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9 **SUPERIOR COURT OF CALIFORNIA**
10 **COUNTY OF SAN DIEGO—CENTRAL DIVISION**

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

14 Plaintiffs,)

15 vs.)

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

21 Defendants.)

CASE NO: 37-2016-00020273-CL-MC-CTL

**PLAINTIFFS’ OBJECTIONS TO COURT’S
STATEMENT OF INTENDED DECISION**

Hon. Joel R. Wohlfeil, Judge

Complaint filed: June 16, 2016

Trial Date: October 4-6, 11, 2016

Status Conference: December 1, 2016

Time: 3:00 p.m.

Department: C-73

22 Plaintiffs submit the objection to the Court’s Statement of Intended Decision (“SOID”)
23 pursuant to California Rules of Court Rule 3.1590(g):

24 The Court issued a Statement of Intended Decision on October 26, 2016, with service
25 on the parties by first class mail. The first twenty four pages are the Court’s recitation,
26 observations and comments concerning the Minute Order of July 25, 2016 (ROA #70), Joint
27 Trial Readiness Conference Report (“TRC”) (ROA #91)/Advance Trial Review Order
28 (“ATRO”) (ROA #90), Trial Exhibits and Trial Witnesses. Plaintiffs understand the Court’s
desire to have a thorough record concerning these events and comments and has no objection
to the form thereof. Plaintiffs note that in the Court’s attempt to recite portions of Plaintiffs

1 trial brief, the references to "Exhibit 54" should be replaced with "Exhibit 59" which actually
2 was the Legislative History exhibit introduced at trial.

3 Page 26, Line 19: Strike "Exhibit 54", Replace "Exhibit 59"

4 Page 26, Line 24: Strike "Exhibit 54", Replace "Exhibit 59"

5 Page 26, Line 27: Strike "Exhibit 54", Replace Exhibit 59"

6 **Objections:**

7 1. Page 1 lines 7-8 -- "no country in the world works as hard as the United States to
8 preserve its election integrity, a bedrock of its democratic principles."

9 This statement is not supported by any evidence in the proceeding. Actually, many
10 countries do as much or more than the United States to insure election integrity. Such a
11 conclusion would require an exhaustive comparison of all other countries to determine who
12 works harder. It also implies that these Defendants are already working harder than all other
13 countries on earth and thus implies that Plaintiffs' Second Amended Complaint overly
14 burdensome. Plaintiffs' role is part of the "hard work" needed to preserve election integrity and
15 without it, our integrity as a nation is diminished. We can accept "the United States works hard to
16 preserve election integrity, a bedrock of its democratic principles."

17 2. Page 3, lines 25-27

18 Although the Court is reciting *Finnie v. Town of Tiburon* (1988) 199 Cal. App. 3d 581,
19 586 ("Finnie") from its preliminary ruling dated July 25, 2016, concerning Plaintiffs' Motion for
20 Preliminary Injunction, the basis for that decision which deemed Plaintiffs' motion as moot, is
21 inaccurate. Finnie is distinguishable. In Finnie, was a decision on a project that was put before
22 the voters. After losing the vote, Finnie filed a law suit. Unlike here, their case was moot due to
23 legitimate election results. Again, there was no dispute that the actions of elections officials were
24 improper, but that the outcome of the election was not desirable to the plaintiffs. The instant
25 case is far different in that the issue is regarding the action of the election official in his capacity
26 and whether California law was followed, not whether some other issue can be decided due to an
27 election. Plaintiffs' Complaint is not a contest of the election results.

28 The Secretary of State's certification, as mentioned on page 3, lines 15-18 was based on

1 and predicated upon, *inter alia*, the certification of the results from San Diego. Thus, certification
2 by the Secretary of State, which relies upon the certification of San Diego County, and all
3 California county results, does not mean that the 1% manual tally, which is the subject of this
4 case, was conducted according to the law, nor does it mean that Plaintiffs should have no
5 recourse regarding the improper conduct of the Registrar of Voters in that election. As clearly
6 demonstrated by facts not in dispute in this case, 39% of legitimate valid ballots were omitted
7 from the scrutiny of the audit, and they also conducted themselves suspiciously in that they
8 operated outside their own written procedures and changed the method of the 1% manual tally
9 from batch-based to precinct-based for the VBM ballots that were included, resulting in 40
10 people spending a week rifling through boxes of ballots to find those that would correctly match
11 reports of the selected precincts. This conduct was so far from what is required, that the court can
12 and should rule that the 1% manual tally be redone in the Presidential Primary just to set the
13 record straight and ensure there was a correct audit and certification reported to the Secretary of
14 State.

15 3. Page 3, line 25 through Page 4, line 2. The court further cites *Wilson v. Los Angeles*
16 *County Civil Service Commission* (1952) 112 Cal. App. 2d 450, 453 (“Wilson”) to
17 support its initial ruling that the Plaintiffs’ Motion for Injunction is moot.

18 Wilson is also a distinguishable case. In Wilson, they considered whether a list of
19 appointees could or could not be extended in time by the authorities involved. In that case, they
20 apparently had the right to take that action under the law. Here, Defendants did not fulfill their
21 obligations under the law to perform the final audit of the election and performed the audit in
22 such a way to raise suspicions as to their motives. It is undisputed that the Registrar certified the
23 election results without full compliance with Elections Code Section 15360, omitting
24 approximately 285,000 ballots from review. Some of the races in that election were within
25 16,000 votes and could be compromised. A complete audit could unveil acts, nefarious or not,
26 such that results of the election would likely need to be nullified. Plaintiffs assert that Plaintiff’s
27 Motion for Injunction was not to be mooted. Instead, the Court should require the election
28 officials conduct the audit, even if after certification is complete, to underwrite the integrity of

1 the certification.

2 4. Page 4, lines 16-17 presents the definition of the 1% manual tally, stating that it "is
3 conducted during the official canvass..."

4 If the manual tally is not completed according to the law, the official canvass cannot
5 certified. By way of analogy, if a service provider was required to perform a test on their work
6 prior to completing the contract and being paid for their work, and they did not complete 39% of
7 the testing phase specified by the contract, the issue does not become moot simply because the
8 contractor says the contract is complete. Testing of the product can be done at any time to
9 validate the work done. 42 USCS § 1974 provides that every officer of election shall retain and
10 preserve, for a period of 22 months from the date of any general, special, or primary election . . .
11 all records and papers which come into his or her possession relating to any application,
12 registration, payment of poll tax, or other act requisite to voting in such election.

13 5. Page 10, line 3: "very single VBM ballot is counted manually." This misstates testimony.
14 VBM ballots are validated manually but processed with optical scan machinery.

15 6. page 10, lines 14-15 "The provisional ballots are processed after the election." -- This
16 misstates testimony. The evidence is that provisional ballots are processed after election
17 day but before the end of the official canvass period. Lines 24-25 correctly states the
18 evidence: "The County completes the process of counting provisional ballots by the time
19 the results are certified."

20 7. Page 11, line 15: "75,000 provisional ballots were cast in the June election." This should
21 read "75,000 ballots were cast provisionally in the June election, and about 68,000 were
22 ultimately validated and officially cast."

23 8. Page 12, lines 6-7: "Vu's practice is to choose only 8 precincts, instead of 32 precincts, to
24 develop the batches." This misstates testimony. The testimony is: "In addition to the 16
25 precincts chosen for the ballots cast at polling places to be manually tallied, Vu's practice
26 was to choose only 8 batches, instead of 16 batches, to develop the set of VBM batches to
27 be manually tallied."

28 9. Page 12, lines 12-13 "He prepared a report of the 1% manual tally from the 2008

1 election.” This misstates testimony. The sentence should read: “He prepared a report of
2 election procedures including the 1% manual tally from the 2008 election.”

3 10. Page 12, lines 16-17 "In his opinion, the County conducts a 1% manual tally without
4 including VBM ballots." This misstates testimony. The sentence should read: "In his
5 opinion, the County conducts a 1% manual tally without including all VBM ballots."

6 11. Page 12, lines 26-27 "In his opinion, the 1% manual tally detects simple tabulator errors
7 which could result in a shift of as many as 10,000 votes from one candidate to another."
8 This misstates testimony. The sentence should read: "In his opinion, the 1% manual tally
9 detects simple tabulator errors as well as possible central tabulator hacking which could
10 result in a shift of as many as 10,000 votes from one candidate to another."

11 12. Page 21, lines 24-25 "San Luis Obispo does not include VBM ballots not counted as of
12 the election or provisional ballots in the 1% manual tally." This misstates testimony. The
13 sentence should read: “San Luis Obispo did not perform the random draw until a week
14 after the election to allow more VBM ballots to be included.”

15 13. Page 27, line 6 to perhaps page 29 line 15 -- The Court excerpts an extended section from
16 Defendants’ trial brief but it is unclear when this quotation ends. Without proper
17 demarcation, the reader may be inclined to think this the opinion of the court when it is
18 only the opinion of the Defendants.

19 14. Page 30, line 6-7: "There appears to be good reason to conclude that this omission was
20 not inadvertent." Plaintiffs never claimed that the omission was inadvertent. Plaintiffs
21 claim the omission was intentional as its inclusion was redundant to the construction of
22 the phrase "ballots cast at precincts" as a validated provisional ballot, once validated, is
23 considered a ballot cast at the precinct.

24 15. As we read the SOID, the Court’s conclusions and decision commence on page 29, line
25 16. Plaintiffs object to the SOID commencing on page 30, line 8 - page 32, line 21. This
26 is essentially the “provisional ballot” portion of the decision. It would appear that the
27 Court misconstrues Plaintiffs contention and request for declaratory relief with regard to a
28 “provisional ballot.” It is not Plaintiffs’ position nor Plaintiffs’ request that unvalidated

1 provisional ballots be included in the 1% manual tally, only the validated provisional
2 ballots must be included because such ballots are, indeed, tabulated by the central
3 tabulation system used by the Registrar. (Elections Code Section 15360(a)). Specifically,
4 the Court states that “(i)f the Court were to accept Plaintiffs’ argument that Section
5 15360's 1% manual tally audit procedure includes “all ballots cast” including provisional
6 ballots, Plaintiffs are, in effect, advocating that Defendants assume the risk of including
7 more than 100% of the ballots cast in the 1% manual tally.” Plaintiffs have never thought
8 that the 1% manual tally should include unvalidated provisional ballots. Plaintiffs
9 contention is and has been that once the provisional ballot is validated, it is no longer
10 “provisional” and is simply another ballot cast at a precinct and tabulated in the
11 Registrar’s central tabulation system. The presentation of evidence at trial was that the
12 Registrar excludes the entire block of “provisional ballots” from the 1% manual tally and
13 must include the validated ballots in the audit. (See Plaintiffs’ Closing Brief, page 3, line
14 27 - page 4, line 4: “There were 75,386 provisional ballots cast at the 1522 county
15 precincts, of which **68,653 were ultimately verified and counted in the Official**
16 **Canvass** but were not included in the 1% Manual Tally. (Testimony of Michael Vu)
17 Thus, by the numbers, 234,000 VBM plus 68,653 provisional ballots cast at the precincts
18 (a combined 302,653 ballots) — more than 39% of the 775,930 total votes cast — were
19 omitted entirely from the 1% Manual Tally conducted by defendants.”

20 16. Page 31, lines 23-24 "inevitable consequences of adding burden to the County's ROV,
21 whose resources are already stretched far too thin." There is no evidence that the
22 resources of the County or the Registrar are "already stretched far too thin" nor that
23 including validated provisional ballots, which would amount to tallying about 2 batches
24 of 400 ballots and consuming less than a day of two teams of workers, would
25 demonstrably affect the budget of the Registrar. Moreover, evidence has been presented
26 in this proceeding that the Registrar has made operational decisions that has consumed
27 additional time, such as switching from batch to precinct mode and employing 40 people
28 for a week to search for ballots. The inclusion of validated provisional ballots is not a

1 substantial burden which the Registrar cannot easily address. Moreover, the budgetary
2 concerns of the Registrar are not a concern for which the Court should alter statutory
3 interpretation here.

4 17. Mandamus: On page 33, lines 19-24, the Court defers, without prejudice, from ruling on
5 the relief sought by Plaintiffs that Defendants be “stayed from certifying any future
6 election.” Plaintiffs are concerned that a final ruling or judgment in this case will not be
7 timely for the November election. Election Day is November 8, 2016. The Official
8 Canvass period expires on December 8, 2016. Waiting until December 1, 2016, for a
9 “Status Conference” will effect a repeat of making any decision herein mooted by the
10 time delay. Plaintiffs would request a sooner meeting so that a final judgment can be
11 issued and filed. A “stay from certifying” is unnecessary if the Registrar complies with
12 the judgment. Moreover, Plaintiffs acknowledge that this is an enforcement issue which
13 would be requested or briefed after a judgment is final.

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15 Respectfully Submitted,

16 Dated: November 8, 2016

17 By: Alan L. Geraci
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19 Group PC Attorney for Plaintiffs
20 Citizens Oversight Inc. and Raymond Lutz
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