1 THOMAS E. MONTGOMERY, County Counsel
   County of San Diego
2 By TIMOTHY M. BARRY, Chief Deputy (State Bar No. 89019)
   STEPHANIE KARNAVAS, Senior Deputy (State Bar No. 255596)
3 1600 Pacific Highway, Room 355
   San Diego, CA 92101-2469
4 Telephone: (619) 531-6259
   E-mail: timothy.barry@sdcounty.ca.gov
5 *Exempt From Filing Fees (Gov't Code § 6103)*

6 Attorneys for Defendants

7

8   **IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA**

9   **IN AND FOR THE COUNTY OF SAN DIEGO**

10   **CENTRAL DIVISION**

11 CITIZENS OVERSIGHT, INC., a Delaware)   No. 37-2016-00020273-CL-MC-CTL
    non-profit corporation; RAYMOND LUTZ,) Action Filed: June 16, 2016
12 an individual,   )
)   **DEFENDANTS' MEMORANDUM OF**
13   Plaintiffs,   )   **POINTS AND AUTHORITIES IN**
)   **OPPOSITION TO PLAINTIFFS'**
14   v.   )   **MOTION FOR PRELIMINARY**
)   **INJUNCTION**
15 MICHAEL VU, San Diego Registrar of   )
    Voters, HELEN N. ROBBINS-MEYER, San   )   **IMAGED FILE**
16 Diego County Chief Administrative Officer,)
    SAN DIEGO COUNTY, a public entity;   )   Date: July 6, 2016
17 DOES 1-10,   )   Time: 1:30 p.m.
)   Dept.: 73
18   Defendants.   )   ICJ: Hon. Joel Wohlfell
)

19

20 / / /

21 / / /

22 / / /

23 / / /

24 / / /

25 / / /

26 / / /

27 / / /

28 / / /

TOPICAL INDEX

DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

TABLE OF AUTHORITIES

Page

**DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION
TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

1

2 **TABLE OF AUTHORITIES**

3 <u>RULES/STATUTES</u>

4 Page

16

17

18

19

20

21

22

23

24

25

26

27

28

**DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION
TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

1   Michael Vu, sued in his official capacity as the Registrar of Voters for the County of San

2   Diego ("Vu"), Helen N. Robbins-Meyer, sued in her official capacity as the Chief

3   Administrative Officer for the County of San Diego ("Robbins-Meyer"), and the County of San

4   Diego ("County") respectfully submit the following memorandum of points and authorities in

5   opposition to plaintiffs' request for a preliminary injunction.

6   **INTRODUCTION**

7   Political activists performing in the role of election watchdogs have initiated this lawsuit

8   to bring attention to themselves, their cause, and their preferred political candidate. In a post on

9   his Facebook page announcing that he would be holding another press conference on June 28th

10   in front of the Registrar's office, plaintiff, Mr. Lutz, reminded his followers that "this is a

11   performance so please play your roles!" (Defendants' Notice of Lodgment ("NOL"), Exhibit 1.)

12   The canvassing of election results is serious public business that is costly in time and

13   resources— not a reality television show.

14   Here, in an apparent attempt to garner as much publicity for their cause as possible,

15   plaintiffs, who for many years have known the methodology used by the Registrar for

16   conducting the 1 percent manual tally, strategically waited until the Registrar was in the midst of

17   the official canvass of a Presidential Primary election to file suit claiming that this methodology

18   violates the Elections Code. Plaintiffs' years delay in bringing this action belies their claim that

19   they will suffer irreparable harm if the Registrar is not enjoined from certifying the election.

20   Moreover, plaintiffs not only seek to enjoin the Registrar from fulfilling his statutory duties,

21   they seek a mandatory injunction obligating him to include thousands of additional ballots in the

22   manual tally. Plaintiffs have failed to demonstrate any irreparable harm much less the extreme

23   circumstances that justify the issuance of a mandatory preliminary injunction. In short,

24   plaintiffs have decidedly failed to meet their burden. The motion for preliminary injunction

25   should be denied.

26   / / /

27   / / /

28   / / /

**DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION
TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

STATEMENT OF FACTS

A. **Prior to Every Election, the Registrar's Office Tests the Electronic Voting Systems For Logic and Accuracy**

For the June 2016 Presidential Primary Election the Registrar's office was required to print 8,160 different ballot types to account for all of the variations in the ballot. Each ballot type is coded so that the devices used to tabulate the ballots can recognize each ballot type and properly count the ballots. (Declaration of L. Michael Vu in Support of Defendants' Opposition, etc. ("Vu Decl."), p. 2, ll. 14-17.) Prior to every election, the Registrar's office conducts a logic and accuracy test of the voting systems used to tabulate the election returns. (Vu Decl., p. 2, ll. 18-20.) The logic and accuracy test includes the following activities:

- Generating a pre-marked test deck which tests each contest and choices across each voting precinct in the election and tests the hardware and software in which ballots are to be tabulated.
- Scanning the pre-marked test deck through each method (i.e. central count and precinct count optical scan) in which ballots are tabulated.
- Testing the Direct Record Electronic (i.e. touchscreen) by manually casting votes onto it.
- Verifying the results of each method by comparing the pre-determined results against the results of tabulation system reports.

(Vu Decl., p. 2, ll. 21-28.)

The logic and accuracy test for the June 7, 2016 election occurred over a 10-day timeframe using approximately 20,000 cards for the test desk. (Vu Decl., p. 3, ll. 1-2.) The purpose of the logic and accuracy test is to ensure that vote tabulating system correctly counts the ballots. Election Code Section 15000. [1]

/ / /

/ / /

/ / /

/ / /

---

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

DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

1 **B.   Post-Election, the Registrar's Office Completes a Manual Tally of**

2 **Ballots to Verify the Accuracy of the Voting Systems that Count the**

3 **Ballots**

4 The Registrar is required to complete the official canvass and certify election results to

5 the Secretary of State's office no later than 30 days after an election.[2] Section 15372. As part of

6 the official canvass, Section 15360(a) directs the Registrar to conduct a "public manual tally of

7 the ballots tabulated by [the vote tabulating system], including vote by mail ballots" using one

8 of two approved methods. Section 15360(a)(1) directs elections officials to complete a manual

9 tally of the ballots cast at 1 percent of the precincts chosen at random and, for each race not

10 included in the initial group of precincts, one additional precinct. Alternatively, elections

11 officials may opt to conduct a two part manual tally that includes the ballots cast in 1 percent of

12 the precincts on election-day, excluding Vote by Mail ("VBM") ballots, and 1 percent of the

13 VBM ballots cast in the election in batches randomly selected by the elections official. Section

14 15360(a)(2). The purpose of the manual tally is to verify the accuracy of the voting systems that

15 are used to count the ballots. Section 336.5. It is not a recount of election results. (Vu Decl.,

16 p. 5, ll, 17-18.) This lawsuit involves a challenge to the methodology utilized by the Registrar

17 for completing this manual tally.

18 **C.   There are a Number of Circumstances in which a Voter Must Vote**

19 **Provisionally**

20 California has, by statute, provided for provisional voting since 1984. Voters may be

21 required to vote provisionally on the day of the election for a number of reasons. One reason

22 that a voter may be asked to vote provisionally is because the voter is registered as a VBM voter

23 and has been issued a mail ballot, but wants to vote at the poll. The purpose of having a voter

24 registered as a VBM voter vote provisionally is to provide a safeguard against the possibility

25 that the VBM voter has already voted, returned his or her VBM ballot and had his or her VBM

26 ballot counted. (Vu Decl., p. 3, ll. 15-17.)

27

28
_____
[2] 28 days for persons voted for at the presidential primary for delegates to national conventions
and for results for presidential electors. Section 15375(c) and (d).

1   Another reason for requiring a voter to vote provisionally, that occurs most frequently, is

2   the voter does not appear on the roster of voters at the precinct where they appear to vote. For

3   example, if a non-VBM voter is registered to vote in a precinct in Poway but the voter appears at

4   a poll in Chula Vista, that voter would be given a provisional envelope in which the voter would

5   place his voted ballot, which is then returned to the Registrar's office unopened for final

6   determination. After voting, the voter is instructed to complete all of the information required

7   on the outside of the provisional ballot envelope, including, among other things, the voter's

8   current residence address. The voter is also required to sign and seal the envelope, and return

9   the envelope to the poll worker for deposit into the ballot box. (Vu Decl., p. 3, ll. 18-26.)

10   Another reason for requiring a voter to vote provisionally is unique to "open primary"

11   elections like we had in June. The Republican primary is a "closed election" meaning that only

12   registered Republicans are allowed to vote for the Republican presidential candidates that appear

13   on the Republican ballot. The Democratic primary is an "open primary" meaning that voters

14   who have registered "No Party Preference" ("NPP") are allowed to vote for the Democratic

15   presidential candidates. (Vu Decl., p. 3, l. 27- p.4, l. 4.)

16   In this election, the NPP voters were not allowed, however, to vote for the Democratic

17   central committee contests that appear on the Democratic ballot. As a result, if an NPP voter

18   wanted to vote for the Democratic presidential candidates, they were given a ballot that did not

19   include the Democratic central committee contests. (Vu Decl., p. 4, ll. 6-10.) If a voter insisted

20   on voting a ballot of a party with which he or she is not registered, or if a person who is

21   registered as NPP insisted on voting a Republican ballot, those persons were asked to vote

22   provisionally. (Vu Decl., p. 4, ll. 11-13.)

23   **D.**   **The Processing of Provisional and VBM Ballots is Laborious and Time**

24   **Intensive**

25   Each VBM ballot envelope and provisional ballot envelope is manually reviewed by the

26   Registrar's staff. This review is very labor intensive. Provisional and VBM ballots must be

27   scanned, sorted and signature checked against the records on file with the Registrar's office

28   before the ballots are extracted from the envelopes and tabulated. In addition, a large percentage

1 of provisional ballots must be remade to eliminate votes for contests that the provisional voter

2 was not eligible to vote for. (Vu Decl., p. 4, ll. 17-19.)

3   New legislation has further complicated the processing and handling of VBM ballots. As

4 of this election, the Registrar's office accepts and processes all VBM ballots that are postmarked

5 and received within three days of the election. In addition, voters who failed to sign their VBM

6 ballot envelope now have up to eight days after the election to provide the Registrar's office

7 with their signature. (Vu Decl., p. 4, ll. 23-27.)

8   The Registrar's office utilizes approximately 135 election workers working every day to

9 process the VBM and provisional ballots. The review and verification of the VBM and

10 provisional ballots requires tens of thousands of man hours to complete. (Vu Decl., p. 5, ll. 1-3.)

11   **E.   The Registrar Properly Initiated the Manual Tally For the June 2016**

12   **Election Based on Election Night Results**

13   As of June 30th, the Registrar's office has processed and counted approximately 490,000

14 (approx. 63.64%) VBM ballots and approximately 41,000 (5.81%) provisional ballots cast.   (Vu

15 Decl., p. 3, ll. 5-8.) As of June 30th there were also approximately 18,500 to 21,500 provisional

16 ballots to be processed and counted. (Vu Decl., p. 3, ll. 9-10.)

17   As of 8:00 p.m. June 8, 2016, the Registrar's office had processed and included 256,685

18 VBM ballots in the semi-official canvass, or "Election Night", totals. These VBM ballots were

19 received by the Registrar before election-day. (Vu Decl., p. 5, ll. 4-6.) When selecting VBM

20 ballots to be included in the manual tally, the Registrar's Office randomly selects 1 percent of

21 the VBM ballots based on the semi-official canvass the day after the election. The County of

22 San Diego does not include VBM ballots that have yet to be processed and added into the

23 official canvass results. (Vu Decl., p. 6, ll. 18-19.) The processing and tabulation of the VBM

24 ballots not included in the semi-official election results the day after the election takes most of

25 the 30-day canvass period to complete. (Vu. Decl., p. 6, ll. 20-21.) The County of San Diego

26 also does not include provisional ballots in the sample selected for the manual tally. For the

27 reasons stated above, provisional ballots cannot be reviewed and processed until the VBM

28 ballots have been reviewed, processed and included in the official count. (Vu Decl., p. 6, ll. 7-

**DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION
TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

10.) The completion of the review and inclusion of all the provisional ballots into the official

count is generally not completed until the last day or two before the election needs to be

certified. (Vu Decl., p. 6, ll. 11-12.)

In this election, the Registrar has opted to utilize the method for the 1 percent manual

tally set forth in Section 15360(a)(1)(A). (Vu Decl., p. 6, ll. 1-2.) On June 8, 2016, members of

the public participated in the random selection of precincts to be included in the 1 percent

manual tally. In addition to the 16 precincts identified through the random selection process, the

Registrar's office thereafter identified and included another 4 precincts in the manual tally so as

to include ballots from precincts in which there are candidates and measures that were not

included in the original selection of precincts. (Vu Decl., p. 5, ll. 23-27.) Utilizing the

methodology set forth in Section 15360(a)(1), the Registrar projects that there will be 7,819

ballots included in the manual tally. (Vu Decl., p. 6, ll. 1-3.) This amounts to 1.02% of the

approximately 770,000 ballots cast in the election. (Vu Decl., p. 6, ll. 2-3.)

The manual tally is a very labor intensive process. The Registrar's office has multiple

three-person panels working every day to complete the tally. The direct labor cost for each

panel of workers for conducting the manual tally is approximately $2,800 per week. (Vu Decl.,

p. 6, ll. 8-10.)

ARGUMENT

I.

INJUNCTIVE RELIEF IS NOT THE PROPER FORM OF RELIEF

Section 13314, subdivision (a)(1) states that "[a]n elector may seek a writ of mandate

alleging that an error or omission has occurred, or is about to occur … in the printing of … a …

sample ballot … or other official matter, or that any neglect of duty, has occurred, or is about to

occur." A writ may issue under that provision upon proof that "the error, omission, or neglect is

in violation of [the Elections Code] or the Constitution" **and** "*[t]hat issuance of the writ will not*

substantially interfere with the conduct of the election." (§ 13314(a)(2); Emphasis added.)

While plaintiffs have alleged that the Registrar is acting in violation of the Elections

Code they have not filed a mandamus action. Instead, plaintiffs seek a mandatory injunction

DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION
TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

1   requiring the Registrar to manually tally thousands of additional ballots as part of the manual

2   tally. Mandamus, rather than mandatory injunction, is the traditional remedy for the alleged

3   failure of a public official to perform a legal duty and should be evaluated in light of the legal

4   principles governing mandamus actions. *Common Cause v. Board of Supervisors* (1989) 49

5   Cal.3d 432, 442. It is also the form of relief required by the Elections Code.

6   Plaintiffs should have filed a verified petition for a writ of mandamus pursuant to Section

7   13314. They didn't and issuance of a mandatory injunction would be improper. In addition, in

8   a mandamus action plaintiffs would expressly have the burden of demonstrating to the court that

9   the granting of relief will not interfere with the conduct of the election. Plaintiffs have failed to

10 meet this burden and plaintiffs' request for a preliminary injunction should be denied on this

11 ground alone.

12   **II.**

13   **PLAINTIFFS ARE NOT ENTITLED TO A PRELIMINARY INJUNCTION**

14   A.   <u>**Standard for Issuance of a Preliminary Injunction**</u>

15   Plaintiffs seek a preliminary injunction to both enjoin the Registrar from certifying the

16 election and to require him to perform the 1 percent manual tally in the manner they deem

17 appropriate. Plaintiffs have not demonstrated that they are entitled to either.

18   In determining whether to grant a request for preliminary injunction, the court must also

19 consider two factors: (1) whether the moving parties are likely to succeed on the underlying

20 merits of their claim; and (2) the relative interim harm to the parties from the issuance or

21 nonissuance of the injunction. *Butt v. State of California,* 4 Cal.4th 668, 677 (1992); *O'Connell*

22 *v. Superior Court,* 141 Cal.App.4th 1452, 1463(2006). "In the absence of a verified showing of

23 threatened harm by the moving party, a trial court exceeds its jurisdiction by granting a

24 preliminary injunction." *Gray v. Superior Court*, 125 Cal.App.4th 629, 640 (2005)(citations

25 omitted). Additionally, where, as here, plaintiffs seek to enjoin a public official or agency from

26 performing their public duties, "public policy considerations also come into play. There is a

27 general rule against enjoining public officers or agencies from performing their duties." *Tahoe*

28 *Keys Property Owners' Assn. v. State Water Resources Control Bd.,* 23 Cal.App.4th 1459, 1471

**DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION
TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

1   (1994). In such cases, plaintiffs "must make a *significant showing of irreparable injury*."

2   *Id*.(emphasis added).

3   An injunction that compels performance of an affirmative act that changes the position of

4   the parties is considered to be a mandatory injunction. *Davenport v. Blue Cross of California,*

5   52 Cal.App.4th 435, 446-447 (1997). "'A preliminary mandatory injunction is rarely granted,

6   and is subject to stricter review on appeal.' [citation omitted] The granting of a mandatory

7   injunction pending trial 'is not permitted except in *extreme* cases where the right thereto is

8   clearly established.' [citation omitted]" *Shoemaker v. County of Los Angeles,* 37 Cal.App.4th

9   618, 625 (1995)(emphasis added).

10   Plaintiffs have failed to demonstrate that they are entitled to the extraordinary remedy of

11   a mandatory preliminary injunction. In addition, they have failed to satisfy their burden on

12   either prong of the test to be applied. Plaintiffs are unlikely to prevail on the merits and the

13   harm to defendants and the public if an injunction were to issue grossly outweighs any possible

14   harm to plaintiffs.

15   **B.**   **The Hardships Weigh Strongly in Favor of Defendants**

16   As stated above, the court must consider whether plaintiffs are likely to suffer greater

17   injury if the injunction is denied than the defendants if the request is granted. *Shoemaker,* 37

18   Cal.App.4th at 633. Plaintiffs have failed to demonstrate that any harm, let alone irreparable

19   harm, will result in the event an injunction is denied.

20   The purpose of the manual tally is to "verify the accuracy of the automated count."

21   Section 336.5. Plaintiffs themselves acknowledge that the purpose of the manual tally is to

22   provide "an objective and statistical basis to test the integrity" of the vote tabulating system.

23   (Lutz Decl., p. 2, ll. 7-8.) It is not a recount and it is not intended to detect fraud. (Vu Decl.,

24   p. 5, ll. 17-18.) Notwithstanding this fact, plaintiffs argue that the manual tally can be used to

25   detect "nefarious conduct such as 'hacking'" and infer that the process by which the Registrar is

26   conducting the manual tally would somehow deprive them of the ability to detect such conduct

27   and have fully verified count. (Lutz Decl., p. 2, ll. 9-10.) Plaintiff's summary allegations lack

28   factual support. Plaintiffs have been observing the Registrar's conduct of the manual tally every

DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION
TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

1 day since it started, yet they have not alleged that fraud has occurred or is about to occur if the

2 Registrar does not adopt their method of performing the manual tally. Plaintiffs have neither

3 demonstrated that the statistical likelihood of detecting fraud is greater if the Registrar were to

4 adopt plaintiffs' methodology.

5   On the other hand, great injury will result to defendants, election contestants, the state,

6 and the public if an injunction is issued. Inclusion of the provisional and the additional VBM

7 ballots demanded by plaintiffs in the manual tally at this late date would prohibit the Registrar

8 from completing the official canvass for up to another three weeks, well beyond the statutory

9 period for certifying the election and at an additional cost to the County, estimated to be in

10 excess of $100,000. (Vu Decl., p. 7, ll. 4-7.)

11   Failure to certify the election in a timely manner would cast uncertainty on dozens of

12 local election contests. Candidates who won the election outright or who require a runoff

13 election would be placed in limbo. Implementation of measures approved by the voters, such as

14 Prop I (the City of San Diego Minimum Wage Ordinance), which would otherwise become

15 effective upon the City council's approval of the certification of the election would be delayed.

16 Candidates that might be considering asking for a recount would not know the timeframe within

17 which to demand a recount. Failure to timely certify the election results for San Diego County

18 would also have a significant impact on the Secretary of State's ability to perform its statutory

19 duties, as well as the post-election rights of voters under other provisions of the Elections Code.

20 (Vu Decl., p. 7, ll. 10-16.; Declaration of Jana M. Lean filed concurrently herewith.)

21   Requiring the Registrar to divert its already stretched resources to manually tally

22 thousands of additional ballots would also materially impact the Registrar's ability to complete

23 the review and verification of hundreds of thousands of signatures on three local proposed

24 initiatives that are of great importance to the voters of San Diego County. (Vu Decl., p. 8, ll. 1-

25 3.)

26   Plaintiffs have failed to demonstrate any harm if the Registrar is not ordered to include

27 the additional VBM and provisional ballots demanded by plaintiffs in the manual tally. On the

28 / / /

**DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION
TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

other hand, great harm will result if an injunction is issued and the certification of the election is delayed. The motion for preliminary injunction should be denied.

C. **Plaintiff is Unlikely to Prevail on the Merits**

A preliminary injunction will not be issued by the court absent a showing that plaintiffs have a reasonable probability of success on the merits of their claim. *San Francisco Newspaper Printing Co., Inc. v. Superior Court*, 170 Cal.App.3d 438, 442 (1985).

1. **Provisional Ballots are not Required to be Included in the 1% Manual Tally**

The Registrar does not include provisional ballots in the manual tally. (Vu Decl., p. 6, ll. 7-8.) This practice is consistent with the practices of other counties. (See Decl. of Neal Kelley, p. 2, ll. 9-10; Decl. of Jill Lavine, p. 2, ll. 7-8; Decl. of Gail Pellerin, p. 2, ll. 8-9; Decl. of William Rousseau, p. 2, ll. 14-15; Decl. of Dean Logan, p. 7, ll. 10-11; Decl. of Joseph E. Canciamilla, p. 2, ll. 12-13; Decl. of Mary Bedard, p. 2, ll. 9-10, submitted herewith). It is also consistent with the original intent of the Legislature in conducting the 1 percent manual tally.

Prior to 2006, Section 15360 read in relevant part as follows: "During the official canvass of every election in which a voting system is used, the official conducting the election shall conduct a public manual tally of the ballots tabulated by those devises cast in 1 percent of the precincts chosen at random by the election official." (See Stats 1998, c. 1073, §31.) In 2006, the Legislature enacted AB 1235 (Stats. 2006, c. 893, § 1), amending Section 15360 to read, in relevant part as follows: "… the official conducting the election shall conduct a public manual tally of the ballots tabulated by those devises, *including absent voters' ballots,* cast in 1 percent of the precincts …." (Emphasis added.)

But when introduced, the proposed amendment to Section 15360 read in relevant part as follows: "… the official conducting the election shall conduct a public manual tally of the ballots tabulated by those devises, *including absent voter's ballots, provisional ballots, and ballots cast at satellite locations,* cast in 1 percent of the precincts …." (Emphasis added; See Defendants NOL, Exhibit 2.) The reference to "*provisional ballots, and ballots cast at satellite locations"* was deleted before the second reading of the bill in committee. As such, it is

1   therefore clear that the Legislature considered but rejected the idea that provisional ballots were

2   to be included in the manual tally.

3   To prevent voter fraud, provisional ballots are not processed until after the tabulation of

4   VBM ballots is complete. (Vu Decl., p. 3, ll. 15-17.) The processing and inclusion of VBM

5   ballots is generally not completed until several weeks after the election giving election officials

6   only a short period of time to process the provisional ballots. In fact, provisional ballots are

7   being processed up to the last day before the election results must be certified. (Vu Decl., p. 6,

8   ll. 11-12.) A manual tally of randomly selected provisional ballots could not occur until those

9   ballots have been processed as part of the official canvass and would prevent the Registrar from

10   being able to certify the election results within the statutorily required period. (Vu Decl., p. 6, ll.

11   12-15.)

12   **2.**   **The Registrar Properly Includes Vote by Mail Ballots in the**

13   **1 Percent Manual Tally**

14   Prior to 2012, after the precincts to be included in the manual tally were selected,

15   elections officials were required to locate the VBM ballots associated with the randomly

16   selected precincts and integrate those ballots into the ballots cast at the precincts. Because the

17   VBM ballots associated with a particular precinct may have been received at different times by

18   different means of delivery, the VBM ballots associated with a particular precinct were spread

19   across all of the VBM ballots included in the semi-official canvass.

20   In 2011, in an effort to streamline the process and reduce the costs of completing the

21   manual tally, the Legislature enacted SB 985 (Stats 2011, c. 52, § 1.) amending Section 15360.

22   As amended by SB 985, Section 15360 provides election officials with an alternative method for

23   conducting the manual tally. Election officials can now conduct the manual tally by precinct as

24   provided under AB 1235 (see § 15360(a)(1)) or, alternatively may conduct a two part manual

25   tally that allows elections officials to manually tally randomly selected batches of VBM ballots,

26   thereby avoiding the cost and time of having to integrate the VBM ballots into the randomly

27   selected precincts (see § 15360(a)(2)).

28   / / /

DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION
TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

1   Both before and after 2012, the Registrar has only included VBM ballots included in the

2   semi-official canvass in the manual tally. (Vu Decl., p. 6, ll. 7-10, 16-19.) This practice is

3   consistent with the practices of other counties. (*See* Decl. of Jill Lavine, p. 2, ll. 20-22; Decl. of

4   Gail Pellerin, p. 2, ll. 10-12; Decl. of William Rousseau, p. 2, l. 27 – p. 3, l. 7; Decl. of Dean

5   Logan, p. 2 ll. 7-9, 23-26; Decl. of Joseph E. Canciamilla, p. 2, ll. 25-28; Decl. of Mary Bedard,

6   p. 2, ll. 22-24, submitted herewith.) It is also consistent with the original intent of the

7   Legislature in conducting the 1 percent manual tally, which is to provide a check on the

8   accuracy of the vote tabulating system. The practice also reflects the practical necessity of

9   having to complete the official canvass of the election and certify the results within the

10   statutorily mandated period after the election.

11   Another reason for not waiting to conduct the manual tally until all of the VBM ballots

12   are included in the official canvass is that if the Registrar waited and then determined that the

13   vote tabulating devices were not recording the votes accurately, there would be no time left to

14   correct the error and rerun all of the ballots previously included in the official canvass. (Vu.

15   Decl., p. 6, l. 24 - p. 7, l. 3.) It is in the public's interest and it is a prudent business practice to

16   begin and complete the manual tally as soon as possible. Waiting until all of the VBM ballots

17   have been processed and included in the official canvass would inarguably substantially delay

18   that process.

19   **D.   Plaintiff is Guilty of Laches**

20   Plaintiff, Raymond Lutz has been self-proclaimed "watchdog of elections" since at least

21   2008. (Lutz Decl. p. 2, l. 1.) Specifically, he has observed nearly all, if not all, of the

22   gubernatorial and presidential primaries and general elections conducted in San Diego County

23   since at least 2008. (Lutz Decl., p. 1, ll. 25-27.) By his own declaration, Mr. Lutz has been

24   familiar with and aware of the County of San Diego's process and procedures for conducting

25   elections for many years. In fact, in a recent press release issued by plaintiffs, Mr. Lutz was

26   quoted as saying: "They [defendants] have had a habit of short-cutting this audit procedure for

27   years." (Defendants' NOL, Exh. 3.)

28   / / /

DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION
TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

1   San Diego County has never included provisional ballots in the manual tally. (Vu Decl.

2   p. 6, ll. 7-8.) San Diego County has never included VBM ballots processed and counted after

3   the semi-official canvass in the manual tally. (Vu Decl., p. 6, ll. 18-19.) If Mr. Lutz perceived

4   this as a problem, he could have filed the instant declaratory relief action at any time since he

5   became a watchdog over the process and procedures utilized by the County of San Diego for

6   conducting the manual tally required by Section 15360. He did not.

7   Instead, he waited until nine days after the June 7th Presidential Primary to file his action,

8   and waited another seven days to come into court to request a hearing on his motion for a

9   preliminary injunction. The hearing on plaintiffs' request for a preliminary injunction is set for

10   July 6, 2016, one working day before the Registrar must certify the election. Delay may be

11   considered in determining whether a claimed injury is "irreparable". *O'Connell v. Superior*

12   *Court*, *supra*, 141 Cal.App.4th 1452, 1481.

13   Plaintiffs could have filed the instant action at any time. Instead, they waited until the

14   Registrar was engulfed in completing the official canvass of a Presidential Primary election, the

15   most difficult and complicated of elections. Plaintiffs delay in bringing their action should not

16   be rewarded and their motion should be denied on the basis of laches alone.

17   **E.   If Injunctive Relief is Granted, Plaintiff Must Post an Undertaking**

18   Before a preliminary injunction may be issued, the court must order the plaintiffs to post

19   an undertaking. (C.C.P. §529.) The purpose of the bond is to cover any damages defendants

20   may sustain by reason of the wrongful issuance of the injunction. *Tom Cat Productions, Inc. v.*

21   *Michael's Los Feliz*, 102 Cal.App.4th 474, 478 (2002).

22   Here, if the court issues a mandatory injunction requiring the Registrar to include

23   provisional and additional VBM ballots in the manual tally and delay certification of the election

24   until that process is complete, the County will expend hundreds of additional hours of staff time

25   and incur thousands of dollars in labor costs. It is estimated that these costs will exceed

26   $100,000. (Vu Decl., p. 7, ll. 6-7.)

27   / / /

28   / / /

**DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION
TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

CONCLUSION

Plaintiffs' request for a preliminary injunction should be denied for any one of a number of reasons. Plaintiffs have sought the wrong form of relief. Plaintiffs have failed to demonstrate that they are likely to succeed on the merits of their claim and the hardships that would result in the event an injunction were to issue weighs heavily in favor of defendants. In addition, plaintiffs unduly delayed in bringing their action. For each of these reasons, the equitable remedy of injunctive relief should be denied.

DATED: June 30, 2016   THOMAS E. MONTGOMERY, County Counsel

                                        By:/s/Timothy M. Barry
                                           TIMOTHY M. BARRY, Chief Deputy
                                        Attorneys for Defendants

DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION