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6 Attorneys for Defendants

7
8 **IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA**
9 **IN AND FOR THE COUNTY OF SAN DIEGO**
10 **CENTRAL DIVISION**

11 CITIZENS OVERSIGHT, INC., a Delaware)
non-profit corporation; RAYMOND LUTZ,)
12 an individual,)

13 Plaintiffs,)

14 v.)

15 MICHAEL VU, San Diego Registrar of)
Voters, HELEN N. ROBBINS-MEYER, San)
16 Diego County Chief Administrative Officer,)
SAN DIEGO COUNTY, a public entity;)
17 DOES 1-10,)

18 Defendants.)
_____)

No. 37-2016-00020273-CL-MC-CTL
Action Filed: June 16, 2016

**DEFENDANTS' OBJECTIONS TO
STATEMENT OF INTENDED DECISION
AND PROPOSED FINDINGS**

IMAGED FILE

Hearing Date: December 1, 2016
Time: 3:00 p.m.
Dept.: 73
ICJ: Hon. Joel Wohlfell

19
20 Defendants/Respondents Michael Vu, sued in his official capacity as the Registrar of
21 Voters for the County of San Diego ("Vu") and the County of San Diego ("County")
22 respectfully submit the following objections to the Statement of Intended Decision ("SOID")
23 and also submit additional proposed findings:

24 The purpose of a statement of decision is to set forth the factual and legal basis for the
25 court's decision as to each of the principal controverted issues. Code of Civil Procedure,
26 Section 632; *Muzquiz v. City of Emeryville* (2000) 79 Cal.App.4th 1106, 1124. It is reversible
27 error where a statement of decision "fails to make findings on a material issue which would

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1 fairly disclose the trial court’s determination. *Sperber v. Robinson* (1994) 26 Cal.App.4th 736,
2 345.

3 In response to the court’s SOID defendants request that the court:

- 4 • Correct inaccuracies set forth in the court’s restatement of the testimony of the
5 witnesses;
- 6 • Consider defendants’ objections, detailed below, to findings contained in the
7 SOID; and
- 8 • Consider adding the additional proposed findings, also set forth below.

9 **INACCURACIES IN THE RESTATEMENT OF TESTIMONY**

10 The court’s restatement of the testimony misstates the testimony of the witnesses, which
11 statements should be corrected or clarified as follows:

12 **A. MICHAEL VU**

13 **Misstatement No. 1:**

14 Page 9, ll. 3-4: “The County does not maintain the white out tape on ballots for
15 inspection.”

16 **Corrected Statement No. 1:**

17 The County secures and maintains the redacted white out taped ballots for 22 months for
18 federal elections and for six months for local elections.

19 **Misstatement No. 2:**

20 Page 9, l. 8: “... with 1,500 precincts ...”

21 **Corrected Statement No. 2:**

22 Mr. Vu testified that there will be 1,552 precincts for the November 2016 Presidential
23 General Election.

24 **Misstatement No. 3:**

25 Page 9, l. 16: “The County counted 68.2% of the provisional ballots.”

26 **Corrected Statement No. 3:**

27 Mr. Vu testified and Exhibit 148 reflects that the County **fully** counted 51,427, or 68.2%
28 of the provisional ballots cast.

1 **Misstatement No. 4:**

2 Page 9, ll. 17-18: “The County partially counted 17,226 provisional ballots.”

3 **Corrected Statement No. 4:**

4 Mr. Vu testified and Exhibit 148 reflects that the County partially counted 17,226, **or**
5 **22.9%**, of the provisional ballots.

6 **Misstatement No. 5:**

7 Page 9, ll. 21-22: “The County received 256,000 VBM ballots, of which 233,000 were
8 included in the official canvass for the June election.”

9 **Corrected Statement No. 5:**

10 As reflected elsewhere in the SOID (See p. 8, ll. 23-24; and p. 11, ll. 15-16) there were
11 489,610 VBM ballots of which 256,685 were included in the semi-final official canvass for the
12 June election. The remaining approximately 233,000 VBM ballots were processed and counted
13 during the official canvass.

14 **Misstatement No. 6:**

15 Page 10, l. 11: “The County has 35 days ‘to certify the election.’”

16 **Corrected Statement No 6:**

17 Mr. Vu testified that the County has **30** days to certify the election.

18 **Misstatement No. 7:**

19 Page 10, ll. 18-19: “He expects the volume of VBM ballots to be processed in November
20 to be greater than the 235,000 VBM ballots processed in the June election.”

21 **Corrected Statement No. 7:**

22 He expects the volume of VBM ballots to be processed in November during the official
23 canvass to be greater than the 235,000 VBM ballots processed during the official canvass of the
24 June election.

25 **Misstatement No. 8:**

26 Page 11, ll. 17-19: “The ballots of non-registered democratic voters cast for a democratic
27 candidate in the June election were cast as provisional ballots which was not included in the
28 semi-final unofficial canvass.”

1 **Corrected Statement No. 8:**

2 Hypothetically, if a non-partisan voter cast a non-partisan democratic ballot and the poll
3 worker mistakenly placed the ballot in a provisional envelope it would not have been included in
4 the semi-final official canvass but rather would have been processed and counted during the
5 canvass following the election.

6 **B. RAYMOND LUTZ**

7 **Misstatement No. 9:**

8 Page 12, l. 4: “The County has 1,522 precincts.”

9 **Corrected Statement No. 9:**

10 The County had 1,522 precincts for the June Presidential Primary Election. The County
11 will have 1,552 precincts for the November Presidential General Election.

12 **Misstatement No. 10:**

13 Page 13, l. 3: “The last time he voted at a poll was 2014”

14 **Corrected Statement No. 10:**

15 Mr. Lutz testified that the last time he **visited** a poll was 2014.

16 **C. DEBORAH SEILER**

17 **Misstatement No. 11:**

18 Page 15, ll. 13-14: “She denies that the word ‘all’ does not appear in section 15360.”

19 **Corrected Statement No. 11:**

20 She denies that the word ‘all’ appears in section 15360.

21 **Misstatement No. 12:**

22 Page 15, ll. 23-24: “The County based the 1% manual tally on the unofficial canvass.”

23 **Corrected Statement No. 12:**

24 The County based the 1% manual tally on the **semi-final official** canvass.

25 **Misstatement No. 13:**

26 Page 16, ll. 9-10: “She considers the reference to include absentee and provisional
27 ballots to be an error.”

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1 **Corrected Statement No. 13:**

2 She considers the statements in the August 30th letter from then Secretary of State
3 **Bruce McPherson (Exhibit 59, p. 45) and the Enrolled Bill Memorandum to Governor**
4 **dated 9/7/06 (Exhibit 59, p. 37-38) that SB 1235 requires elections officials to include**
5 absentee and provisional ballots to be an error.

6 **D. CHARLIE WALLIS**

7 **Misstatement No. 14:**

8 p. 18, l. 18: “‘VVPPT’ stands for voter verified paper trail.”

9 **Corrected Statement No. 14:**

10 VVPAT stands for voter verified paper **audit** trail.

11 **E. DEAN LOGAN**

12 **Misstatement No. 15:**

13 Page 21, l. 4: “12,000,000 persons live in L.A. County.”

14 **Corrected Statement No. 15:**

15 Twelve million persons live in L.A. County **and Mr. Lutz is the only one who has ever**
16 **complained about how they conduct the 1 percent manual tally.**

17 **F. JULIE RODEWALD**

18 **Misstatement No. 16:**

19 Page 21, l. 24-25: “San Luis Obispo does not include VBM ballots not counted as of the
20 election or provisional ballots in the 1 % manual tally.”

21 **Corrected Statement No. 16:**

22 San Luis Obispo **included those VBM ballots that had already been counted at the**
23 **time of the random selection for manual tally and did not include any** provisional ballots in
24 the 1% manual tally.

25 **OBJECTIONS TO PROPOSED FINDINGS**

26 Defendants object to the following findings set forth in the SOID:

27 **Finding No. 1:** At page 24, l. 26 the court concludes: “Declaratory relief is a proper
28 remedy.”

1 **Objection to Finding No. 1:** Under CCP § 1061 the court has discretion whether to
2 grant relief sought by declaratory relief. *Communist Party of United States v. Peck*, 20 Cal.2d
3 536, 540 (1942). Where, as here, it appears from the face of the complaint that plaintiffs have a
4 speedy and adequate remedy it is within the court’s discretion to refuse to grant declaratory
5 relief. *Id.*

6 **Finding No. 2:** At page 31, l. 27 through page 32, l. 1 the court concludes: “On the
7 other hand, Plaintiffs’ interpretation that all VBM ballots should be included in the 1% manual
8 tally strikes the Court as more reasonable than Defendants’ rejection of the need to do so.”

9 **Objection to Finding No. 2:** The court’s interpretation of Section 15360 requires the
10 court to insert the word “all” into the Section 15360(a). As detailed in defendants’ trial brief and
11 in their closing brief, **as introduced**, AB 2769 provided that: “[t]he manual tally shall include
12 **all** ballots cast by voters in each of the precincts selected, including absentee, provisional, and
13 special absentee ballots.” (Emphasis added.) AB 2769 was amended on May 26, 2006, and the
14 provision relating to “**all** ballots cast by voters in each of the precincts selected, including
15 absentee, provisional, and special absentee ballots.” **was deleted. As enacted** by AB 2769
16 Section 15360 provided that:

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

20 When interpreting a statute the court is “to ascertain and declare what is in terms or in
21 substance contained therein not to insert what has been omitted” CCP § 1858. ““When the
22 Legislature chooses to omit a provision from the final version of a statute which was included in
23 an earlier version, this is strong evidence that the act as adopted should not be construed to
24 incorporate the original provision.’ [citation]” *UFCW & Employers Benefit Trust v. Sutter*
25 *Health* 241 Cal.App.4th 909, 927 (2015), citing *People v. Delgado* 214 Cal.App.4th 914, 918
26 (2013). See also, *Berry v. American Exp. Publishing, Inc.* 147 Cal.App.4th 224, 231 (2007) –
27 “courts must not interpret a statute to include terms the Legislature deleted from earlier drafts.”

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1 As such, it is clear that the Legislature considered but rejected the idea that “all” vote by mail
2 ballots were to be included in the manual tally.

3 **Finding No. 3:** At page 32, ll. 15-16 the court concludes: “The Secretary of State’s
4 contrary opinion (Exh. “107”) is rejected.

5 **Objection to Finding No. 3:** The administrative construction of Section 15360 by
6 elections officials is entitled to deference by the court. The court must “defer to an
7 administrative agency’s interpretation of a statute or regulation involving its area of expertise,
8 unless the interpretation flies in the face of the clear language and purpose of the interpreted
9 provision.” *Communities for a Better Environment v. State Water Resources Control Board* 109
10 Cal.App.4th 1089, 1104 (2003). See also, *Carson Citizens for Reform v. Kawagoe*, 178
11 Cal.App.4th 357, 366 - 367, (2009). [“An agency interpretation of the meaning and legal effect
12 of a statute is entitled to consideration and respect by the courts”]

13 In this case, the Secretary of State who is the chief elections official for the State and who
14 is charged with oversight of elections in California issued a 3-page directive/guideline on
15 September 15, 2016, to all county clerks and registrars in the State regarding Section 15360.
16 After discussing the legislative history of Section 15360, the Secretary of State concluded that
17 “neither provisional ballots nor all vote-by-mail ballots are required to be included in the one
18 percent manual tally.” In addition, elections officials throughout the state have consistently
19 interpreted and applied Section 15360 in a manner consistent with the manner in which San
20 Diego County has interpreted and applied that provision. The administrative construction of
21 Section 15360 by the Secretary of State and election officials around the State is due deference
22 and it is error for the court to reject this evidence out of hand.

23 **Finding No. 4:** At page 32, ll. 17-18 the court concludes: “Accordingly, the Court
24 accepts Plaintiff’s interpretation that the 1% manual tally include all VBM ballots.”

25 **Objection to Finding No 4:** See Objection to Finding No. 2 above, which is
26 incorporated herein by reference.

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1 **Finding No. 5:** At page 32, ll. 25-26 the court concludes: “A writ of mandate
2 compelling the County Registrar of Voters Office to comply with the California Elections Code
3 is a proper remedy.”

4 **Objection to Finding No. 5:** While a court may issue a writ of mandate to compel a
5 public officer to perform a ministerial, mandatory duty (see *Code Civ. Proc.*, § 1085; *City of*
6 *Dinuba v. County of Tulare*, 41 Cal.4th 859, 868 (2007)), a writ will not lie to control the
7 discretion conferred upon a public officer absent an abuse of discretion. *Ellena v. Department*
8 *of Insurance*, 230 Cal.App.4th 198, 205–06 (2014). No abuse of discretion has been shown here
9 and the issuance of a writ would be contrary to law.

10 Section 15360 provides that a 1 percent manual tally “shall” be conducted using one of
11 the methodologies described in that section. But the use of the term “shall” does not eliminate a
12 public official’s discretion in carrying out his or her statutory duty. See *California Public*
13 *Records Research, Inc. v. County of Stanislaus*, 246 Cal.App.4th 1432, 1453–54 (2016). Unless
14 the statute requires a particular action, the official retains discretion. *Id.* In other words, an
15 action is ministerial only if the public officer “is required to perform in a prescribed manner”
16 and “without regard to his or her own judgment or opinion concerning the propriety of such
17 act.” *Ridgecrest Charter School v. Sierra Sands Unified School District*, 130 Cal.App.4th 986,
18 1002 (2005) (citations omitted). In the context of elections, courts have repeatedly recognized
19 that local elections officials exercise discretion in fulfilling their statutory duties relating to the
20 processing and counting of ballots. See *Clark v. McCann*, 243 Cal.App.4th 910, 918 and 920
21 (2015); *Escalante v. City of Hermosa Beach*, 195 Cal.App.3d 1009, 1024–25 (1987); *Mapstead*
22 *v. Anchundo*, 63 Cal.App.4th 246, 268 (1968). Likewise, local election officials exercise
23 discretion in fulfilling their statutory duty to conduct a 1 percent manual tally.

24 As relevant here, the Registrar has discretion regarding the timing of the manual tally.
25 Section 15360 requires a manual tally “*during* the official canvass” that extends 30 days past the
26 election. § 15360 (a) (capitalization omitted) (emphasis added). But the precise timing of the
27 manual tally within this 30-day period is left to the discretion of local elections officials. While
28 some smaller counties may conduct the manual tally after most or all ballots are processed,

1 larger counties like Los Angeles, San Diego and Sacramento that are faced with a much greater
2 number of VBM and provisional ballots may conduct the manual tally before all of these ballots
3 are processed. This practice reflects the inherent and practical problems that delaying the
4 manual tally would pose to completing the official canvass in a timely manner. As
5 demonstrated by the evidence and testimony, not only is the processing and counting of VBM
6 and provisional ballots extremely complicated and labor intensive, the Registrar must now
7 accept VBM ballots for up to three days after the election (Section 3020(b) and voters now have
8 up to eight days after the election to sign their VBM envelope (Section 3019(f)).

9 With respect to the mandamus relief sought by plaintiffs, Section 13314 provides that “an
10 elector may seek a writ of mandate alleging that ... any neglect of duty has occurred or is about
11 to occur” but is only entitled to relief upon proof that the “neglect is in violation of this code or
12 the Constitution” and “the issuance of a writ will not substantially interfere with the conduct of
13 the election.” Section 13314 (a)(1) and (2). It is also presumed that the Registrar has and will
14 properly perform the duties and obligations of his office. CCP § 664. Plaintiffs in this action
15 therefore had the burden to prove that the Registrar has or is about to fail to perform a duty in
16 violation of the Elections Code **and** that the granting of any relief would not substantially
17 interfere with the conduct of the upcoming November Presidential General Election. Plaintiffs
18 failed to present any evidence in satisfaction of the second prong of Section 13314 and their
19 request for the issuance of a writ of mandate should be denied.

20 **Finding No. 6:** At page 33, ll. 14-18 the court concludes: “The Court finds that
21 Defendants are ‘obligated’ to include all VBM ballots in the 1% manual tally, in performance of
22 the requirements imposed on elections officials by Election Code Sections 336.5 and 15360. To
23 the extent, the Court grants the relief sought by Plaintiffs to require Defendants to “to fully
24 comply with the breadth of California Elections Code Section 15360” SAC, page 12.”

25 **Objection to Finding No. 6:** See Objection to Finding Nos. 2 and 5 above, which are
26 incorporated herein by reference.

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1 **PROPOSED ADDITIONAL FINDINGS**

2 In addition to the corrections to the testimony of the witnesses and the objections to the
3 court’s findings as set forth above, defendants request that the court make and incorporate the
4 following additional findings into its final Statement of Decision:

5 1. Except as stated below, elections officials are required to complete the official
6 canvass and certify election results to the Secretary of State’s office no later than 30 days after
7 an election. Elections Code Section 15372.

8 2. Elections officials are required to complete the canvass for persons voted for at the
9 presidential primary for delegates to national conventions and for results for presidential electors
10 within 28 days after an election. Section 15375(c) and (d).

11 3. As part of the official canvass, Section 15360(a) directs elections officials to
12 conduct a “public manual tally of the ballots tabulated by [the vote tabulating system], including
13 vote by mail ballots” using one of two approved methods.

14 4. Section 15360(a)(1) directs elections officials to complete a manual tally of the
15 ballots, including vote-by-mail (“VBM”) ballots, cast at 1 percent of the precincts chosen at
16 random and, for each race not included in the initial group of precincts, one additional precinct.

17 5. Alternatively, elections officials may opt to conduct a two part manual tally that
18 includes the ballots cast in 1 percent of the precincts on election-day, excluding VBM ballots,
19 and 1 percent of the VBM ballots cast in the election in batches randomly selected by the
20 elections official. Section 15360(a)(2).

21 6. The purpose of the manual tally is to verify the accuracy of the voting systems that
22 are used to count the ballots. Section 336.5. It is not a recount of election results.

23 7. The court finds that latent ambiguities exist in the language of Section 15360(a)
24 and that it is appropriate for the court to consider extrinsic aids, “including the ostensible
25 objects to be achieved, the evils to be remedied, the legislative history, public policy,
26 contemporaneous administrative construction, and the statutory scheme of which the statute is a
27 part.’ [Citation]” *Hoeschst Celanese Corp. v. Franchise Tax Bd.*, 25 Cal.4th 508, 519 (2001).

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1 8. In addition, the court must consider “the entire substance of a statute and the
2 scheme of law of which it is a part to determine the scope and purpose, construe its words in
3 context and harmonize its various parts.” *Varshock v. Department of Forestry & Fire*
4 *Protection*, 194 Cal.App.4th 635, 641 (2011).

5 9. The goal is to arrive at a “reasonable and common sense interpretation consistent
6 with the apparent purpose and intention of the lawmakers, practical rather than technical in
7 nature, which upon application will result in wise policy rather than mischief or absurdity.”
8 [Citation]” *City of Poway City of San Diego*, 229 Cal.App.3d 847, 858 (1991).

9 10. In 1965, with the introduction of electronic vote tabulating systems, the California
10 Legislature enacted Section 15417. Section 15417 required elections officials to conduct a
11 public manual count of 1% of randomly selected ballots within 15 days after an election, the
12 purpose of which was to verify the accuracy and reliability of the software used to count the
13 ballots. (Stats. 1965, ch. 2040.)

14 11. In 1998, the Legislature amended and renumbered the previous iteration of the
15 manual tally as new Section 15360. (Stats. 1997-1998, ch. 1073, § 31.) As enacted, Section
16 15360 clarified that the process required a “manual tally” and not a recount of the ballots
17 tabulated by the devices cast in 1 percent of the precincts.

18 12. In addition, at that time, the Legislature repealed the term “semi-official canvass,”
19 and added Sections 335.5, 336.5, and 353.5 defining “the official canvass,” “1% manual tally,”
20 and “semifinal official canvass,” respectively. (See Stats 1997-1998, ch. 1073, §§ 3, 4, and 5.)

21 13. In 2006 two competing bills worked their way through the legislative process. SB
22 1235 was introduced by then State Senator Debra Bowen.

23 14. **As introduced**, SB 1235 proposed to amend the sentence of Section 15360 to
24 expressly provide as follows:

25 During the official canvass of every election in which a voting system is
26 used, the official conducting the election shall conduct a public manual tally of the
27 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.)

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

4 16. AB 2769 was introduced by Assembly Member John Benoit and sponsored by
5 then Secretary of State Bruce McPherson. As introduced, AB 2769 focused on the timing and
6 notice requirements for the manual tally; the reporting requirements for reporting the results of
7 the manual tally to the Secretary of State; and the establishment of uniform procedures for the
8 manual tally by the Secretary of State's office.

9 17. **As introduced**, AB 2769 also provided that: “[t]he manual tally shall include **all**
10 ballots cast by voters in each of the precincts selected, including absentee, provisional, and
11 special absentee ballots” but when amended on May 26, 2006, the specific language set forth
12 immediately above **was deleted**.

13 18. On August 7, 2006, SB 1235 was amended expressly deleting the reference to
14 “*provisional ballots, and ballots cast at satellite locations*”. As amended, proposed Section
15 15360(a) read:

16 During the official canvass of every election in which a voting system is
17 used, the official conducting the election shall conduct a public manual tally of the
18 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.)

19 19. On August 7, 2006, AB 2769 was also amended to provide in relevant part that:
20 “This bill shall become operative only if Senate Bill 1235 of the 2005-06 Regular Session is
21 enacted and becomes effective on or before January 1, 2007.

22 20. SB 1235 was again amended on August 21, 2006 and AB 2769 was again
23 amended on August 24, 2006. The amendments essentially conformed the language of each bill
24 to substantially mirror the other.

25 21. The Governor subsequently signed both bills into law but because AB 2769 (Stats
26 2006, ch. 894) was chaptered after SB 1235 (Stats 2006, ch. 893) AB 2769 “chaptered out” SB
27 1235, and became the operative amendment going forward. **As enacted** by AB 2769 Section
28 15360 provided that:

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

5 22. In 2010, the Legislature enacted AB 46 as urgency legislation effective June 22,
6 2010. (Stats 2010, ch. 28.) As enacted AB 46 added and repealed Section 15360.5. AB 46 was
7 necessitated by the fact that the Governor had declared a special election to take place in San
8 Luis Obispo, Santa Barbara, Santa Clara and Santa Cruz counties on June 22, 2010, (and
9 possibly August 17, 2010, if a runoff proved necessary) just two weeks after the regular
10 Statewide Primary Election on June 8, 2010.

11 23. The purpose of AB 46 was to streamline the process and reduce the costs incurred
12 by those four counties in conducting the manual tally of polling place and vote by mail ballots.
13 Specifically, Section 15360.5 provided election officials with an alternative method for
14 conducting the manual tally. Election officials could conduct the manual tally by precinct as
15 provided under AB 2769 (see § 15360.5(a)(1)) or, alternatively could conduct a two-part manual
16 tally that allowed elections officials to manually tally randomly selected batches of VBM
17 ballots, thereby avoiding the cost and time of having to integrate the VBM ballots into the
18 randomly selected precincts (see § 15360.5(a)(2)). By its own terms, AB 46 expired January 1,
19 2011.

20 24. In 2011, the Legislature enacted AB 985 (Stats 2011, c. 52, § 1.) amending
21 Section 15360 by incorporating the operative provisions of Section 15360.5 and making those
22 provisions applicable to all jurisdictions in the State. (See Section 15360(a)(2)(A) and (B).)
23 Section 15360 as amended by SB 985 is the operative iteration of that section for purposes of
24 this case.

25 25. The words “provisional ballots” do not appear in Section 15360.

26 26. The word “all” does not appear in Section 15360(a).

27 27. The Registrar has discretion regarding the timing of the manual tally which must
28 be completed “*during* the official canvass.”

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1 28. Though the subject of much discussion throughout its history (see for example,
2 Defendants’ trial brief, pages 2 - 4), the legislature chose not to include “provisional ballots” in
3 Section 15360. There appears to be good reason to conclude that this omission was not
4 inadvertent.

5 29. ““When the Legislature chooses to omit a provision from the final version of a
6 statute which was included in an earlier version, this is strong evidence that the act as adopted
7 should not be construed to incorporate the original provision.’ [citation]” *UFCW & Employers*
8 *Benefit Trust v. Sutter Health* 241 Cal.App.4th 909, 927 (2015), citing *People v. Delgado* 214
9 Cal.App.4th 914, 918 (2013). See also, *Berry v. American Exp. Publishing, Inc.* 147
10 Cal.App.4th 224, 231 (2007) – “courts must not interpret a statute to include terms the
11 Legislature deleted from earlier drafts.”

12 30 As such, it is clear that the Legislature considered but rejected the idea that
13 provisional ballots be included in the manual tally.

14 31. Vu’s testimony – which the court perceived to be credible – is consistent with
15 defendants’ trial brief explanation of the circumstances under which provisional ballots are cast.
16 The court finds the initial explanation (a provisional voter may be a voter who is “registered as a
17 VBM voter and been issued a mail ballot, but wants to vote at the poll”) to be significant. The
18 court infers from this explanation that provisional ballots may be nothing more than duplicate
19 ballots of VBM ballots cast by the same voters. Indeed, according to defendants “In the June
20 Presidential Primary, more than one-half of the 75,386 voters who voted provisionally were
21 VBM voters who appeared at the polls on election day but who could not surrender their VBM
22 ballot. And, in fact, during the canvass, the Registrar determined that 521 voters voted both
23 their VBM ballot and a provisional Ballot.” If the court were to accept plaintiffs’ argument that
24 Section 15360’s 1 percent manual tally procedure includes “all ballots cast” including
25 provisional ballots (Plaintiffs’ trial brief at pages 4-7), plaintiffs are in effect, advocating that
26 defendants assume the risk of including more than 100% of the ballots cast in the 1 percent
27 manual tally. Not only does this interpretation strike the court as unreasonable but it has the

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1 inevitable consequence of adding burden to the County's ROV, whose resources are already
2 stretched too thin.

3 32. Accordingly, the court rejects plaintiffs' interpretation that the 1 percent manual
4 tally include provisional ballots.

5 33. Since 1984 voters have been permitted to vote provisional ballots. Sections
6 14310-14313.

7 34. Voters have been allowed to cast absentee ballot in limited circumstances since the
8 1920's. Since 1979 all voter have had the option to vote-by-mail. Sections 3000-3025.

9 35. On election-day in November 2016 there will be more than 7,000 poll workers
10 manning 1,552 voting precincts throughout the County.

11 36. Each of these poll-workers will have participated in both in person and online
12 training.

13 37. The Registrar's office has printed 623 ballot types in five different languages for
14 the upcoming November 2016 Presidential General Election.

15 38. Each ballot type is coded so that the devices used to tabulate the ballots can
16 recognize each ballot type and properly count the ballots. Each ballot type must be correctly
17 distributed to one or more of the 1,552 voting precincts and 1,378 physical polling locations.

18 39. Due to the high number of contests (184), including a historical number of 52
19 statewide propositions and local measures across the County, the Registrar must print for the
20 first time a two-card ballot for every registered voter within the County.

21 40. There will be approximately 1.6 million registered voters in San Diego County for
22 the November Presidential General Election. Of the 1.6 million registered voters, more than
23 62% are permanent vote-by-mail voters.

24 41. The official canvass includes, but is not limited to, the following:

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

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

28 ///

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

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

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

10 (f) Counting any valid write-in votes.

11 (g) Reproducing any damaged ballots, if necessary.

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

14 Section 15302.

15 42. VBM ballots may be sent to voters beginning 29 days before the election and can
16 be returned to the Registrar up to three days after the election.

17 43. The processing of VBM ballots begins immediately after the Registrar begins
18 mailing the ballots to voters. Section 15101.

19 44. The Registrar has extensive procedures for processing VBM ballots. The
20 procedures for processing VBM ballots are both complicated and time consuming.

21 45. Each VBM ballot envelope is manually reviewed by the Registrar’s staff. VBM
22 ballots must be scanned, sorted, and signature checked against the records on file with the
23 Registrar’s office before the ballots are extracted from the envelopes and tabulated.

24 46. New legislation has further complicated the processing and handling of VBM
25 ballots. As of this election, the Registrar’s office accepts and processes all VBM ballots that are
26 received within three days of the election provided they are postmarked as of election day.

27 (Section 3020). In addition, voters who failed to sign their VBM ballot envelope now have up
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1 to eight days after the election to provide the Registrar’s office with their signature. Section
2 3019(f).

3 47. If there are any anomalies in the envelope or the ballot, the Registrar’s staff will
4 further review the ballot/envelope and liberally construe any defects in the envelope/ballot in
5 favor of the voter.

6 48. The Registrar utilizes approximately 281 election workers working every day both
7 before and after election-day to process the VBM ballots. The review and verification of the
8 VBM ballots requires tens of thousands of man hours to complete.

9 49. Voters may be required to vote provisionally on the day of the election.

10 50. In the June Presidential Primary there were 75,386 provisional ballots cast.

11 51. More than one-half of the 75,386 voters who voted provisionally were VBM
12 voters who appeared at the polls on election-day but who could not surrender their VBM ballot.

13 52. During the canvass, the Registrar determined that 521 voters voted both their
14 VBM ballot and a provisional ballot.

15 53. In the June Presidential Primary more than 12,000 voters appeared at a poll other
16 than where they were registered and voted provisionally.

17 54. A large percentage of provisional ballots must be remade to eliminate votes for
18 contests for which the provisional voter was not eligible to vote. This process is also labor
19 intensive, requiring election workers to place white-out tape over invalid votes cast by the voter.

20 55. The amount of labor required to be able to timely certify an election involves
21 hundreds of thousands of man-hours.

22 **REQUEST FOR CLARIFICATION**

23 Page 33, l. 28 – page 34, l. 2: “The Court finds, as set forth above, in favor of Plaintiffs
24 and against Defendants MICHAEL VU and COUNTY OF SAN DIEGO, and in favor of
25 Defendant HELEN N. ROBBINS-MEYER and against Plaintiff, on Plaintiffs’ claims against
26 Defendants.”

27 **Clarification Requested:**

28 As set forth above, the court:

