In the

Court of Appeal

of the

State of California

FOURTH APPELLATE DISTRICT
DIVISION ONE

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D071907

CITIZENS OVERSIGHT, INC. and RAYMOND LUTZ,
Plaintiffs, Respondents and Cross-Appellants,

v.

MICHAEL VU, HELEN N. ROBBINS-MEYER and SAN DIEGO COUNTY,
Defendants, Appellants and Cross-Respondents.

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APPEAL FROM THE SUPERIOR COURT OF SAN DIEGO COUNTY
HONORABLE JOEL R. WOHLFEIL · CASE NO. **37-2016-00020273-CL-MC-CTL**

BRIEF OF RESPONDENTS AND CROSS-APPELLANTS CITIZENS OVERSIGHT, INC. AND RAYMOND LUTZ

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Court of Appeal
of the
State of California

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Court of Appeal Case No.: D071907

Case Name: Citizens Oversight, Inc. et al. v. Vu et al.

☑ There are no interested entities or parties to list in this Certificate per California Rules of Court,

☐ Interested entities or parties are listed below:

Name of Interested Entity or Person   **Nature of Interest**

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/s/ Alan L. Geraci
Signature of Attorney/Party Submitting Form

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Party Represented: Citizens Oversight, Inc. and Raymond Lutz (Respondents / Cross-Appellants)
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PRELIMINARY STATEMENT

This appeal concerns election integrity in California and the willingness of Defendants-Appellants Michael Vu ("Vu") and San Diego County ("the County") (collectively "Defendants") to sacrifice it on the altar of expediency. Plaintiffs-Cross-Appellants Citizens Oversight, Inc. ("Citizen's Oversight") and Raymond Lutz ("Lutz") (collectively "Plaintiffs") were compelled to bring this action because Defendants insisted on misapplying a self-serving interpretation of California Elections Code Section 15360[1] in order to justify their practice of cutting corners in conducting the required one-percent manual tally that the legislature designed to ensure the accuracy of election results.

Plaintiffs sought only to compel Defendants to do what the statute already obligated the Registrar to do – conduct the manual tally by sampling all votes cast in an election. Defendants, for their own convenience and alleged budget concerns, claimed that "the ballots . . . cast" [Elections Code § 15360(a)(1)(A)] meant only those ballots cast by a certain time. Indeed, the record in this case confirms that whether or not a particular type of ballot would or would not be included in the universe of ballots from which samples were to be obtained for the one-percent manual tally depends on which county the voter lives in – the very type of irregularity that Section 15360 was amended to remedy.

The trial court correctly concluded that the plain and unambiguous language of Section 15360 required Defendants, when drawing samples, to include all vote-by-mail ballots in the manual tally, not just those received

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[1] All references are to the California Elections Code unless otherwise cited.

by election night. That portion of the judgment from which Defendants have appealed should be affirmed, along with the attorneys' fees award premised upon that victory.

The court erred, however, by finding that provisional ballots were not required to be included in the manual tally. That portion of the judgment should be reversed, with judgment entered in Plaintiffs' favor, and the attorneys' fee award appropriately increased to reflect such reversal.

COUNTER STATEMENT OF THE FACTS

Because Defendants have omitted material facts from the record and presented a slanted, self-serving version of the facts, Plaintiffs are compelled to offer the following counter statement of the relevant facts:

Procedural History

Lutz commenced this action for declaratory relief *pro se* on June 16, 2016. (CT 17-32). He subsequently retained counsel, and filed an Amended Complaint for Declaratory and Injunctive Relief, adding Citizens Oversight as a plaintiff. (CT 47-73). The trial court denied Plaintiffs' preliminary injunction request on July 25, 2016, but stated that Plaintiffs were likely to prevail on the merits at trial. (CT 264-266). Plaintiffs filed a Second Amended Complaint for Declaratory Relief and Mandamus on August 10, 2011, which Defendants answered. (CT 276-303, 304-313).

The Bench Trial

A three-day bench trial commenced on October 4, 2016. (RT 1). Prior to the close of Plaintiffs' case in chief, the trial court granted Defendants' motion for nonsuit as to Robbins-Meyers. (RT 87-93). The court concluded that she was not a necessary party to the litigation in order for Plaintiffs to be able to obtain complete relief and granted the nonsuit against her on that ground. (RT 87-93).

Plaintiffs' Case in Chief

        1. **Michael Vu, Registrar of Voters**:

Vu testified that he is the Registrar of Voters for the County of San Diego and has held that position since the end of 2012. (RT 42). In that role, he is responsible for the overall direction and conduct of federal, state, and local elections in the County. (RT 42-43). Vu conceded that he is required to ensure that his office performs its functions as required by law. (RT 43, 48).

Prior to his current position, Vu held a similar office in Cuyahoga County in Ohio from 2003 through a portion of 2007. (RT 44). He served in that post during the 2004 presidential election (Kerry v. Bush). (RT 44). Because of misconduct by some of Vu's employees related to their mishandling ballots prior to a recount in that election, Vu was asked to resign his position. (RT 44, 46-47). Vu denied that the employees (who were prosecuted for their actions, but successfully appealed their convictions) preselected the ballots for the recount in order to ensure that the ballots would not cause any discrepancies when audited, but admitted that the employees under his supervision did in fact illegally examine the ballots prior to the recount. (RT 47-48, 68). Vu admitted that he did resign his position, but denied that he did so because of the request related to his mishandling of the 2004 election. (RT 47). Vu claimed he had no knowledge of the wrongdoing that occurred under his watch, blaming it on practices imposed by his predecessors in the position. (RT 67-68).

Vu acknowledged that Section 15360 was amended in 2011 to provide two options for the process by which his office could conduct the required one-percent manual tally. (RT 48-49). Vu testified that the statute

allowed his office to either conduct the one-percent manual tally based entirely upon precincts or to do it using one-percent of the precincts and batch (or "deck") the vote-by-mail ballots[2] separately and not tally them by precinct. (RT 49). Vu continued that his department has conducted the manual tally using the batching method since the statute was amended under its current procedures manual. (RT 49-51; EV 6-12 [Exhibit 4]. The procedures manual does not specify how the batching was to be done, and Vu conceded that this made the manual "outdated." (RT 51-52; EV 6-12 [Exhibit 4].

Vu confirmed that following the June 7, 2016 primary election, his department began the one-percent manual tally of precinct ballots and one-percent manual tally of batched vote-by-mail ballots. (RT 52). At some unspecified time during the post-election canvass, Vu became aware that the written procedure outlined in the manual did not reconcile with the way his office was conducting the one-percent manual tally. (RT 52-53; EV 4-5 [Exhibit 1], EV6-12 [Exhibit 4]. Meanwhile, Vu's office also received a complaint from Lutz regarding how many ballots should be included in the manual tally. (RT 53). Vu then decided to "go back to a process that was – we believed that was tried and true" in order to "sate" Lutz and switched back to the precincts method. (RT 53-54). Vu also started the process of updating the manual to reflect the proper procedures for the batch method. (RT 53-54).

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[2] The term "vote-by-mail" is synonymous with "absentee" and "absent voter" ballots, older terms which are used in some of the documents entered into evidence. (RT 277). For consistency, this brief refers to all such ballots as "vote-by-mail," and has inserted that term in brackets in any quoted language which uses the alternate names.

At the time of the subject election, there were 1,523,251 voters registered in the County. (RT 55; EV 33-42 [Exhibit 19].   There were 775,930 ballots certified in the election results meaning there had been a 50.94 percent turnout. (RT 54-55; EV 33-42 [Exhibit 19]. Vu testified that 489,610 vote-by-mail ballots had been received and processed by his office during the election cycle or 63.1 percent or votes cast. (RT 61-62; EV 33-42 [Exhibit 19] Only 256,685 (52.43%) of those ballots made it into the semifinal official count (received by the end of election night), however. (RT 61-62; EV 33-42 [Exhibits 19]. Thus, 232,925 vote-by-mail ballots or 47.6 percent of the vote-by mail ballots or 30.02 percent of the total ballots certified, were excluded in the one-percent manual tally because they were received by the Registrar after election day.

Vu confirmed that increasing numbers of County voters are using vote-by-mail ballots to vote in each election. (RT 57-58). Vu testified that a majority of vote-by-mail ballots included in the count were received prior to election day and were reflected in the "semifinal official count," although he had previously testified in his deposition that only approximately 50 percent of those ballots were included as of election night. (RT 58, 60-61).

Vu also explained the difference between "early" vote-by-mail, "early received" vote-by-mail, and "later received" vote-by-mail ballots. (RT 60). Vu stated that "early" and "early received" vote-by-mail ballots were those ballots received as of election day and included in the "semifinal official" count as of election night. (RT 60). "Later received" vote-by-mail ballots were valid votes received after election night. (RT 60).

Vu reported that, as of election day, there were 285,000 ballots that had not been processed. (RT 55). These ballots would have included vote-by-mail ballots that were received after election day and provisional

ballots. (RT 55-56). Vu explained that provisional ballots are ballots cast at the polling places on election day but which are sequestered for further review and inspection due to some irregularity or question concerning the status of a particular voter. (RT 56-57). Provisional ballots are processed after it is verified that the voter is a registered voter and was properly casting the ballot in question. (RT 56). Approximately 68,000 (out of approximately 75,000 received) provisional ballots that were verified and processed in the canvass following the subject election. (RT 57). This was approximately 91 percent of the total number of provisional ballots received. (RT 57).

Vu admitted that, during the subject election, some nonpartisan voters' ballots were deemed provisional at the polling places, claiming that it was normal to do this if a political party closed off its ballot to anyone not registered with the party. (RT 58-59). Vu also testified that election officials under his control will use "White-Out" to cover or conceal votes made by voters who purportedly voted in the wrong location and thereby cast a vote in a local election for which the voter was not eligible. (RT 63-64). The use of "White-Out" to redact the ballots made it possible to scan them into the computer system. (RT 63-65).[3] Vu's office has no written policy on how this process is used, however, and the process is not supervised, and no records are kept regarding which ballots are redacted. (RT 65-66). Nor are the redacted ballots segregated or otherwise kept so that they may be inspected to ensure that they were fairly and accurately processed. (RT 66-67).

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[3] Charles Wallis, the County's principal IT analyst confirmed this practice. (RT 173, 357-359).

Vu also conceded that his office's policy is not to include any provisional ballots in the one-percent manual tally. (RT 59). He further conceded that none of the "later received" vote-by-mail ballots were included in the one-percent manual tally. (RT 62). Vu acknowledged that the preclusion of the "later received" vote-by-mail ballots and the provisional ballots from the one-percent manual tally meant that approximately 37 percent of the total votes cast in the election were excluded from the one-percent manual tally. (RT 62-63).

2. **Raymond Lutz**:

Lutz testified that he is a citizen and voter in the County. (RT 71). He is also the founder of Citizens Oversight, which is a 501(c)(3) nonprofit nonpartisan organization formed to encourage civic engagement by citizens in the oversight of elections. (RT 71-72, 150). Lutz and Citizens Oversight began investigating the County's election processes in 2006. (RT 72). Lutz is an electronics and computer software engineer, having been employed in those fields for the United States Navy and in the private sector. (RT 72-73; EV 54-59 [Exhibit 58]. He has never been a poll worker, worked for a registrar in any election, or served as an election official, although he twice ran for one state and one federal elected office. (RT 73-74, RT 146-147).

Lutz testified that the vote-by-mail process commences with the ballot being sent to the voter. (RT 170-171). The voter completes the ballot, puts the ballot in an envelope, signs the envelope, and sends it back to the registrar. (RT 171). The ballots are then initially run through a sorting machine which captures the front of the ballot, the barcode, and the voter's signature for later comparison. (RT 171). The registrar can computer-match some signatures. Ballots where no signature is found may be separated out for further manual inspection. (RT 171). Once the ballots are scanned, the

registrar compares the signatures on file from the voter registration records to those on the ballots. (RT 171). If the signatures do not match, then the ballot may be rejected. (RT 171).

The vote-by-mail ballots are then removed from the envelopes and briefly checked for issues that may cause them not to scan properly. (RT 172-173). Ballots with issues are set aside for "quality control," with any correctable issues fixed. (RT 173). As the ballots are received, the vote-by-mail ballots are compiled into "batches" (400 ballots). Ultimately, each vote-by-mail ballot is scanned through a voting machine. (RT 173). The resulting data is fed directly into the central tabulator with no record of the totals from each batch, making a subsequent audit difficult, if not impossible. (RT 173).

Provisional ballots are cast at the polling place and put in envelopes for delivery to the registrar and are processed last to ensure that they are not duplicative of any other vote-by-mail ballots. (RT 173-174).

Lutz and Citizens Oversight had dealt amicably with Vu on several election and recall elections prior to the subject election. (RT 73-76; Exhibit 58). Regarding the subject election, Lutz and Citizens Oversight noticed discrepancies with the handling of vote-by-mail ballots and protested about how the vote-by-mail ballots were being handled in the one-percent manual tally. (RT 76-77). They were told that there was a "first snapshot" consisting of the precinct ballots and the first batches of the vote-by-mail ballots, but they could not obtain any information about the vote-by-mail batches themselves. (RT 76-77). Lutz and Citizens Oversight assumed that, consistent with the Election Law, Vu and his office were continuing to include all the vote-by-mail ballots in the manual tally. (RT 76-77). During the subject election, they discovered that Vu and his office were not

including the later received vote-by-mail ballots in the manual tally.
(RT 76-77).

Lutz testified that in June 2016, the County had 1522 precincts. (RT 77-78). Each precinct generally has anywhere from a few hundred to 500-600 ballots processed at the precinct. (RT 78). Batches of vote-by-mail ballots, however, are from mixed precincts. (RT 78). Lutz testified that the County has a sorting machine that could sort the vote-by-mail ballots by precinct, but the County instead elects to sort those ballots by City Council district. (RT 78, 172).

Lutz continued that the Elections Code requires each vote-by-mail batch to have a report identifying what is in the batch. (RT 78-79). When the vote-by-mail batch is manually tallied, the report is kept apart from the individuals tallying the batch. (RT 79). The manual tally determines what the vote-by-mail batch actually contains and that information is then compared to the report to determine accuracy. (RT 79). The same process is used for the precinct ballots. (RT 79). This process ensures that, in order to preserve the integrity of the manual tally, the individuals doing the manual tally do not know in advance the contents of the report. (RT 79).

Lutz explained that Vu's office has never produced the required batch reports, despite multiple requests to inspect them. (RT 79, 85). On June 8, 2016, the public process by which the random precincts and batches are selected took place at a meeting at the Registrar's office. (RT 79-81). Only eight batches were selected as part of the manual tally, which Lutz knew was insufficient to be one percent of all the vote-by-mail batches. (RT 79-81). Lutz protested at the meeting about the additional batches that would be needed in the manual tally for the later received vote-by-mail ballots. (RT 79-81). Lutz was directed to take up his issue with the

Registrar.   (RT 79-81). Lutz sent Vu an email stating that, in order to comply with the Election Law, another eight batches needed to be selected to account for later received vote-by-mail ballots. (RT 81-83; EV 25-27 [Exhibit 12], EV 28-29 [Exhibit 13], EV 30-32 [Exhibit 14]. Vu responded that those ballots would not be included in the manual tally. (RT 81-83; EV 25-27 [Exhibit 12], EV 28-29 [Exhibit 13], EV 30-32 [Exhibit 14]. Lutz and Citizens Oversight video recorded and transcribed this meeting. (RT 80).

Approximately two weeks later, Lutz learned that Vu and his office planned to abandon the one-percent manual tally of vote-by-mail ballots using the batch option and instead intended to do the manual tally of vote-by-mail ballots by precinct. (RT 85-86). Lutz testified that he and Citizens Oversight learned that Vu's office had started tallying the vote-by-mail batches but had apparently decided to stop after having wasted that initial time. (RT 86). Vu's office never published any public notice that it was changing midstream the way the manual tally was being conducted. (RT 87). After Lutz and Citizens Oversight confirmed with Vu that he would not be conducting the manual tally by sampling all votes cast in the election, whether at the precinct, by vote-by-mail, or via provisional ballots, Lutz commenced this action. (RT 86).

Lutz testified that the County Registrar was not complying with Section 15360. (RT 108-109). The County Registrar purports to conduct the one-percent manual tally without including all the vote-by-mail ballots, omitting those received after election day. (RT 109). In addition, none of the provisional ballots are included in the manual tally. (RT 175-176, 177-179). Section 336.5 mandates that the purpose of the manual tally is to verify the automated count. (RT 109-110). This tally is supposed to check for several errors, including, but not limited to, tabulator errors (such as

misfeeds), double-feeding of ballots, the voting machines pulling two ballots at once, misreads of ballots, and "hacks" into the system (whether internal or external). (RT 136-138, 143-144).

Lutz opined that it should not a significant burden on the County Registrar to include all vote-by-mail and provisional ballots in the one-percent manual tally. (RT 175-176). Section 15360 allows the manual tally to be completed in phases. (RT 175-176). So, the only additional step needed would be to handle the later received vote-by-mail ballots and the provisional ballots after their verification, drawing additional random batches from those ballots, and including them in the manual tally calculation. (RT 175-176).

The initial process used by the County Registrar ("batching" the vote-by-mail ballots) allowed for scanning the batches, but the altered process required the County Registrar to sort the vote-by-mail ballots into their respective precinct and then tally them. (RT 111-112, 115-116; EV 43-45 [Exhibits 49], EV 46-48 [Exhibit 50], EV 49-51 [Exhibit 51], EV 52-53 [Exhibit 52]. In the subject election, the manual tally process for the vote-by-mail ballots did not start until June 27, 2016, and proceeded until June 29, 2016. (RT 119-121). Lutz concluded from this information that the County Registrar's change in the manner of the manual tally delayed the start of the tally for the vote-by-mail ballots until the third week of the month; otherwise, the delay was inexplicable. (RT 121-122).

After the election, Lutz and Citizens Oversight reviewed the election process and manual tally as they had in the 2008 review. (RT 122-123). They determined that the one-percent manual tally of the vote-by-mail ballots did not match the count of the ballots in the "snapshot file" provided the day after the election. (RT 123, 136). The County Registrar had selected

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sixteen precincts and had a count of the vote-by-mail ballots for those precincts in the "snapshot file." (RT 136). That count differed, however, from the computer count report that was compared to the "snapshot file" (the one-percent manual tally), with the counts being off between one to three votes per precinct. (RT 136-137).

        3.   **Phillip Stark, Ph.D.**:

Phillip Stark, Ph.D. ("Professor Stark"), is a statistics professor and associate dean of mathematical and physical sciences from the University of California at Berkeley, who has received accolades for his work on election integrity and election audits and has testified extensively in court and before legislatures on those issues. (RT 570-577). He is renowned by the American Statistical Association, and as a physicist by the Institute of Physics. (RT 572 14-15). He has worked extensively with the California legislature regarding improving the processes used to audit the election results and was instrumental to the 2012 amendments to Section 15360 and has worked with other state legislatures as well. (RT 575-577). Professor Stark received the John Gideon Award for Election Integrity from the Election Verification Network and he received the Chancellor's Award for Research in the Public Interest for his outstanding work on election integrity issues. (RT 573).

Professor Stark is the recognized expert in California for the one-percent manual tally's mechanisms and purpose. (CT 476-478; RT 578-579, 583-586). He also invented a process called the "risk-limiting audit" to drastically improve the accuracy of election audits and does so more efficiently. (RT 579-582) Professor Stark explained that both the risk-limiting audit and the one-percent manual tally require a robust chain of custody to be reliable. (RT 582).

Professor Stark testified free of charge for the plaintiffs in this matter, reimbursed for travel expenses only. (RT 583). He testified that the allegations in the complaint concerning the manner in which the one-percent manual tally had been conducted in the subject election by Vu and had compromised the integrity of the subject election. (RT 583).

Professor Stark explained to the court that the batching method was superior to the precinct method for detecting errors in the election results. (CT 476-478; RT 587-589). He adamantly asserted that it was important that all votes cast be counted before the manual tally occurs. (CT 476-478, emphasis added). He charged that the County's methods of conducting the manual tally were so flawed, that they undermined the manual tally's ability to confirm the accuracy of the voting system results, and that the registrar's omission of the provisional and vote-by-mail ballots impaired the manual tally's ability to detect errors. (CT 476-478; RT 590-596). He explained that the random draw the County Registrar uses made it twice as likely for precinct numbers 680 to 999 to be selected as the other precincts, improperly scrutinizing certain precincts while leaving others reviewed less frequently, thereby compromising the audit's accuracy. (RT 590-596). This meant that someone desiring to interfere with the election would know to target those precincts with a reduced probability of being included in the tally. (RT 590-596). He also made it clear that it was improper to exclude any ballots from the sample selected to be tallied because omitting them compromised the process. (RT 595-596). Professor Stark compared the County's method of conducting the manual tally to performing a safety inspection and deeming the car safe before the rear brakes were installed. (RT 595-596).

Professor Stark concluded that the County's method creates a "frame bias" and does not meet the requirements of the manual tally's purpose. (CT 476-478; RT 596-597, 648-650). He explained that the collection of things from which a random sample of a population is drawn is called a "frame." (RT 596). When the frame is not identical to the population, a bias can result from the mismatch. (RT 596). Accordingly, if the tally is supposed to confirm the accuracy of all the ballots in an election, but the frame results in only certain ballots cast at a certain time being drawn, then a frame bias results and compromises the tally's accuracy. (RT 596-597).

On cross-examination, Professor Stark acknowledged that he had not reviewed the County's general procedures for processing vote-by-mail and provisional ballots. (CT 476-478; RT 599-603). Nor had he participated in an audit of the County's one-percent manual tally in the subject election. (CT 476-478; RT 599-603). He is not familiar with the County's specific central tabulation system for processing voting results. (CT 476-478; RT 599-603). He agreed that the official canvass is meant to include elements other than the one-percent manual tally. (CT 476-478; RT 599-603). He agreed that he is not familiar with all the requirements of the official canvass. (CT 476-478; RT 599-603). The focus of his analysis was limited in this case to the manner in which defendants had conducted the 1% manual tally in the subject election. (CT 476-478; RT 599-603).

Professor Stark agreed that a "risk-limiting-audit" is different than the one-percent manual tally and that they have different goals. (CT 476-478; RT 604-605). He disagreed, however, that a "risk-limiting-audit" is similar to a recount procedure, though he characterized it as "like an intelligent incremental recount." (CT 476-478; RT 605-612). He also explained that the risk-limiting audit was a far more efficient and less costly

procedure than the one-percent manual tally. (RT 607).   He generally agreed that the "broad" goals of both a "risk-limiting-audit" and the one-percent manual tally are to check that the election results are correct. (CT 476-478; RT 605-612). He agreed that the one-percent manual tally is not a recount. (CT 476-478; RT 605-612).

Professor Stark agreed that the registrar is required to report discrepancies detected from the one-percent manual tally to the Secretary of State. (CT 476-478; RT 613-615). He also agreed that the Elections Code does not require that jurisdictions perform a "risk-limiting-audit." (CT 476-478; RT 613-615).

Professor Stark opined that the one-percent manual tally is a relatively ineffective and inefficient means to confirm election results but that it is the law and is better than no audit process at all. (CT 476-478; RT 615-625). He explained that the one-percent manual tally has a small chance of detecting errors in the election results, whereas a "risk-limiting-audit" has up to a 90% chance of detecting errors in the election results. (CT 476-478; RT 615-625). He agreed, however, that the one-percent manual tally measures the accuracy of the election count, although ineffectively and inefficiently, and needs to include all votes cast to be reliable at all. (CT 476-478; RT 615-625).

Professor Stark testified that he participated in a pilot program which conducted risk limiting audits in elections in eleven counties in 2011-2012. (CT 476-478; RT 625-631). The audits used a software program other than those counties' existing voting system software program. (CT 476-478; RT 625-631). He noted that the most common tabulation error is the misinterpretation of voter ballots, or voter intent. (CT 476-478; RT 632-635). He is not familiar with the voter guidelines promulgated by the

Secretary of State or the County's procedures to test whether ballots are scanned properly. (CT 476-478; RT 635-637, 660).

Professor Stark agreed that a quality control system should reduce errors in the ballots counted. (CT 476-478; RT 637-646). He has not reviewed the County's one-percent manual tally results for the June 2016 election, although he noted discrepancies in the scanned count and the one-percent manual tally in the subject election. (CT 476-478; RT 638).

Professor Stark opined that the California's entire election audit system needs an overhaul. (CT 476-478; RT 646-647). He testified that, as a matter of statistics, failure to include all the ballots in the tally compromises its efficacy and has consequences. (RT 648-650). He agreed, however, that the current voting system does not require a "risk-limiting-audit." (CT 476-478; RT 647-649). He is not familiar with the term "semi-final official" canvass. (CT 476-478; RT 548). He identified the existing elements of the official canvass. (CT 476-478; RT 655-656). Professor Stark concluded that the existing elements of the official canvass, while providing some assurances of accuracy, are "not enough," and explains why post tabulation auditing like the manual tally is necessary. (CT 476-478; 656-658). The one-percent manual tally as a double check" is not as good as a "risk-limiting-audit." (CT 476-478; RT 657). Professor Stark further testified that, to be a reliable accuracy indicator, the random draw should occur after the results of the election are known. (CT 476-478; RT 662-666). He expects that the more reliable and accurate risk limiting audit will be the next generation of audits in the State's election procedures. (CT 476-478; RT 670).

Defendants' Case in Chief

      1. **Michael Vu, Registrar of Voters**:

Vu also testified for the defense. (RT 456). He confirmed that the County has 1,522 precincts and approximately 1300 polling places (RT 458-459). Further, Vu continued that 75,386 provisional ballots were cast in the 2016 election, and that 51,427 provisional ballots were eventually counted in their entirety. (RT 468). Vu explained that there were three categories of provisional ballot: (1) those that were counted entirely; (2) those that were counted partially; and (3) those that were not counted at all. (RT 468). Most of the fully counted ballots (37,172) were vote-by-mail voters who voted at the polls on election day but did not surrender their mail ballots, requiring them to vote provisionally so they could not vote twice. (RT 468-469). If a voter submitted both a provisional and a vote-by-mail ballot, then the vote-by-mail ballot was counted and the provisional was not. (RT 471). Partially counted ballots (17,226) resulted where a voter cast a ballot at the wrong polling place and the ballot they cast was different than the ballot at their correct polling place. They also resulted where a person registered with no party preference (NPP) where a person voted in a party's primary. The races in which that voter was not supposed to vote needed to be redacted from the ballot. (RT 469-471).

Vu testified to the staffing of his office, the purportedly "Herculean" task of running an election, and the extra handling that vote-by-mail and provisional ballots require. (RT 459-468, 472-490, 496-503, 507-519). If a ballot is too damaged to scan, it is "remade" with a scannable ballot from that precinct and both ballots are serialized to ensure that the remade ballot is accurate. (RT 490). He also explained how White-Out is used to remedy

mis-marked ballots to ensure voter intent or to redact votes from ballots where the voter was not entitled to vote in the particular race. (RT 491).

Vu testified that, during the official canvass, his office is required to process all remaining ballots that need to be considered for the election (un-scannable ballots, polling place ballots, provisional ballots, and vote-by-mail ballots), reconcile the precinct ballots, prevent double-voting, and conduct the one-percent manual tally. (RT 492). Vu's office has thirty days to certify the election. (RT 493-494). Vu claimed that the Election Law's requirements that vote-by-mail ballots may be "later received" up to three days after the election if postmarked by election day and the eight-day period in which the registrar must try to contact voters who failed to sign their vote-by-mail ballot envelopes and give them an opportunity to come to the office and sign the ballot envelope complicate the processing of vote-by-mail ballots during the canvass. (RT 494-496).

Vu testified that the manual tally is not a recount, but acknowledged that its purpose is to verify that the programming and coding of the electronic voting machines are correctly tabulating the votes. (RT 523-524). He complained that the manual tally is an arduous process that takes nearly all the thirty-day certification period to complete. (RT 524-528). Vu confirmed that his office does not process "later received" vote-by-mail ballots or provisional ballots (together amounting to approximately 308,000 ballots in the subject election – approximately 37% of the total ballots cast in the election) so as to include them in the manual tally. (RT 527-531, 539-540). Vu claimed that inclusion of all vote-by-mail ballots in the manual tally would make the odds of timely certifying the election "grave" and would impact his office's other responsibilities during the canvass

period. (RT 531-534). He claimed that performing the manual tally in stages was not feasible. (RT 533-534).

Vu admitted that his office encourages voters to vote by mail rather than in person. (RT 538). He also conceded that there were some instances where poll workers were improperly treating crossover nonpartisan ballots as provisional ballots when they should have allowed those voters to have voted (regular) crossover ballots processed at the polls, which would not have removed them from the manual tally as had occurred. (RT 541-544). He additionally acknowledged that he made the decision to switch to the precinct method despite the fact that the manual tally had already been started using the batch method in the subject election. (RT 544-547). He also admitted that this was a knee-jerk reaction to Lutz's communication, because he did not fully understand what Lutz was asking. (RT 546-548).

2. **Erin Mayer**:

Erin Mayer ("Mayer") is the County's Chief of Departmental Operations, Elections Services. (RT 196). She is directly responsible for the one-percent manual tally and supervises the process. (RT 196). She has supervised the manual tally process for five elections. (RT 197).

Mayer testified that the procedure she employed for those elections was to batch the vote-by-mail ballots and conduct the manual tally by batch. (RT 197). That process was altered for the subject election, however. (RT 198). That change was prompted by Lutz's inquiries. (RT 198-200). The change was made after the numbers for the tallied batches had been drawn and public notice for the batching process had already been given. (RT 198). There was no public notice of the change. (RT 199).

Mayer testified that the manual tally of the precinct polling place ballots started June 13, 2016. (RT 201). The early vote touch screen manual

tally commenced on June 21, 2016. (RT 201). The manual tally of the vote-by-mail ballots for the precinct polls already drawn did not commence until June 27, 2016. (RT 201-202). Mayer testified that the vote-by-mail ballots received by hand at the polls were processed separately from those received in the mail. (RT 201). Mayer confirmed that the only vote-by-mail ballots included in the manual tally were those that were received from the polling places on election day and those received by mail on or before the June 7, 2016 election. (RT 202-204). She later changed her testimony to state that no vote-by-mail ballots that were hand delivered to the polls were included in the manual tally. (RT 209). No provisional ballots were included in the tally. (RT 205). Mayer testified that the vote-by-mail ballots are always tallied later in the process. (RT 205-206).

3. **Charles Wallis**:

Wallis testified that he manages the information technology for the registrar's office, including the central tabulator and the electronic voting equipment. (RT 283-284). He also provides Vu's office with the information it needs to conduct the one-percent manual tally. (RT 284).

Regarding the subject election, Wallis received an email approximately one week after the election requesting that he pull the ballots for the selected precincts and prepare the required reports containing the voting results. (RT 284-287, 345-346). The ballots are either vote-by-mail ballots in batches or ballots cast at the polls. (RT 285-286, 346-347). Wallis said he also supplied the data for the manual tally of the touchscreen votes. (RT 285-286). It took him a total of twenty minutes to pull the precinct boxes and the vote-by-mail batches. (RT 287-288). Wallis testified, however, that generating the report for the vote-by-mail process is not automated like the process for the polls [i.e. precinct] ballots. (RT 347).

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It involves copying the database and manually deleting certain data to generate the reports by batch or deck. (RT 347-349). Wallis claimed that it would take two weeks or more to run the required report for the approximately 1300 vote-by-mail batches in the subject election. (RT 348-349, 360).

At some later point, Wallis was asked to retrieve vote-by-mail ballots at the precinct level, rather than by batch. (RT 289). No explanation was given to Wallis for this request and he did not question it. (RT 289). It took him a week to comply with the request even though he had a staff of forty people. (RT 289-290). Wallis explained that the sorting machines could sort the envelopes, but not the ballots themselves. (RT 290). Since the ballots had already been removed from the envelopes, the vote-by-mail ballots had to be sorted by hand. (RT 290). Wallis confirmed that none of the later received vote-by-mail ballots – approximately half the total ballots – were included in the manual tally. (RT 360).

Wallis agreed that the vote counts on the unofficial reports he generates for the election results should exactly match the computer reports used in the one-percent manual tally. (RT 291-292). He also testified that the beginning of the manual tally process took longer than expected in the subject election. (RT 297). He noted that the provisional ballots verification and vote-by-mail ballot adjudication took longer than expected. (RT 297). There were approximately 25,000 more provisional ballots than expected. (RT 297). Wallis also testified that the number of vote-by-mail ballots had been increasing over the years. (RT 297-298).

Wallis testified that vote-by-mail ballots get scanned through a device that is directly connected to the central tabulator. (RT 335). The vote-by-mail ballots are coded to a specific precinct, and the software

ensures that the ballot matches the format for the particular precinct and records the votes. (RT 335-336). Wallis testified that, in any election where there are two-card ballots, the scanning will take twice as long (RT 327, 336-337).

    4. **Deborah Seiler**:

Deborah Seiler ("Seiler"), the former County Registrar who retired in 2012, testified that, prior to being the County Registrar, she held several positions with the Secretary of State analyzing election legislation and preparing proposed legislative packages. (RT 214-215). She also worked in the private sector as an observer of foreign elections. (RT 215-217). She had also served previously as an assistant registrar for Solano County, California. (RT 217).

Seiler testified that the one-percent manual tally has been in effect since 1965 as a means to verify the accuracy of electronic voting. (RT 219-220). The legislation requiring the manual tally has been amended several times throughout the years, including the eventual separation of the manual tally provisions from the recount provisions in the Elections Code. (RT 220-224).

Seiler testified that the "nature" of the manual tally was not a recount. (RT 222-223). Section 336.5 was added in 1998 to define the manual tally and stated, in part, that, "The procedure is conducted during the initial canvass to verify the accuracy of the automated count." (RT 224). Seiler noted that the phrase "during the canvass" required the manual tally to occur as part of the canvass, rather than after it. (RT 225). She claimed that "verify" meant verifying the computer coding to ensure that "a vote for Candidate A went to Candidate A and not Candidate B." (RT 225-226).

Seiler testified that the 2007 amendments to Section 15360 removed previous language requiring provisional ballots to be included in the manual tally. (RT 226, 228-229; Attachments 1-5 to Appellant's RJN [Exhibits 100, 101, 104, 180]. She claimed that this meant that the legislature intended to exclude provisional ballots from the manual tally. (RT 229-234). She also stated that none of the versions of that bill used the word "all." (RT 232). She stated that the Senate Bill (1235) and the Assembly Bill (2769), which were virtually identical, were both enacted, but legislative procedures and "double joining language" in the Assembly Bill resulted in the later-chaptered Assembly Bill being the controlling version. (RT 235).

On cross-examination, however, Seiler conceded that it was her personal position and the official position of the California Association of Clerks and Election Officials ("CACEO") (of which she was a prominent member) that the amendments to Section 15360 intended to include both vote-by-mail and provisional ballots in the one-percent manual tally. (RT 261-262; EV 85-86 [Exhibit 59 at pp. 25-26].

Upon being confronted with a Enrolled Bill Memorandum from Cynthia Bryant to Governor Schwarzenegger regarding the Senate Bill that was enacted in the 2007 amendments stated that, "(t)his bill establishes a uniform procedure for election officials to conduct a one percent manual tally of the ballots including: (1) the requirement that [vote-by-mail] ballots, provisional ballots and ballots cast at satellite locations be included in the manual tally of ballots. . . (RT 275-276; EV 97 [Exhibit 59 at p. 37] [emphasis added]. Seiler confirmed that the CACEO, Department of Finance, and the Secretary of State all supported that interpretation of the Senate Bill that was enacted as the 2007 amendment to Section 15360. (RT 276). The letter continued, "This bill stems from anecdotal reports that

some counties routinely exclude [vote-by-mail] and provisional ballots from the one percent manual tally process." (RT 276-277; EV 98 [Exhibit 59 at p. 38 [emphasis added]). The letter also stated that, "The use of provisional ballots has also increased in recent years. Excluding these votes from the manual tally severely lessens the value and accuracy of this post-election audit." (RT 277; EV 98 [Exhibit 59 at p. 38 [emphasis added]).

When cross-examined on another letter from the former Secretary of State Bowen's office to the governor concerning the enacted Senate Bill, which states, "I respectfully request your signature on this Senate Bill 1235 which amends the current procedure for the one percent manual tally to specifically include [vote-by-mail], provisional and early vote ballots." (RT 277-278; EV 105 [Exhibit 59 at p. 45] [emphasis added]).

Seiler dismissed both of these letters as "staff errors." (RT 279-280). Seiler also admitted that provisional ballots were ballots cast at the polls, and were therefore necessarily included within "votes cast at the polls," a phrase used in other letters to the governor concerning the Senate Bill. (RT 280-281).

Seiler further testified that, when she was the Registrar, pursuant to policy of her department, the County did not include all vote-by-mail ballots in the manual tally in the 2008 election, but only those available as of the close of election night. (RT 235-237). She stated that this was a continuation of her department's policy in place prior to the 2007 amendments to Section 15360. (RT 236-238).

In 2012, Elections Code Section 15360 was again amended to allow counties the option of either selecting one percent of the precincts and one percent of the vote-by-mail ballots by precinct or one percent of the precincts and one percent of the vote-by-mail ballots by batch (not sorted

down to the precinct level) for the manual tally. (RT 240-241). She claimed that this amendment rendered a process enacted initially as emergency legislation applicable only to four counties, enabling them to conduct the manual tally faster and cheaper, applicable to all counties. (RT 237-241). Seiler testified that the County did not alter its prior policies pursuant to this amendment because it perceived that its former policy complied with the amended law. (RT 241-242).

Seiler claimed that including all vote-by-mail and provisional ballots in the manual tally would require the registrar's staff to work multiple shifts, "possibly around the clock" to complete the manual tally within the specified time. (RT 243-244). She further claimed that Lutz's complaints and interpretations of the applicable laws and regulations were erroneous and unfounded. (RT 247-249).

5. **Jill Laving / Dean Logan**:

Defendants offered testimony from two other registrars of voters, one from Sacramento County (Jill Laving) and another from Los Angeles County (Dean Logan). (RT 376, 408). They gave substantially similar testimony. They each claimed that elections are arduous undertakings that strain available resources and that vote-by-mail ballots are labor-intensive to tabulate. (RT 377-378, 410-418). They each conceded that the one-percent manual tally was supposed to verify the voting equipment's accuracy and each claimed that the manual tally must take place during the canvass. (RT 378-379, 419-420). They each reiterated that the manual tally was not a recount. (RT 379). They each testified that they use the precinct method to conduct the manual tally and that they treat vote-by-mail ballots differently than poll ballots. (RT 379-380, 421-424). They both claimed that

the 2007 and 2012 amendments did not require provisional ballots to be included in the manual tally and did not require consideration of any later received vote-by-mail ballots in the manual tally. (RT 380-381, 384-386, 389, 421-428; Exhibit 107). They both claimed that it takes approximately two weeks to process the later received vote-by-mail ballots during the canvass and approximately a week thereafter to process the provisional ballots. (RT 390-391). They both claimed that including all vote-by-mail and provisional ballots would be a "logistical problem" and would "jeopardize" their ability to certify the election within the thirty-day period, although they conceded that adding staffing and additional computers could resolve the problem. (RT 391, 399-400, 429-430, 432-433, 438-439).

Laving conceded that the one-percent manual tally had revealed errors that had to be corrected in the 2014 and 2016 elections, although she blamed the errors on "voter intent" mistakes (like mis-marked or double-marked ballots) and not on errors in the voting system. (RT 397-398, 404-405; Exhibits 68, 69). She conceded, however, that a scanner failed in one precinct in the 2016 election and the entire precinct had to be recounted manually. (RT 405-406; Exhibit 69). Laving also refused to even consider using the batching method to include all vote-by-mail ballots in the manual tally, insisting that "I don't count by batches. I count by precinct." (RT 400). She did concede, however, that the batch method could be a tool for other registrars to more efficiently manually vote-by-mail ballots. (RT 400).

Logan testified that his office begins processing provisional ballots the day after the election, noting that those cast by voters who were not listed in the rolls as registered voters or who were never issued a vote-by-mail ballot could be processed immediately. (RT 416-417). Where

the provisional voter had also received a vote-by-mail ballot, his or her provisional ballot is held to ensure that the voter had not already voted by mail. (RT 417). He too rejected out of hand using the batch method to manually tally vote-by-mail ballots, but also admitted that it could be used to more efficiently tally those ballots. (RT 439-441).

6. **Julie Rodewald**:

Defendants also offered (via deposition read into the record) testimony from Julie Rodewald ("Rodewald"), the San Luis Obispo county clerk (retired at the time of trial). (CT 475-476). She testified substantially the same as had the other two registrars. (CT 475-476).

Despite their similar testimony, the three registrars did indicate discrepancies between the way each county handles vote-by-mail ballots. (CT 486). For example, Rodewald testified that San Luis Obispo County delays the random draw by a week to include in the manual tally more vote-by-mail ballots not counted by election day. (CT 486, 522). Logan testified that Los Angeles County includes vote-by-mail ballots in the manual tally so long as they are counted or received by election day. (CT 486). Meanwhile, Sacramento County (Laving) tries to include as many vote-by-mail ballots in the manual tally as possible. (CT 486). This contrasts with San Diego County, which does not include any vote-by-mail ballots not processed by election night in its manual tally. (CT 486).

The Trial Court Ruled that All Vote-By-Mail Ballots Must Be Included in the One-Percent Manual Tally, But That Provisional Ballots Are Not Required to Be Included, and Awards Plaintiffs Attorneys' Fees.

After post-trial briefing, the trial court issued a Statement of Intended Decision. (CT 455-488), in which, after reviewing the applicable law and the evidence adduced at trial, the court ruled that Section 15360

does not require provisional ballots to be included in the manual tally. (CT 481-485). The trial court continued, however, that Section 15360, as amended, did require all vote-by-mail ballots to be included in the manual tally. (CT 485-486). The trial court stated its intention to issue a writ of mandamus compelling the County and Vu to comply with Section 15360 and include all vote-by-mail ballots in its manual tally in future elections. (CT 486-488).

Plaintiffs (CT 490-497) and Defendants (CT 498-516) both filed objections to the Statement of Intended Decision. The parties subsequently stipulated to certain amendments to the Statement of Intended Decision addressing their objections. (CT 519-522). As amended, the resulting Statement of Decision was filed. (CT 524-557). Judgment was entered on the Statement of Decision on January 10, 2017. (CT 560-599).

Plaintiffs moved to tax costs in the amount of $4,618.28. (CT 638-655). Plaintiffs also moved for an award of fees under Code of Civil Procedure, Section 1021.5, seeking $98,750.00, and supplementing the amount sought as appropriate arising from subsequent filings, oppositions, and replies. (CT 656-671, 743-779, 802-805). Defendants moved to tax costs in the amount of $7,805.40 and opposed portions of Plaintiffs' motion to tax costs. (CT 672-682). Defendants opposed Plaintiffs' motion for attorneys' fees. (CT 694-708, 794-801). Plaintiffs moved to strike Defendants' motion to tax costs and also filed opposition to the Defendants' motion. (CT 685-693, 709-721, 722-735).

Defendants appealed the judgment. (CT 683-684, 736-738). Plaintiffs cross-appealed on the issue whether the provisional ballots cast in the election must be included in the manual tally in addition to vote-by-mail ballots. (CT 792-793).

The trial court granted Plaintiffs motion to strike Defendants motion to tax costs. (CT 806-807, 811-812). It granted in part and denied in part Plaintiffs' motion for attorneys' fees, awarding a total of $80,268.75. (CT 807-810, 812-816). Defendants appealed the fee award. (CT 817).

ARGUMENT (RESPONDENTS' BRIEF)

I.   STANDARD OF REVIEW.

To the extent that requests for declaratory judgment involve statutory interpretation, they present questions of law reviewed de novo. *(Gilb v. Chiang* (2010) 186 Cal.App.4th 444, 457 [111 Cal.Rptr.3d 822].) Similarly, while appellate review of a trial court's ruling on a writ of mandate is ordinarily confined to substantial evidence review, where the case involves resolution of questions of law and the facts are undisputed, the review is de novo. (*Californians Aware v. Joint Labor/Management Benefits Committee* (2011) 200 Cal.App.4th 972, 978 [133 Cal.Rptr.3d 766].) Statutory interpretation is also a question of law, reviewed de novo. *(Colgan v. Leatherman Tool Group, Inc*. (2006) 135 Cal.App.4th 663, 683 [38 Cal.Rptr.3d 36].)

Plaintiffs agree that the facts here are undisputed and that the question is whether Defendants' conduct is lawful. Accordingly, de novo review is appropriate.

As set forth below, the trial court correctly ruled that all vote-by-mail ballots must be included on the one-percent manual tally.

II.   THE APPLICABLE STANDARDS OF STATUTORY INTERPRETATION.

This case turns on interpretation of Section 15360. Under California law, a court's primary role in statutory interpretation is determining the legislature's intent. (*Mt. Hawley Ins. Co. v. Lopez* (2013) 215 Cal.App.4th

1385, 1396-1397 [156 Cal.Rptr.3d 771] [citations omitted].) California courts have established a three-step process of statutory interpretation that must be applied in the proper sequence. (*Id*.)

First, the court looks to the plain meaning of the statute's text. (*Id*.) This is because the words of the statute are the most reliable indicator of legislative intent. (*Id*.) Only when the meaning of the statute's words are not clear will a court proceed to the next step. (*Id.*)

Second, if the statute's words are not clear (which is not the case here), then the courts may turn to legislative history and the wider historical circumstances of its enactment. (*Id.*)

Third, if any ambiguity remains after consulting the legislative history, courts will apply reason, practicality, and common sense to the statutory language, considering the consequences that flow from a particular interpretation. (*Id*.) This last step involves consideration of the evils to be remedied, the history of the times and legislation on the same subject, public policy, and contemporaneous construction. (*Id*.) This final step must remain consistent with effectuating the purpose of the law. (*Id*.)

III.   ELECTIONS CODE SECTION 15360 AND RELATED STATUTES

Section 15360 applicable to this case provides as follows:
(a)   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 <u>ballots tabulated by those devices, including vote by mail ballots</u>, using either of the following methods:
(1)   (A)   A public manual tally of the <u>ballots, including vote by mail ballots, cast</u> in 1 percent of the precinct ballots chosen at random by the elections official. If 1 percent of the precinct ballots is less than one whole precinct, the tally shall be conducted in one precinct chosen at random by the elections official.

(B) (I)   In addition to the 1 percent manual tally, the elections official shall, for each race not included in the initial group of precincts, count one additional precinct. The manual tally shall apply only to the race not previously counted.
(ii)   Additional precincts for the manual tally may be selected at the discretion of the elections official.

(2)   A two-part public manual tally, which includes both of the following:

(A)   A public manual tally of the ballots, not including vote by mail ballots, cast in 1 percent of the precincts chosen at random by the elections official and conducted pursuant to paragraph (1).

(B) (I)   A public manual tally of not less than 1 percent of the vote by mail ballots cast in the election. Batches of vote by mail ballots shall be chosen at random by the elections official.
(ii)   For the purposes of this section, a "batch" means a set of ballots tabulated by the voting system devices, for which the voting system can produce a report of the votes cast.
(iii) (I)   In addition to the 1 percent manual tally of the vote by mail ballots, the elections official shall, for each race not included in the initial 1 percent manual tally of vote by mail ballots, count one additional batch of vote by mail ballots. The manual tally shall apply only to the race not previously counted.
(II)   Additional batches for the manual tally may be selected at the discretion of the elections official.

(b) If vote by mail ballots are cast on a direct recording electronic voting system at the office of an elections official or at a satellite location of the office of an elections official pursuant to Section 3018, 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 direct recording electronic voting machines used in that election chosen at random by the elections official.

(c)   The elections official shall use either a random number generator or other method specified in regulations that shall be

adopted by the Secretary of State to randomly choose the initial precincts, batches of vote by mail ballots, or direct recording electronic voting machines subject to the public manual tally.

(d) The manual tally shall be a public process, with the official conducting the election providing at least a five-day public notice of the time and place of the manual tally and of the time and place of the selection of the precincts, batches, or direct recording electronic voting machines subject to the public manual tally prior to conducting the selection and tally.

(e) The official conducting the election shall include a report on the results of the 1 percent manual tally in the certification of the official canvass of the vote. This report shall identify any discrepancies between the machine count and the manual tally and a description of how each of these discrepancies was resolved. In resolving any discrepancy involving a vote recorded by means of a punchcard voting system or by electronic or electro-mechanical vote tabulating devices, the voter verified paper audit trail shall govern if there is a discrepancy between it and the electronic record.
(Elections Code § 15630 [emphasis added].)

Elections Code § 336.5 defines the one-percent manual tally:
"One percent manual tally" is the public process of manually tallying votes in 1 percent of the precincts, selected at random by the elections official, and in one precinct for each race not included in the randomly selected precincts. This procedure is conducted during the official canvass to verify the accuracy of the automated count.
(Elections Code § 336.5 [emphasis added].)

Elections Code § 301: The term "ballot" is defined as:
(a) The combination of a card with number positions that is marked by the voter and the accompanying reference page or pages containing the names of candidates and the ballot titles of measures to be voted on with numbered positions corresponding to the numbers on the card.
(b) One or more cards upon which are printed the names of the candidates and the ballot titles of measures to be voted on by punching or marking in the designated area.
(c) One or more sheets of paper upon which are printed the names of candidates and the ballot titles of measures to be voted on by marking the

designated area and that are tabulated manually or by optical scanning equipment.
(d)   An electronic touchscreen upon which appears the names of candidates and ballot titles of measures to be voted on by touching the designated area on the screen for systems that do not contain a paper ballot. (Elec. Code § 301.)

IV.   THE TRIAL COURT CORRECTLY CONCLUDED THAT THE PLAIN LANGUAGE OF SECTION 15360 REQUIRES ALL VOTE-BY-MAIL BALLOTS TO BE INCLUDED IN THE ONE-PERCENT MANUAL TALLY.

Applying the principles of statutory interpretation set forth above, the trial court correctly held that all vote-by-mail ballots must be included in the one-percent manual tally. The language of the statute is clear and unambiguous, so there is no need to go beyond the statute's words. Even so, the legislative history reinforces the trial court's conclusion. Finally, the trial court correctly concluded that the purpose of the statute – to ensure uniformity in the way the tallies are conducted in order to verify the accuracy of the electronic voting statewide – is best served by requiring all counties to follow the same procedure and include all the vote-by-mail ballots. The trial court correctly rejected Defendants' self-serving contention that the statute should be interpreted to allow each registrar to decide unilaterally how many vote-by-mail ballots are to be included in the manual tally for his or her county, which would then result in the use of differing, non-uniform methodologies and therefore differing degrees of validity of the one-percent manual tallies in the different counties, contravening the purpose of the statute. The plain, unambiguous language of Section 15360 confirms that the legislature intended that all vote-by-mail ballots are to be included in the manual tally.

Since the trial court correctly interpreted Section 15360 to include all vote-by-mail ballots, and since the statutory language is clear and unambiguous that all ballots cast – "including vote by mail ballots" – are to be included in the manual tally, no reasonable interpretation of the statute allows its language ". . . [a] public manual tally of the ballots, including vote by mail ballots, cast . . ." [Elections Code § 15360(a)(1)(A).] to mean only some of the vote-by-mail ballots at the arbitrary determination of each county's registrar of voters, as Defendants claim.

First, subsection (a) of the statute requires ". . . a public manual tally of the ballots tabulated by those devices, <u>including vote by mail ballots</u> . . ." [Elections Code § 15360(a). (Emphasis added.)] The statute expressly requires all votes tabulated by the voting system comprising the universe of ballots to be sampled for the manual tally, and expressly states that the subset of vote-by-mail ballots is to be included. (*Id.*)

The statute then lists the two optional alternative methods by which the manual tally may be conducted, and again reiterates that all votes cast are to be included in the whole from which to draw the sample for the manual tally, expressly confirming that the subset of vote-by-mail ballots must be included in that tally. The first method allowed – the "precinct tally method" – speaks of a ". . . manual tally of the ballots…cast in 1 percent of the precincts chosen at random . . ." [Elections Code § 15360(a)(1)(A).] The term "cast" is not defined in the Elections Code, but one of its common definitions and the most applicable in this context is "to deposit (a ballot) formally."[4] Thus, the "precinct tally method" contemplates that from among all ballots formally deposited in the election, ". . . the ballots, including vote

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[4] https://www.merriam-webster.com/dictionary/cast, definition 1(d).

by mail ballots, cast in 1 percent of the precincts chosen at random . . ." will be included in the sample for the manual tally. [Elections Code § 15360(a)(1)(A).] The statute expressly erases any doubt that "ballots . . . cast" includes all the subset of vote-by-mail ballots by inserting as an apposition the clause ". . . including vote by mail ballots . . ." [Elections Code § 15360(a)(1)(A).]

As if to further reinforce the mandate that all vote-by-mail ballots were intended to be included in the manual tally, the second option for conducting the manual tally – the "batch method" – confirms that ". . . not less than 1 percent of the vote by mail ballots cast in the election . . ." must be included as part of the two-part manual tally under the batch method. [Elections Code § 15360(a)(2)(B)(I).] It further refers to ". . . the 1 percent manual tally of the vote by mail ballots . . ." [Elections Code § 15360(a)(2)(B)(iii)(I).] Even vote-by-mail ballots cast on a direct recording system are required to be accounted for as part of the manual tally. [Elections Code § 15360(b).]

There is no basis in fact or law to conclude that one subsection of this statute defining the "batch method" would require a ". . . manual tally of not less than 1 percent of the vote by mail ballots cast in the election . . ." [Elections Code § 15360(a)(2)(B)(I).] – but permit less than the total amount of vote-by-mail ballots to be included in the manual tally if the "precinct method" were used. It defies logic and reason for Defendants to claim that the precinct method does not require all the vote-by-mail ballots to be sampled as part of the manual tally when the batch method specifically states that one percent of all vote-by-mail ballots cast must be included in the manual tally – or vice-versa.

The trial court's conclusion that all vote-by-mail ballots must be included in the manual tally is also supported by the express purpose of the manual tally, namely, "to verify the accuracy of the automated count." (Elections Code § 336.5; *County of San Diego v. Bowen* (2008) 166 Cal.App.4th 501, 511-512 [82 Cal.Rptr.3d 818] (the statute appears on its face to be concerned with assuring the accuracy of the vote, not with limiting tallying). It is axiomatic that omitting ballots from the manual tally would work against that purpose because the results would be less accurate – and therefore less likely to reveal irregularities in the functioning of the tabulation machines. Indeed, Plaintiffs submitted significant evidence and expert testimony that the omission of vote-by-mail and provisional ballots from the manual tally was flawed and rendered the manual tally unreliable for its stated purpose. (CT 476-478; RT 99-108, 250). Defendants' mantra – that the manual tally is not a recount – is intended to deflect the court's attention from the issues raised in this case while it ignores the fact that – by their own admission – the purpose of the manual tally is to verify the accuracy of the voting machines. The trial court was well within its discretion to accept Plaintiffs' evidence that the methods used by Defendants were insufficient to adequately verify the machines' accuracy. (CT 476-478; RT 99-108, 250).

Defendants also contend that the trial court improperly inserted the word "all" into the statute. Not so. The trial court analyzed the plain language of the statute and harmonized the language in its provisions to reach the only reasonable reading of the statute. **It is Defendants who attempt to insert the words "some of" into the statute.** Again, it makes no sense for the statute to require all vote-by-mail ballots to be sampled for the manual tally if the batch method is used but not if the precinct method is

used. The trial court correctly noted that the self-serving interpretation advanced here by the Defendants is motivated by a what the court perceived to be their inability or (more likely) unwillingness to comply with the law as written due to the alleged lack of resources to complete the required task within the specified time. (CT 635). Defendants' claimed lack of resources, however, does not excuse them from complying with the law. They must either obtain more resources or reallocate existing resources to comply, or seek redress from the legislature to enlarge the time in which to complete their duties. What they may not do is what they have been doing for many years, as revealed by the testimony of Deborah Seiler – shirking their obligations by clinging to a disingenuous, illogical interpretation of Section 15360.

For the same reason, Defendants' reliance upon *Robertson v. Rodriguez* is unavailing. That case states that, while there is an axiom that a statute employing a term in one place and omitting it elsewhere means the term should not be inferred where omitted, courts must also construe a statute consistently with its purpose, reasonably, and to avoid absurdity. (*Robertson v. Rodriguez* (1995) 36 Cal.App.4th 347, 361 [42 Cal.Rptr.2d 464].) The trial court's reading of the statute is more grammatically, semantically, and logically consistent with the statute's language than is the bizarre interpretation Defendants insist upon. Indeed, given that the statute refers to the entire universe of "the ballots…cast" in any election, which necessarily means "all" the ballots, it is more likely that the word "all" was not included in the statute because the legislature recognized that to have included it would have been superfluous.

The trial court also correctly rejected the current Secretary of State's cynical, self-serving "opinion" that all provisional ballots and significant

portions of the vote-by-mail ballots could be excluded from the manual tally. (CT 635; Attachment 4 to Appellant's RJN). First, Defendants revealed that it was contrived for purposes of this litigation, when they divulged that the Secretary of State's "opinion" was requested in response to Plaintiffs' lawsuit. (Appellant's Brief at p. 20). Second, Defendants acknowledge that where, as here, an agency determination disregards or conflicts with the clear language and purpose of the statute, no deference is given. (*Family Planning Assocs. Medical Group v. Belshe* (1998) 62 Cal.App.4th 999, 1004 [73 Cal.Rptr.2d 221].) Courts are required to find a statute's true meaning, even if doing so results in rejection of an earlier erroneous administrative determination. (Id.)

Accordingly, Section 15360 plainly and unambiguously requires that all vote-by-mail ballots be included in the manual tally. Thus, the court was neither required nor authorized to go beyond the statute's language. *(Mt. Hawley Ins. Co. v. Lopez, supra*, 215 Cal.App.4th at 1396-1397 [156 Cal.Rptr.3d 771].) The portion of the judgment that Defendants appeal from should be affirmed on that basis alone.

But even if, despite the clear, unambiguous language of the statute, the legislative history of Section 15360 were to be considered, Defendants fare no better. The legislative history of the statute steadfastly supports the trial court's determination. SB 1235 was the legislature's response to anecdotal reports that some counties routinely excluded vote-by-mail and provisional ballots from the one-percent manual tally process and may not have been selecting precincts to be tallied in a truly "random manner." (California Bill Analysis, S.B. 1235 Sen., 4/19/2006.)

For example,

"Requiring all of the ballots - not just those cast at the polling place on Election Day- in a given precinct to be a part of the percent audit should increase the thoroughness and the reliability of the audit. Absent a complete count of all of the ballots in a precinct that's subject to the 1% audit, it's difficult to see how elections officials can argue they've complied with the audit requirements under the law." (California Bill Analysis, S.B. 1235 Sen., 4/19/2006.)

As an additional example,

"In 2006, Elections Code section 15360 was amended to require that all vote-by-mail ballots be included in the 1% manual tally by precinct. This requirement resulted in over 540 additional staff hours to complete the manual tally process and approximately $12,000 in additional costs for each election…." (06/03/11- Senate Elections and Constitutional Amendments, 2011 Cal Stat. Ch. 52 [emphasis added].)

The additional burden of this requirement led the legislators to add the option to manually tally vote-by-mail ballots separately, in batches, to ensure that all of them could be counted efficiently. (*Id*.) The proponents of AB707 state the intent clearly:

"The votes on [vote-by-mail] ballots are no less valid or important than the votes cast at the polling place, and the potential for the vote to be incorrectly tabulated on [a vote-by-mail] ballot is just as likely as a vote cast in a traditional polling booth. Therefore, it makes no sense to exclude [vote-by-mail] ballots, provisional ballots and ballots cast at satellite locations from the 1% manual tally. By excluding them from the manual tally, there is no way to verify that the votes cast on them are being recorded accurately. Moreover, in the event that counties are authorized to conduct an all-mail election, this provision would ensure that the manual tally is still conducted in those counties."

(Exhibit 59, page 3.)

Further support was provided by the then-serving Secretary of State
Bruce McPherson (who served from March 2005 - December 2006).

> "This proposal also requires a county election official to
> include all ballots cast in a precinct in the 1% manual tally.
> This means that a county will need to include any ballots cast
> at the polls, via absentee ballot, provisional voters, and any
> ballots cast on direct recording electronic (DRE) voting
> machines." (EV 76 [Exhibit 59, p. 15.]

The final recommendation in an Enrolled Bill Recommendation to
Governor Schwarzenegger states:

> "Summary: This bill establishes a uniform procedure for
> elections officials to conduct the 1% manual tally of the
> ballots including (1) the requirement that [vote-by-mail]
> ballots, provisional ballots, and ballots cast at satellite
> locations to be included in the manual tally of ballots…" (RT
> 275-276; EV 97, 105 [Exhibit 59, pp. 37, 45]).

Defendants' own witness, Deborah Seiler – who claimed to have had
a hand in authoring the amendments to the statute – confirmed that the
CACEO, Department of Finance, and the Secretary of State all supported
that interpretation of the Senate Bill that was enacted as the 2007
amendment to Section 15360. (RT 276). The recommendation to the
Governor continued that, "This bill stems from anecdotal reports that some
counties routinely exclude [vote-by-mail] and provisional ballots from the
one percent manual tally process." (RT 276-277; EV 98 [Exhibit 59 at p.
47] [emphasis added]).

The recommendation further stated that: "The use of provisional
ballots has also increased in recent years. Excluding these votes from the
manual tally severely lessens the value and accuracy of this post-election

audit." (RT 277-278; EV 105 [Exhibit 59 at p. 47] [emphasis added]). In another letter from Secretary of State Bruce McPherson's office to the governor concerning the enacted Senate Bill, the letter states: "I respectfully request your signature on this Senate Bill 1235 which amends the current procedure for the one percent manual tally to specifically include [vote-by-mail], provisional and early vote ballots." (RT 277-278; EV 105 [Exhibit 59 at p. 45] [8/30/2006 Letter] [emphasis added]).

While Defendants now conveniently seek to dismiss each of these letters as "staff errors," (RT 279-280), they confirm that, at the time, everyone was in agreement that the language of Section 15360 required all vote-by-mail ballots (as well as provisional ballots) to be included in the manual tally. The trial court was well within its discretion to consider this legislative history to be more persuasive than the portions Defendants rely upon. Accordingly, the legislative history confirms what the plain language of Section 15360 states and the trial court found – all vote-by-mail ballots must be included in the manual tally.

If any further confirmation that all vote-by-mail ballots must be counted in the manual tally were to be needed, the third step of the statutory analysis provides it. As set forth above, if any ambiguity remains after consulting the legislative history, courts will apply reason, practicality, and common sense to the statutory language, considering the consequences that flow from a particular interpretation. (*Mt. Hawley Ins. Co. v. Lopez, supra*, 215 Cal.App.4th at 1396-1397 [156 Cal.Rptr.3d 771].) This last step involves consideration of the evils to be remedied, the history of the times and legislation on the same subject, public policy, and contemporaneous construction and must remain consistent with effectuating the purpose of the law. (Id.)

Here, as the trial court noted, one of the goals of Section 15360 was to mandate a more uniform procedure for the manual tallies given the fact that there were reports that some counties routinely excluded vote-by-mail and provisional ballots from the manual tally. (CT 608, 635.) The trial court also correctly noted that, under the interpretation Defendants proposed, each individual registrar would be justified in conducting the manual tally differently, resulting in a haphazard, non uniform application of Section 15360. (CT 486, 522). This would contravene the stated goal present in the amendments of achieving uniformity among the counties. Requiring election officials to include all vote-by-mail ballots in the manual tally ensures uniformity and greater accuracy in the manual tally. It is therefore the interpretation most consistent with the addressing the "evils to be remedied" by the amendment of Section 15360.

In sum, the trial court properly concluded that Section 15360 required all vote-by-mail ballots in the manual tally. The plain and unambiguous statutory language itself compels that conclusion and should end the inquiry. Even if the additional steps in the statutory interpretation process were to be considered, they too confirm that the trial court ruled correctly. That portion of the judgment appealed from by the County – holding that Section 15360 requires all vote-by-mail ballots to be included in the manual tally – should therefore be affirmed in its entirety.

V.   A WRIT OF MANDATE IS THE CORRECT REMEDY TO COMPEL AN OFFICIAL TO CONDUCT AN ELECTION ACCORDING TO LAW.

Defendants' claim that the trial court's issuance of a writ of mandate to obligate them to perform a mandatory duty they are already obligated to

perform is devoid of merit. Defendants essentially claim that a registrar has discretion to ignore a statutory requirement and cut corners solely for his or her own perceived convenience as to the timing and rigor of the manual tally during the canvass.

"Mandamus is the correct remedy for compelling an officer to conduct an election according to law." (*Hoffman v. State Bar of California* (2003) 113 Cal.App.4th 630, 639 [6 Cal.Rptr.3d 592]; *quoting, Wenke v. Hitchcock* (1972) 6 Cal.3d 746, 751 [100 Cal.Rptr. 290, 493 P.2d 1154].)

Here, as stated above, the trial court correctly found that Defendants are obligated by the statute to include all vote-by-mail ballots in the manual tally. The trial court merely issued a writ of mandate directing them to comply with that obligation, which is already imposed by the statute. It did not interfere at all with the discretionary aspects of that obligation. Defendants are free to perform the manual tally in a manner and at a time within their discretion, so long as they comply with the requirements of the election law. What they may not do is to ignore their obligation to include all the vote-by-mail ballots in the manual tally.

VI. THERE IS NO BASIS TO REVERSE THE AWARD OF ATTORNEYS' FEES, AND PLAINTIFFS ARE ENTITLED TO AN AWARD OF ATTORNEYS' FEES ON THIS APPEAL.

Defendants' sole challenge to the attorneys' fees award is premised on their claim that the judgment appealed from should be reversed. Because that contention is erroneous for the reasons set forth above, there is no basis to reverse the award.

Plaintiffs, however, are entitled to an additional award of attorneys' fees on this appeal if the judgment is affirmed. (*Serrano v. Priest* (1977) 20

Cal.3d 25, 49-50 [141 Cal.Rptr. 315, 569 P.2d 1303].) Accordingly, if it affirms, this court should so find and remand the matter to the trial court for an appropriate attorneys' fees award.

VII.   CONCLUSION (RESPONDENTS' BRIEF)

For the reasons set forth above, that portion of the judgment appealed from — holding that Defendants were required to include all vote-by-mail ballots in the one-percent manual tally and issuing a writ of mandate to enforce that holding — should be affirmed, and Plaintiffs awarded their costs and attorneys' fees accrued both for the trial below and additionally in this appeal, together with such other and further relief to Plaintiffs as this Court deems just and proper.

ARGUMENT (APPELLANTS OPENING BRIEF ON CROSS-APPEAL)

I.   STATEMENT OF APPEALABILITY.

A cross-appeal is timely so long as it is filed within the time that an appeal may be taken from the judgment or order appealed from or within twenty days of the appellant filing its notice of appeal, whichever is later. (Cal. Rules of Court, rule 8.406(b)). Here, the underlying judgment was entered on January 10, 2017 and served on Defendants with notice of entry on January 20, 2017. (CT 560-599, 683-684). Thus, Defendants had sixty days from January 20, 2017 to file their notice of appeal, which ended on March 21, 2017. (Cal. Rules of Court, rule 8.406(a)). Plaintiffs timely filed their notice of cross-appeal within that period on March 13, 2017. (CT 792-793).

II. STANDARD OF REVIEW.

As set forth above, Plaintiffs agree with the County that the facts here are undisputed and that the question is whether Defendants' conduct has been lawful. Accordingly, de novo review is appropriate. (*Gilb v. Chiang, supra*, 186 Cal.App.4th at 457 [111 Cal.Rptr.3d 822]; *Californians Aware v. Joint Labor/Management Benefits Committee, supra*, 200 Cal.App.4th at 978 [133 Cal.Rptr.3d 766]; *Colgan v. Leatherman Tool Group, Inc., supra*, 135 Cal.App.4th at 683 [38 Cal.Rptr.3d 36].) While the trial court correctly ruled that all vote-by-mail ballots must be included on the one-percent manual tally, it misconstrued the statute by ruling that provisional ballots were not required to be included in the manual tally.

III. THE TRIAL COURT ERRONEOUSLY CONCLUDED THAT PROVISIONAL BALLOTS WERE NOT ALSO REQUIRED TO BE PART OF THE MANUAL TALLY.

Provisional ballots arise at the precinct polling places when for example a voter appears at the wrong polling place or for some other reason cannot be verified as a registered voter in the records available to the poll workers, or when a voter who the records show has been sent a vote by mail ballot appears without their vote by mail ballot to prove that they have not or will not either inadvertently or intentionally also vote by mail, which might result in a double vote. Provisional ballots also arose in the subject election because poll workers incorrectly required the thousands of "No Party Preference" voters who wished to vote as they are allowed to do in a party's primary election to vote provisional ballots rather than that party's "crossover ballots." These voters are given paper ballots that otherwise would be identical to all "regular" ballots, which they then vote and insert into envelopes (similar to the envelopes used for vote by mail ballots) on

which the voters provide their identifying information (such as their address, etc.), and then date, sign, and seal the envelopes. They then give the sealed envelopes containing the ballots to the poll workers. The poll workers deliver these envelopes along with "regularly voted" ballots and vote by mail ballots (also in signed envelopes) that were returned to the polls rather than mailed to the registrar of voters. The registrar of voters personnel then processes the envelopes and the ballots much in the same manner as they process vote by mail envelopes and ballots, ultimately using the tabulating system to count those provisional ballots that have been verified. (RT 507-511).

As set forth herein, in the subject election, the County registrar received approximately 68,000 verified provisional ballots, none of which Vu allowed to be included in the universe (or "frame") of ballots to be sampled for the one-percent manual tally. (RT 507-511).

While the trial court correctly ruled that all vote-by-mail ballots must be included in the manual tally, it erroneously concluded that all provisional ballots may properly be excluded from the manual tally. As demonstrated above, Section 15360 applies to the entire universe of "ballots…cast" [Elections Code § 15360(a)(1)(A).] and ". . . tabulated by those devices . . ." utilized by the registrar's "voting system" "[d]uring the official canvass of every election . . .". [Elections Code § 15360(a).] It cannot be disputed that a provisional ballot qualifies as a "ballot" as that term is defined in the Elections Code. [Elec. Code § 301.] It also cannot be disputed that provisional ballots are "cast," as they are formally deposited by the voter with the precinct poll workers, who in turn deliver them, along with all

regularly voted ballots, to the registrar.[5] Nor is it – nor can it be – disputed that once they have been verified, provisional ballots are ". . . ballots tabulated by those devices . . ." "[d]uring the official canvass." Thus, provisional ballots must all be included as part of the one-percent manual tally.

Defendants and the trial court overvalue the fact that the term "provisional ballot" no longer appears from an earlier version of the Assembly Bill and Senate Bill that ultimately became Section 15360 as amended. Given that the amended bill ended up covering the entire universe of "ballots…cast" and "tabulated" in an election, the absence of the phrase "provisional ballots" in subsequent versions of the bills is more accurately viewed as the elimination of superfluous language by fastidious, expert legislative drafters. Indeed, as set forth above in Plaintiffs' argument regarding vote-by-mail ballots above, the legislative history of the statute confirms that, upon its amendment, it was understood by all involved to include both vote-by-mail and provisional ballots. (California Bill Analysis, S.B. 1235 Sen., 4/19/2006; 06/03/11- Senate Elections and Constitutional Amendments, 2011 Cal Stat. Ch. 52; Exhibit 59, page 3; Exhibit 59, page 15; RT 275-277; Exhibit 59, p. 37, 45, 47.)

Including all provisional ballots also increases the accuracy of the manual tally, as Professor Stark testified (see above), which comports with the tally's express purpose of verifying the accuracy of the voting equipment. [Elections Code § 336.5.]

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[5] https://www.merriam-webster.com/dictionary/cast, definition 1(d).

In sum, because the legislature intended that all "ballots . . . cast" and "tabulated" in an election be subjected to the manual tally, the trial court's exclusion of provisional ballots from the manual tally was in error. Mere difficulty or expense encountered in complying with the requirement to include provisional ballots in the manual tally is not an excuse to ignore a statutory mandate. Accordingly, that portion of the judgment appealed from – holding that Defendants were not required to include any provisional ballots in the one-percent manual tally – should be reversed, and Plaintiffs granted the declaratory and mandamus relief sought.

In addition, the matter should be remanded for recalculation of the attorneys' fees award if this Court reverses on this issue. This is because, having held that Plaintiffs had not succeeded on this question, the trial court applied a negative multiplier to the fee award. (CT 810). It follows that, if the law permits a negative multiplier for partial success to reflect the unsuccessful claims, (*Harman v. City and County of San Francisco* (2007) 158 Cal.App.4th 407, 425 [69 Cal.Rptr.3d 750]), subsequent success on those claims on appeal warrant, at a minimum, eliminating the negative multiplier. Accordingly, if Plaintiffs prevail on the cross-appeal, the basis for the negative multiplier will be gone, and the fee award will need to be recalculated by the trial court. Furthermore, this Court should award costs and attorneys' fees should it prevail in this cross-appeal.

IV.   CONCLUSION (CROSS-APPEAL)

For the reasons set forth above, that portion of the judgment appealed from holding that Defendants were not required to include any provisional ballots in the one-percent manual tally should be reversed, Plaintiffs granted the declaratory and mandamus relief sought below, Plaintiffs awarded costs and additional attorneys' fees by the trial court for

also having prevailed on this issue, and Plaintiffs awarded their costs and attorneys' fees on this appeal, together with such other and further relief to Plaintiffs as this Court deems just and proper.

Dated: December 27, 2017   **CARE LAW GROUP PC**

                                   By: /s/ ALAN L. GERACI
                                   ALAN L. GERACI, ESQ.
                                   Attorneys for Respondents and Cross-
                                   Appellants Citizens Oversight, Inc.
                                   and Raymond Lutz

CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rule 8.204(c)(1) and 8.204(c)(4) of the California Rules of Court, the enclosed Brief of Respondents / Cross-Appellants is produced using 13-point or greater Roman type, including footnotes, and contains 13,955 words, which is less than the total words permitted by the rules of court. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: December 27, 2017   **CARE LAW GROUP PC**

By: /s/ ALAN L. GERACI
ALAN L. GERACI, ESQ.
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I, Stephen More , declare that I am not a party to the action, am over 18 years of age and my business address is: 631 S Olive Street, Suite 600, Los Angeles, California 90014.

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