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Honorable Judith McConnell, Chief Justice and the Associate Justices
Court of Appeal, State of California, Fourth Appellate District, Division One
750 B Street, Suite 300
San Diego, CA 92101

Re: *Citizens Oversight, Inc., et al. v. Vu, et al.*, D071907
San Diego Superior Court Case No. 37-2016-00020273-CL-MC-CTL

To the Chief Justice and the Associate Justices of the Court of Appeal:

This letter brief is written in response to your request dated May 8, 2018, to provide comments on whether the issues presented by the appeal and cross-appeal in this matter have been rendered moot by the amendment of Elections Code[1] section 15360, effective January 2, 2018.

In this case, the trial court concluded that election officials are required to include "all" vote-by-mail ("VBM") ballots in the 1% manual tally that is to be conducted during the official canvass but that provisional ballots are not required to be included in the tally. (Volume 3, Clerk's Transcript ("3CT"), 561.) In addition, the trial court ordered "the clerk of the court [to] issue a writ of mandamus directing the Registrar … to comply with … Section 15360 by including all Vote-by-Mail ballots in the random selection process for the purposes of completing the one percent manual tally in all future elections to which Section 15360 applies." (*Id.*) On appeal, appellants/cross-respondents ("Appellants") have argued that the trial court was wrong with respect to VBM ballots but correctly concluded that provisional ballots are to be excluded from the tally.

Subsequent to the filing of Appellants' Opening Brief, the Governor signed legislation amending Section 15360. The amendments to Section 15360 clarify and confirm that Appellants' interpretation and implementation of Section 15360 was correct both before and after the most recent amendments to Section 15360. Specifically, the

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

amendments to Section 15360 "[c]onform[ed] the Elections code to current accepted interpretations and practice by clarifying that the one percent manual tally of ballots casts are those ballots and VBM ballots tabulated during the semiofficial canvass and do not include provisional ballots." (Appellants' Supplemental Request for Judicial Notice ("Supp. RFJN"), Attachment 15, p. 3-4 and Supp. RFJN, Att. 16, p. 3; see also, Supp. RFJN, Att. 16, p. 1 ["*Amendments* … clarify the code regarding existing interpretation and practice regarding the 1% manual tally of ballots"]; Supp. RFJN, Att. 16, p. 8 and Att. 18, p. 6 ["AB 840 simply clarifies that counties are allowed to continue completing the 1% manual tally and ballot tabulation on time while protecting the integrity of our elections"]; Supp. RFJN, Att. 17, p. 2 and Att. 18, p. 6 ["The Senate amendments clarify that the one percent manual tally of ballots cast are those canvassed during the semiofficial canvass and do not include provisional ballots"]; and Supp. RFJN, Att. 19, p. 2 ["While this has been the accepted interpretation of the law by many election officials, without additional clarification, we put our County Registrars in danger of being unable to certify election results on schedule"].)

On a going forward basis, the questions raised by respondents/cross-appellants ("Respondents") regarding the conduct of the 1% manual tally have been resolved by the amendments to Section 15360. The 1% manual tally is "[a] public manual tally of the ballots canvassed in the semifinal official canvass, including vote by mail ballots but not including provisional ballots." Section 15360(a)(1)(A). The relief granted to Respondents is therefore moot. Subsequently enacted legislation "can render an appeal moot." *Van't Rood v. County of Santa Clara* (2003) 113 Cal.App.4th 549, 560; *Equi v. San Francisco* (1936) 13 Cal.App.2d 140, 141-142.

Rather than simply dismiss the pending appeals, the Court should reverse that portion of the judgment in favor of Respondents and order that judgment be entered in favor of Appellants. The reasons for this result are twofold.

First, the decision of the trial court was clearly erroneous. Besides the briefs on the merits which have been previously submitted by Appellants, the legislative history relating to the amendments of Section 15360 enacted by AB 840, as referenced above, further substantiate the conclusion that the trial court's decision in favor of Respondents was wrong as a matter of law.

Second, because the trial court granted prospective relief, i.e. ordered the clerk of the court to issue a writ of mandamus requiring the Registrar "to comply with … Section 15360 by including all Vote-by-Mail ballots in the random selection process for the purposes of completing the one percent manual tally in all future elections", this Court must reverse that portion of the judgment and remand to the trial court with directions to rescind its order for issuance of a writ. By taking this action the Court will ensure that the portion of the judgment finding in favor of Respondents and ordering the issuance of

a writ of mandamus will not have any preclusive effect on subsequent litigation. *Coalition for a Sustainable Future in Yucaipa v. City of Yucaipa* (2011) 198 Cal.App.4th 939, 944, fn. 4.

Reversing that portion of the judgment in favor of Respondents based on the merits of the case would preclude a determination that Respondents were the prevailing party in the underlying action and require that the trial court set aside its award of attorneys' fees and costs. In addition, it would entitle Appellants to an award of costs per the Memorandum of Costs filed with the trial court on February 1, 2017, in the amount of $7,805.40. (3CT, p. 678-682.)

In the alternative, the Court could reverse the judgment in its entirety and order the trial court to set aside its judgment and dismiss the action as moot. "A trial court judgment rendered moot on appeal and dismissed has not been fully litigated." *City of Yucaipa* at 98 Cal.App.4th 939, 943. When a judgment on the merits has not been fully litigated, affirmation of that judgment by a simple dismissal of the appeal is improper. *Id.* at 944; see also, *Paul v. Milk Depots, Inc.* (1964) 62 Cal.2d 129, 134-135. Because the judgment is reversed and the action dismissed, the award of attorneys' fees and costs in favor of Respondents would be vacated and the trial court would be precluded from awarding costs in favor of Appellants.

Very truly yours,

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