1, subdivision (a)(1). An appeal is timely if it is filed within 60 days after the party filing the notice of appeal serves or is served with the Notice of Entry of Judgment. (California Rule of Court, rule 8.104(a)(1)(B).) Notice of Entry of Judgment in this case was filed and served on January 20, 2017. (3CT, 598-637.) Appellants filed their timely Notice of Appeal on February 3, 2017. (3CT, 683-684.) Appellants filed a timely Notice of Appeal of the order granting attorney's fees, which was entered on March 30, 2017, (3CT, 811-816) on April 27, 2017. (3CT, 817.)

STANDARD OF REVIEW

"In reviewing the trial court's ruling on a writ of mandate (Code Civ. Proc., § 1085), the appellate court is ordinarily confined to an inquiry as to whether the findings and judgment of the trial court are supported by substantial evidence. [Citation.] However, the appellate court may make its own determination when the case involves resolution of questions of law where the facts are undisputed. [Citations.]" (*Californians Aware v. Joint Labor/Mgmt. Benefits Com*. (2011) 200 Cal.App.4th 972, 978 (internal quotation marks and citations omitted).)

Questions of statutory construction are reviewed *de novo.* (See *Taylor v. Dep't of Indus. Relations, Div. of Labor Standards Enf't.* (2016) 4 Cal.App.5th 801, 807.)

LEGAL ARGUMENT

I.

SECTION 15360 MUST BE HARMONIZED INTERNALLY AND WITH RELATED PROVISIONS AND READ IN LIGHT OF THE PURPOSE TO BE ACHIEVED, CONTEMPORANEOUS ADMINISTRATIVE CONSTRUCTION AND LEGISLATIVE HISTORY

This case turns on the interpretation of section 15360. In interpreting a statute, the court must first ascertain the Legislature's intent so as to be able to adopt an interpretation that best gives effect to the purpose of the statute. (*Varshock v. Department of Forestry & Fire Protection* (2011) 194 Cal.App.4th 635, 641.) The analysis begins with an examination of the actual words of the statute, giving them their usual, ordinary meaning. (*Coburn v. Sievert* (2005) 133 Cal.App.4th 1483, 1495.) While the initial examination of the statute may suggest a single unambiguous meaning, "a court may not simply adopt a literal construction and end its inquiry" where there is a latent ambiguity in the statute. (*Id*. at 1495.) A latent ambiguity exists where "some extrinsic factor creates a need for interpretation or a choice between two or more possible meanings." (*Varshock, supra*, 194 Cal.App.4th at 644 *citing Mosk v. Superior Court* (1979) 25 Cal.3d 474, 495, fn. 18.) Such a necessity is present where a "literal construction would frustrate rather than promote the purpose of the statute." (*Coburn, supra*, 133 Cal.App.4th at 1495.)

Where an ambiguity exists, the court must "look to 'extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part.'

[Citation]." (*Hoeschst Celanese Corp. v. Franchise Tax Bd.* (2001) 25 Cal.4th 508, 519.) Moreover, "the 'plain meaning' rule does not prohibit a court from determining whether the literal meaning of a statute comports with its purpose or whether such a construction of one provision is consistent with other provisions of the statute. The meaning of a statute may not be determined from a single word or sentence; the words must be construed in context, and provisions relating to the same subject matter must be harmonized to the extent possible." (*Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735.)

Properly construed, section 15360 does not require the inclusion of "all" VBM ballots in the 1 percent manual tally.

A. Section 15360 Must be Harmonized Internally and With Related Provisions.

Section 15360 begins with this directive: "*During* the official canvass of every election in which a voting system is used, the official conducting the election shall conduct a public manual tally of the ballots tabulated by those devices, *including vote by mail ballots*, using either of the following methods. . . ." (§ 15360, subd.(a) (emphasis added).) The method Appellants chose to use is set forth in section 15360, subdivision (a)(1)(A), which provides: "A public manual tally of the ballots, including vote by mail ballots, cast in 1 percent of the precincts chosen at random by the elections official. If 1 percent of the precincts is less than one whole precinct, the tally shall be conducted in one precinct chosen at random by the elections official." While the trial court interpreted these provisions as requiring the inclusion of "all" VBM ballots in the 1 percent manual tally, the word "all" does not appear before the phrase "vote by mail ballots." The word "all" should not be inserted. (CCP § 1858 [when interpreting a statute the court is "to ascertain and declare what is in terms or in substance contained therein not to insert what has been omitted."].)

This statutory language must be harmonized both internally and with related provisions. (See *Lungren, supra,* 45 Cal.3d at 735.) Here, the phrase "vote by mail ballots" must be construed in light of section 15360's directive that the 1 percent manual tally be done "*during* the official canvass. . . ." (§ 15360, subd. (a), (capitalization omitted, emphasis added).)

The official canvass includes the processing and tallying of all ballots received in an election and must be completed, with limited exceptions, within 30 days. (§§ 335.5, 15372.) Section 15360 does not direct that the 1 percent manual tally be conducted at a given point, such as "after all ballots have been counted." On the contrary, section 15360 directs that the 1 percent manual tally be completed *during* the official canvass. The processing and tallying of ballots, including VBM ballots, is not complete until the very end of the official canvass. (3RT, 432:18-433:2; 3RT, 505:15-24.) If section 15360 required all VBM ballots to be included in the 1 percent manual tally, it would have to be completed after the official canvass is complete, not *during* the official canvass. Thus, the most reasonable interpretation of section 15360 is that the 1 percent manual tally, which must be completed during the official canvass, need not include "all" VBM ballots.

B. Section 15360 Must be Construed in Light of the Objects to be Achieved and Contemporaneous Administrative Construction.

This construction of section 15360 is the most reasonable in light of the object to be achieved by section 15360, which is ***not*** to ***recount*** all ballots in the randomly selected precincts. (See § 336.5; 2RT 222:25-223:16; 3RT, 379:20-22; 3RT 419:7-15.) Rather, the 1 percent manual tally is a ***test*** to verify that voting machines ***correctly recorded*** the ballots counted by the machines in the selected precincts. (See *Nguyen v. Nguyen*

(2008) 158 Cal.App.4th 1636, 1643 [“‘1 percent manual tally’ is a procedure used in California to test whether there are any discrepancies between the electronic record generated by a voting machine and what is essentially a manual audit of that electronic record.”])

The vote tabulating system is tested before and during the official canvass to ensure that the vote tabulating system has not been tampered with.[8] VBM ballots are paper ballots that are tabulated using the same system used to tabulate the paper ballots cast at the polls. (Exh. 171; 3RT, 497:16-498:27.) If the 1 percent manual tally verifies that the voting machines are correctly recording ballots at the time of the tally, these machines will correctly record all VBM ballots processed after the manual tally is complete. Thus, the purpose of section 15360 (checking the accuracy of the tabulation machines) is served regardless of when during the official canvass a particular county chooses to conduct the 1 percent manual tally.

While some smaller counties may conduct the manual tally after all VBM (as well as provisional)[9] ballots are processed, larger counties like

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[8] Besides physical security, which includes 24-hour security cameras, an alarm system, server password restrictions, limited badge access to the secured room containing the tabulating system, the Registrar is constantly taking steps to ensure the security of the vote tabulating system. (2RT, 309:28-310:21.) These steps include testing the hardware for functionality (2RT, 337:16-25), logic and accuracy testing (2RT, 337:11-13; 2RT, 339:14-345:3); deposit of the election computer vote count program with the Secretary of State before any ballots are counted (2RT, 351: 7-20); and calibration testing of the scanners used to tabulate the ballots and constant software testing before and after any ballots are tabulated by the system. (2RT, 351:22-352:25.) In addition, the County’s software vendor is required to deposit its “source code” with a private escrow vendor (Section 19212; 2RT, 304:26-305:4) and the County is required to submit use and security procedures with the Secretary of State’s office, and cannot change those use procedures without approval of the Secretary of State. (2RT, 305:5-306:8.)

[9] As noted, the issue of provisional ballots will be addressed in response to Cross-Appellants’ briefing on this point. (See fn. 2, *supra*.)

Los Angeles, San Diego and Sacramento, which are faced with a much greater number of VBM (again, as well as provisional) ballots, may conduct the manual tally based on ballots included in the semifinal official canvass, before all of the VBM and provisional ballots are processed. This practice reflects the inherent and practical problems that delaying the manual tally would pose to completing the official canvass in a timely manner. (3RT 390:19-391:12; 3 RT, 429:21-430:16; 3RT 531:8-534:17.) As demonstrated by the evidence and testimony at trial, the processing and counting of VBM (and provisional ballots) is complicated and labor intensive, and may not be fully complete until the end of the official canvass period. (3RT, 432:18-433:2; 3RT 503:15-24.)

The flexible administrative construction counties have given to section 15360 is also consistent with the administrative construction of that statute by the Secretary of State, who is charged with oversight of elections in California. In response to inquiries regarding whether all VBM ballots must be included in the 1 percent manual tally after this lawsuit was filed, the Secretary of State on September 15, 2016 issued a CC/ROV which is a directive to all county clerks and registrars statewide, clarifying the requirements of section 15360. (Exh. 107; 3RT, 386:4-21.) After discussing the purpose and legislative history of Section 15360 at some length, the Secretary of State confirmed his position that "neither provisional ballots nor *all* vote-by-mail ballots are required to be included in the one percent manual tally." (*Ibid.* (emphasis added).)

"An agency interpretation of the meaning and legal effect of a statute is entitled to consideration and respect by the courts . . . ." (*Carson Citizens for Reform v. Kawagoe* (2009) 178 Cal.App.4th 357, 366-368.) The court should "defer to an administrative agency's interpretation of a statute or regulation involving its area of expertise, unless the interpretation flies in the face of the clear language and purpose of the interpreted

provision." (*Communities for a Better Environment v, State Water Resources Control Board* (2003) 109 Cal.App.4th 1089, 1104.)

Here, the administrative construction given section 15360 is a reasonable one in light of the statute's language, purpose and legislative history. (Exh. 107.)

C. The Legislative History Demonstrates that the Legislature Declined to Require that "All" VBM Ballots be Included in the 1 Percent Manual Tally.

As noted previously, SB 1235 was introduced as a "result of anecdotal reports that some counties were not including absentee [now referred to as vote by mail] or provisional ballots in their manual tally." (RJN, Attch. 11, p. 100.)[10] **As introduced**, SB 1235 proposed to amend section 15360 to expressly provide as follows:

> During the official canvass of every election in which a voting system is used, the official conducting the election shall conduct a public manual tally of the ballots tabulated by those devices *including absent voter's* [sic] *ballots, provisional ballots and ballots cast in satellite locations,* cast in 1 percent of the precincts chosen at random by the elections official. (Emphasis added.)

Noticeably absent from the text of SB 1235 was the word "all" when referencing absentee and provisional ballots.

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[10] In further support of their argument, Appellants urge the Court to also consider the following documents contained in the RJN:
Attach. 7, pp. 039 – 044 Governor's Office of Planning & Research dated 9/7/2006;
Attach. 9, pp. 060 – 061 Department of Finance Enrolled Bill Report dated August 21, 2006;
Attach. 10, pp. 062 – 067 Senate Rule Committee – Unfinished Business, dated August 26, 2006;
Attach. 12, pp. 119 – 120 Assembly Committee on Appropriations, Hearing date August 9, 2006;
Attach. 13, pp. 123 – 135 Senate Third Reading, As Amended August 21, 2006;
Attach. 14, p. 136 Amendments to Senate Bill No. 1235;
Attach. 15, pp. 156 – 157 Department of Finance Bill Analysis dated August 8, 2006.

On the other hand, when competing measure AB 2769 was introduced it expressly provided that: "[t]he manual tally shall include **all** ballots cast by voters in each of the precincts selected, including absentee, provisional, and special absentee ballots." (Emphasis added.) But once amended, the provision relating to "**all** ballots cast by voters in each of the precincts selected, including absentee, provisional, and special absentee ballots" **was deleted**. (Exh. 180.)

Finally, as enacted by AB 2769 Section 15360 provided that:

> During the official canvass of every election in which a voting system is used, the official conducting the election shall conduct a public manual tally of the ballots tabulated by those devices including absent voters' ballots, cast in 1 percent of the precincts chosen at random by the elections official.

AB 2769 "chaptered out" SB 1235, and thus this language became the operative amendment. Although the Legislature chose to omit the word "all" in amending section 15360, the trial court's interpretation of this language effectively re-inserts the word "all." But "'[w]hen the Legislature chooses to omit a provision from the final version of a statute which was included in an earlier version, this is strong evidence that the act as adopted should not be construed to incorporate the original provision.' [citation]." (*UFCW & Employers Benefit Trust v. Sutter Health* (2015) 241 Cal.App.4th 909, 927, citing *People v. Delgado* (2013) 214 Cal.App.4th 914, 918.) In such cases "courts must not interpret a statute to include terms the Legislature deleted from earlier drafts." (*Berry v. American Exp. Publishing, Inc.* (2007) 147 Cal.App.4th 224, 231.)

Given that the Legislature considered -- but rejected -- versions of the statutory language that would have required the inclusion of "all" VBM ballots, the trial court erred in construing the relevant portion of section 15360 as if it contained the word "all." The intent of this language is reasonably read as requiring the inclusion of VBM ballots in the manual

tally, but not "all" ballots.[11] This construction of section 15360 harmonizes the requirement that VBM ballots be included in the 1 percent manual tally, with the recognition that not "all" VBM ballots must be included if the tally is conducted at a point "during the official canvass" before all such ballots are counted.

This construction also serves the legislative purpose in amending section 15360 to include VBM ballots. After the amendment, counties such as Los Angeles and Sacramento, which had previously not included *any* VBM ballots in their 1 percent manual tally, adopted the practice followed by San Diego, basing their 1 percent manual tally on the semifinal official canvass vote. (See fn. 6, *supra*.) This shift resolved the perceived problem that gave rise to the legislative proposals to add the VBM ballot requirement, i.e., that some counties did not include VBM ballots in their manual tallies. Nothing in the legislative history indicates that the Legislature intended to change the existing practice of counties such as San Diego, which already included most but not all VBM ballots in the 1 percent manual tally.

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[11] When the Legislature intended to include the word "all" in Section 15360, the Legislature did. Section 15360(b) which pertains to ballots cast on direct recording electronic ("DRE") voting systems provides that:

> …the official conducting the election shall either include those ballots in the manual tally conducted pursuant to paragraph (1) or (2) of subdivision (a) or conduct a public manual tally of those ballots cast on no fewer than 1 percent of **all** the [DRE] voting machines used in that election chosen at random by the elections official." (Emphasis added.)

Where drafters of a statute have used a term in one place in a statute and omitted it from another place in the same statute, the term should not be inferred where it has been omitted. (*Robertson v. Rodriquez* (1995) 36 Cal.App.4th 347, 361.)

II.

THE TRIAL COURT'S ISSUANCE OF A WRIT OF MANDATE IMPROPERLY INTERFERES WITH THE REGISTRAR'S EXERCISE OF DISCRETION IN THE TIMING OF THE 1 PERCENT MANUAL TALLY

The trial court erred in issuing a writ of mandate that usurps the Registrar's discretion regarding the timing of the 1 percent manual tally. A court may only issue a writ of mandate to compel a public officer to perform a ministerial, mandatory duty. (*Code Civ. Proc., § 1085*; *City of Dinuba v. County of Tulare* (2007) 41 Cal.4th 859, 868.) A writ will not lie to control the discretion conferred upon a public officer absent an abuse of discretion. (*Ellena v. Department of Insurance* (2014) 230 Cal.App.4th 198, 205–06.) The Registrar does not have a "ministerial duty" to conduct the 1 percent manual tally only after "all" VBM ballots for the chosen precincts had been counted. While section 15360 mandates that a tally "shall" be conducted using one of the methodologies described in that section, the use of the term "shall" does not eliminate a public official's discretion in carrying out his or her statutory duty. (See *California Public Records Research, Inc. v. County of Stanislaus* (2016) 246 Cal.App.4th 1432, 1453–54.) Unless the statute requires a *particular* action, the official retains discretion. (*Ibid.*)

In other words, an action is ministerial only if the public officer "is required to perform in a prescribed manner" and "without regard to his or her own judgment or opinion concerning such acts propriety or impropriety." (*Ridgecrest Charter School v. Sierra Sands Unified School District* (2005) 130 Cal.App.4th 986, 1002 (citations omitted).) In the context of elections, courts have repeatedly recognized that local elections officials exercise discretion in fulfilling their statutory duties relating to the processing and counting of ballots. (See *Clark v. McCann* (2015) 243 Cal.App.4th 910, 918 and 920; *Escalante v. City of Hermosa Beach* (1987)

195 Cal.App.3d 1009, 1024–25; *Mapstead v. Anchundo* (1968) 63 Cal.App.4th 246, 268.)

Likewise, local elections officials exercise discretion in fulfilling their statutory duty to conduct a 1 percent manual tally under section 15360. As relevant here, the Registrar has discretion regarding the *timing* of the manual tally that must occur "during the official canvass" period. (Section 15360 (a) (capitalization omitted).) Because section 15360 does not specify the point during the official canvass at which the tally must take place or require that the tally take place only after all ballots are counted, such a requirement cannot be read into section 15360. It is well-settled that courts may not insert words into a statute in the guise of interpretation. (See, *Boy Scouts of America Nat. Foundation v. Superior Court* (2012) 206 Cal.App.4th 428, 446.)

The Registrar's exercise of discretion may result in less than all VBM ballots being included in the 1 percent manual tally, but as noted, section 15360 is not a recount but rather an equipment test. The Registrar acted within his discretion in conducting the 1 percent manual tally before the end of the official canvass, when not all VBM ballots have been processed and when by definition not all VBM ballots have to be counted.

III.

THE AWARD OF ATTORNEY FEES TO CROSS-APPELLANTS AS THE SUCCESSFUL PARTIES AT TRIAL MUST BE REVERSED

The trial court awarded attorney's fees to Cross-Appellants under Code of Civil Procedure section 1021.5, finding them to be the successful parties at trial based on the court's determination that section 15360 required the inclusion of all VBM ballots in the 1 percent manual tally. (3CT, 811-816.) Because the trial court's statutory interpretation is incorrect for the reasons discussed, the award of attorney fees must be reversed. (See *Carson Citizens for Reform, supra*, 178 Cal.App.4th at 370 ("*Citizens*").)

In *Citizens,* the trial court similarly awarded attorney fees under Code of Civil Procedure section 1021.5, which makes fees available "to a successful party" in an action resulting in the enforcement of an important right affecting the public interest where the other statutory criteria are met. (*Id.* at 370-371) But the appellate court reversed the trial court's ruling on the merits, finding that the court erred in interpreting the governing statute. As a result, the appellate court found that the plaintiff was "no longer a successful party in the litigation entitled to attorney fees." (*Id.* at 371.)

Likewise, if this Court reverses the trial court's ruling in favor of Cross-Appellants, they are no longer the successful parties in the litigation and thus are not entitled to an award of attorney fees.

CONCLUSION

Section 15360 does not require the inclusion of "all" VBM ballots in the 1 percent manual tall but instead vests the Registrar with discretion as to the timing of the tally during the official canvass period. The Registrar exercised his discretion to conduct the tally based on the semifinal official canvass. For these reasons, the trial court erred in issuing a writ of mandate ordering the Registrar to include all VBM ballots in future elections to which section 15360 applies because the Registrar does not have a ministerial duty to include all VBM ballots in the 1 percent manual tally. Accordingly, the trial court's ruling in Cross-Appellants' favor must be reversed, as well as the order awarding them attorney fees as the prevailing party.

DATED: October 5, 2017

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WORD COUNT CERTIFICATION
(Cal. Rules of Court, rule 8.360(b)(1))

The text of this brief consists of 6,736 words as counted by the Microsoft Word 2010 word-processing program used to generate the brief.

DATED: October 5, 2017

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***Citizens Oversight, Inc., et al, v. Michael Vu, et al*;**
Court of Appeal, 4th Appellate District, Division One, Case No. D071907
San Diego Superior Court Case No. 37-2016-00020273-CL-MC-CTL

DECLARATION OF SERVICE

I, the undersigned, declare under penalty of perjury that I am over the age of eighteen years and not a party to the case; I am employed in the County of San Diego, California. My business address is 1600 Pacific Highway, Room 355, San Diego, California, 92101.

On October 5, 2017, I served the following documents:

1. **APPELLANTS' OPENING BRIEF.**

In the following manner:

☒ **(BY E-mail)** I cause to be transmitted a copy of the foregoing document(s) this date via TrueFiling System, which electronically notifies all counsel as follows:

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Executed on October 5, 2017, at San Diego, California.

By: 
ODETTE ORTEGA