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SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN DIEGO–CENTRAL DIVISION

CITIZENS OVERSIGHT INC., a Delaware non-profit corporation; RAYMOND LUTZ, an individual, Plaintiffs, vs. MICHAEL VU, San Diego Registrar of Voters; HELEN N. ROBBINS-MEYER, San Diego County Chief Administrative Officer; COUNTY OF SAN DIEGO, a public entity; DOES 1-10, Defendants.	CASE NO: 37-2016-00020273-CL-MC-CTL **PLAINTIFFS' REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF INJUNCTIVE RELIEF** **Hon. Joel R. Wohlfeil, Judge** Complaint filed: June 16, 2016 No Trial Date Set Hearing Date: July 6, 2016 Hearing Time: 1:30 p.m. Dept: C-73

Plaintiffs submit the following Reply to Defendants' Memorandum of Points and Authorities in Opposition to Plaintiffs' Motion for Injunctive Relief.

I.

INTRODUCTION

Defendants oppose the Plaintiffs' request for an injunction *pendente lite* based upon an argument that some compliance or even substantial compliance with the law is sufficient to defeat Plaintiffs' case. Substantial compliance requires actual compliance with respect to the substance essential to every reasonable objective of the statute. Defendants' defense that it is impractical or expensive or too difficult are woeful defenses when election integrity is essential

for the public good. Plaintiffs have met their burden of meeting the two-pronged standard for an injunction *pendente lite* that they are likely to prevail on the merits and that the harm that would be caused should the Court fail to impose an order requiring compliance is substantial.

II.

FACTUAL REPLY

Defendants' curious opening salvo asserts rank speculation unsupported supposition regarding the Plaintiffs' motives or timeliness in bringing this matter to court. (Defendants' Memorandum of Points and Authorities in Opposition to Plaintiffs' Motion for Preliminary Injunction, page 1)

To the contrary and in fact, Plaintiff has brought this case entirely in the interest of promoting and preserving election integrity and public education as the mission of Citizens Oversight, and in response to the Registrar's unlawful conduct leading up to the lawsuit.[1]

The Registrar offers little to defend his failure to comply with the requirement of the Elections Code for a full and accurate audit of the election results. Registrar Vu first argues that it is appropriate to leave out nearly half the votes cast by the voters in conducting his required one percent manual tally, just because that is the way he allegedly has done it in the past, whether he was at the time operating under former or current statutory law.[2] Registrar Vu next argues that his failure to include all provisional and vote-by-mail ballots in the total set of votes from which the one percent sample was drawn is somehow excusable because certain other Registrars of Voters also violate the law in this manner. (Defendants' Memorandum of Points and Authorities in Opposition to Plaintiffs' Motion for Preliminary Injunction, pages 10 and 12)

Registrar Vu finally contends absurdly that the Legislature intended to require an audit of the election system while leaving out half the votes cast by the voters in the total set of votes to

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[1] (Supplemental Declaration of Raymond Lutz in support of Motion for Injunctive Relief ("Supp Lutz"), at para 3-7 (election integrity), para 8-13 (timeliness))

[2] On June 8, the Registrar staff selected 8 batches from this set, roughly 1% of the batches in that set. It would have been possible then for the Registrar to work on the manual tally for those 8 batches while still continuing to accumulate ballots that were not subject to the audit in batches. According to the Registrar's own figures on election night, there were an additional 285,000 ballots that were uncounted. (Lutz Supp, para 19)

be sampled.[3] Registrar Vu seems to base this argument on his apparent disgruntlement that the legislature might have unrealistically or impractically required him to complete a "labor-intensive" task within an unrealistic time frame, thereby justifying him in substituting his own discretion in place of the intent of the legislature by employing the shortcut of sampling only a fraction of the ballots cast by the voters by excluding entire categories of votes, namely Vote-by-mail ballots received after the close of polling places on June 7 as well as the high proportion of provisional votes which he inexplicably and unnecessarily instructed his poll workers to give to NPP-registered voters seeking to vote in the Democratic Presidential Primary. The latter category — by the very nature of this election — is very likely to show a different distribution of votes among the candidates than do non NPP votes, a difference that could affect the outcome of the election.

If Registrar Vu felt the legislature had saddled him with an impractical task to be completed within unrealistic deadlines, he himself had years before this election to bring his dissatisfaction with the statutory process to the attention of the legislature, and to request them to make appropriate amendments to the statutory scheme, rather than to "freelance" by substituting his own non noncompliant procedure in place of the procedure set forth in the statute.

III.

LEGAL DISCUSSION

1. An injunction *pendente lite* is appropriate.

Defendants assert that injunctive relief is improper for to order the Registrar to comply with Elections Code section 15360 before certification of the June 6, 2016, election. (See Defendants' Memorandum of Points and Authorities in Opposition to Plaintiffs' Motion for Preliminary Injunction, pages 6-7.) Defendants' basis for this assertion is that Plaintiffs could have also brought a cause of action for mandamus, i.e., "[a]n elector *may* seek a writ of mandate

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[3] In conducting post-election audits, election officials should not exclude any category of votes (e.g. absentee ballots, provisional ballots, damaged ballots). ... Excluding these ballots from an audit would leave a significant opportunity for errors to remain undetected." (Brennan Center Report, page 7) (Lutz Supp, para 22)

alleging that an error or omission has occurred . . . " (Elections Code Section 13314, emphasis added.)

An injunction *pendente lite* is not a cause of action. It is a provisional remedy. It is a proper form of relief to ensure election integrity. Elections Code statutes have long been discussed in connection with injunctive relief claims against public officials executing laws in electoral contexts. (See, *Drumhiller v. Wright* (1923) 64 Cal.App. 498, 501; *Kevelin v. Jordan* (1964) 62 Cal.2d 82, 83; *Santa Clara County v. Superior Court* (1949) 33 Cal.2d 552, 554–555; *Wright v. Jordan* (1923) 192 Cal. 704, 710; *People v. Board of Supervisors* (1888) 75 Cal. 179, 180–182; *Martinez v. Board of Supervisors* (1972) 23 Cal.App.3d 679, 684–685, 100 Cal.Rptr. 334, as cited in *Jauregui v. City of Palmdale* (2014) 226 Cal.App.4th 781.)

An injunction *pendente lite* is not the same as a permanent injunction. Defendants misplace their reliance on *Common Cause v. Board of Supervisors* (1989) 49 Cal.3d 432. In granting or denying an injunction *pendente lite*, the trial court determines whether the *status quo* of the parties should be maintained pending the litigation. In making this determination, the trial court considers whether the plaintiff has a likelihood of succeeding on the merits and whether the plaintiff will suffer greater interim harm from a denial of the injunction *pendente lite* than the defendant is likely to suffer from its grant. (*Baypoint Mortgage Corp. v. Crest Premium Real Estate etc. Trust* (1985) 168 Cal.App.3d 818, 823–824.) A permanent injunction is an equitable remedy for certain wrongful acts of a defendant where a damage remedy is inadequate. A permanent injunction is a determination on the merits that a plaintiff has prevailed on a cause of action for tort or other wrongful act against a defendant and that equitable relief is appropriate. A permanent injunction is not issued to maintain the *status quo* but is a final judgment on the merits. (6 Witkin, Cal. Procedure (3d ed. 1985) Provisional Remedies, §§ 250, 251, pp. 216–218; *Richards v. Dower* (1883) 64 Cal. 62, 64, 28 P. 113.)

Therefore, although mandamus may also be an appropriate cause of action, Plaintiffs are also correct to ask the court for declaratory relief and an injunction *pendente lite*.

A. Defendants admit lack of compliance with Elections Code Section 15360.

Defendants argue that the Registrar's failure to include provisional ballots and vote-by-

mail ballots in its one percent manual tally is standard operating procedure. Defendants offer the irrelevant evidence that other county registrars also do not include provisional ballots and vote-by-mail ballots in the one percent manual tally (Defendants' Memorandum of Points and Authorities in Opposition to Plaintiffs' Motion for Preliminary Injunction, pages 10 and 12). The argument that others are guilty of this unlawful, improper, invalid practice does not further the defense that it is permissible.

B. Defendants incorrectly argue the history of the legislative history of Elections Code Section 15360.

Elections Code Section 15360 was enacted in 1998, repealing and reenacting the previous version of the statute, Section 15645. The previous version, Section 15645, put a 15-day time limit on the 1% manual recount. (1994 Cal ALS 920, 1994 Cal SB 1547, 1994 Cal Stats. ch. 920). In reenacting the statute as Section 15360, this time limitation was repealed, and the 1% tally was authorized to occur "during the official canvass." (1998 Cal ALS 1073, 1997 Cal SB 627, 1997 Cal Stats. ch. 1073) [Emphasis added.]. At this point, Elections Code § 336.5 was also added, defining "one percent manual tally" and stating its purpose: "[t]his procedure is conducted during the official canvass to verify the accuracy of the automated count." (Stats 1998 ch 1073 § 4 [SB 627]) [Emphasis added.].

Defendants' refer to the clause "provisional ballots and ballots cast at satellite locations" having been deleted before the second reading of the Bill in committee as supportive of their decision to not count provisional ballots before conducting the one percent manual tally. We disagree that such a deletion supports their decision. Deleting a clause DOES NOT imply that the opposite is intended. It DOES NOT mean that provisional ballots should not be included in the one percent manual tally nor that it is recommended that they NOT be included. The phrase was removed only because it was redundant. "All votes cast at precincts" already includes the provisional ballots but does not necessarily include vote-by-mail ballots. Thus, adding a separate phrase for vote-by-mail ballots is called for since there may be confusion because, unlike provisional ballots, vote-by-mail ballots are not "cast at precincts," but the clause "(a)ll votes cast at precincts" clearly includes the provisional ballots because once they are reviewed, they are also

"votes cast at precincts." The drafters in the committee simply streamlined the wording to eliminate the possibility that having a class of ballots enumerated could lead to confusion that other classes of ballots were excluded, whereas the final wording of "all votes cast at precincts" is unambiguous, clear, and unarguable.

Moreover, it is clear that the legislative intent of this section does not exclude from sampling all vote-by-mail ballots that were not processed as of election night. There is no doubt that the wording of the statute does and always has included all the vote-by-mail ballots in the manual tally procedure. There is no section "deleted in the second reading" that a Registrar can use to reduce the scope of the one percent manual tally.

This whole notion that the Registrar strives to exclude ballots from being the subject of the one percent manual tally audit process is beyond reason. Furthermore, excluding entire categories of ballots from the total to be sampled for the one percent manual tally, could invite mischief. For example, suppose the extraordinarily high number of provisional ballots cast by NPP voters in the June 7 primary election were to reflect a substantially different distribution of votes among the candidates for president. If those provisional votes could be excluded from the set of votes to be sampled, there would then be no manual tally of one percent of those votes and therefore no way to determine whether that category of votes might have been scanned inaccurately or, indeed, pursuant to fraudulent programming (since if they were omitted, provisional votes would have been scanned at a later time than those votes from which the one percent sample would already have been drawn. The unambiguous final reading of Section 15360 should be implemented. Without exception, all ballots cast should be included in the total set of ballots from which to draw the one percent sample, including all Vote-by-mail ballots and "(a)ll votes cast at precincts".

This conclusion also is supported by various expert study groups on the subject, such as the Brennan Center. According to the Brennan Center's recommendation on such audits, they specifically recommend that all ballot types be included:

> Audit All Methods of Voting. In conducting post-election audits, election officials should not exclude any category of votes (e.g., absentee ballots,

provisional ballots, damaged ballots). In 2004, seven states reported that more than twenty percent of all votes were cast during early voting periods. Excluding these ballots from an audit would leave a significant opportunity for errors to remain undetected. (Brennan Report, page 7)

The sponsoring Senator, Debra Bowen, Chairwoman of the Senate Elections, Reapportionment & Constitutional Amendments Committee, (who later served as California Secretary of State) stated on the Senate floor when the Bill shortly before the Bill passed:

> "This bill, and SB 1235 (Bowen), stems from anecdotal reports that some counties routinely exclude absent voter and provisional ballots from the one percent manual tally process and may not be choosing the relevant precincts in a truly "random" manner. Over 40 percent of the votes cast in the last statewide election were from absent voter ballots, a number that has steadily risen in recent years. The use of provisional ballots has also increased in recent years. Excluding these ballots from the manual tally severely lessens the value and the accuracy of this post-election audit."
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> (Background, 8/24/06 Senate Floor Analysis, 2006 Cal AB 2769).

B. All votes must be counted for the one percent manual tally to be the check and balance for election integrity.

1. Vote-by-mail Ballots:

The legislative history repeatedly indicates that "all vote-by-mail ballots [should] be included in the 1% manual tally." (Julie Rodewald, Argument in Support, 6/7/11 Senate Floor Analysis, 2011 Cal AB 985; see also Background, 8/24/06 Senate Floor Analysis, 2006 Cal AB 2769). The statute was amended to explicitly include vote-by-mail ballots (2006 Cal AB 2769), and again to facilitate counting all vote-by-mail ballots more efficiently in the one percent manual tally. (2011 Cal AB 985). Although Registrar Vu initially decided to follow this more efficient procedure — a two-part public manual tally — set forth in Elections Code Section 15360 (a) (2), when confronted with Plaintiffs' objections that he was omitting the Vote-by-mail ballots received after election day, the Registrar later changed his mind and announced his intent

to simply perform a one-part manual tally pursuant to Elections Code Section 15360 (a) (1), but excluding the Vote-by-mail ballots and provisional ballots that would not be counted until after the one percent samples would have been drawn shortly after the election. Having done so, he contaminated the entire audit process, leaving the door wide open for mischief and outright fraud, should any malefactor wish to perpetrate it.

2. Provisional Ballots:

This election cycle resulted in record number of provisional ballots cast at the precincts. There are proper uses for provisional ballots at the polls, i.e., when someone is registered to receive a vote-by-mail ballot and shows up at the poll without the ballot sent by mail. In this election, however, poll workers were improperly instructed by the Registrar to give provisional ballots to the vast majority of those voters registered as "No Party Preference" who requested ballots for the Democratic presidential primary at the precinct polling places. (Lutz Decl, para 31)

The Registrar asserts that the processing of provisional and vote-by-mail ballots is labor intensive and expensive. (Vu Decl, para 30) He further dismisses including provisional ballots in the audit because doing so will take too long. (Vu Decl, para 32, 32, 34) One can at best infer from this testimony that he is pleading that substantial compliance is enough to comply with Elections Code Section 15360. In fact, he is pleading to be permitted by this court to proceed in blatant noncompliance with the statute.

In *Ruiz v. Sylva*, the Second District Court of Appeal, stated: " '[S]ubstantial compliance . . . means actual compliance in respect to the substance essential to every reasonable objective of the statute.' " (Citing *Assembly v. Deukmejian* (1982) 30 Cal.3d 638, 649, quoting *Stasher v. Harger–Haldeman* (1962) 58 Cal.2d 23, 29) The doctrine of substantial compliance, however, cannot save action that misinforms the voters or fails to inform the voters of information necessary to "exercise intelligently their rights . . . " (*Creighton v. Reviczky* (1985) 171 Cal.App.3d 1225, 1232.) Nor may it be "relied upon to save carelessly or negligently prepared petitions." (*California Teachers Assn. v. Collins* (1934) 1 Cal.2d 202, 205.) "[S]tatutes passed for the purpose of protecting electors from confusing or misleading situations should be enforced."

(*Clark v. Jordan* (1936) 7 Cal.2d 248, 252.) (*Ruiz v. Sylvia (*2002) 102 Cal.App.4th 199.)

"Substantial compliance, as the phrase is used in the decisions, means actual compliance in respect to the substance essential to every reasonable objective of the statute." [Citation.] "[o]ur primary concern is the objective of the statute." *(Flannery v. VW Credit, Inc.* (2014) 232 Cal.App.4th 606; *Malek v. Blue Cross of California* (2004) 121 Cal.App.4th 44, 72).

The Elections Code also provides clarity. Elections Code Section 14310 describes the procedures regarding provisional ballots:

> 14310. (a) At all elections, a voter claiming to be properly registered, but whose qualification or entitlement to vote cannot be immediately established upon examination of the index of registration for the precinct or upon examination of the records on file with the county elections official, shall be entitled to vote a provisional ballot. . .

And the section goes on to describe how that ballot is to be processed. This would apply to voters who may be at the wrong precinct or who may be on the list as a vote-by-mail voters. In such a case, this code section describes how it is to be processed. However, there is another class of provisional ballots. These arise with regard to electronic voting systems:

> Section 14300
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> . . .
> (c) Upon request, the precinct board shall provide a paper ballot to a voter, regardless of the availability of the direct recording electronic voting system, as long as supplies remain available.
> (d) The paper ballots described in this section may consist of provisional ballots.
> (e) Any vote cast on a provisional ballot subject to this section by an otherwise qualified voter shall be counted as a regular ballot and shall not be subject to the requirements of Section 14310.

Section 14310 relates to voters whose registration is in question, who are in the wrong polling place or are a vote-by-mail voter without a ballot to surrender. In this election, there were numerous "No Party Preference" (NPP) voters who wanted to request partisan ballots for the purposes of the presidential race. These are not "provisional" ballots pursuant to section 14310 because the registration of the voter is not in question. Instead, these should be processed pursuant to section 14300, under which a voter can request a paper ballot and not be subject to the requirements of section 14310.

For this reason, many of the ballots which have been classified as "provisional ballots"

are actually treated under section 14300(e) and "shall be counted as a regular ballot and shall not be subject to the requirements of Section 14310". Since this class of "provisional ballots" must be "counted as a regular ballot" they must also be included in the set of ballots subject to the 1% manual tally.

The Registrar actually manufactured the problem presented by such a large number of provisional ballots in the June 7 Primary Election that he now claims cannot practically be included in the samples for the one percent manual tally. At the precinct polling places, unless those NPP voters who requested ballots to vote in the Democratic presidential primary were omniscient or sufficiently conversant with official jargon so that they would have known to request a "Democratic crossover ballot," but instead simply asked for a Democratic ballot or to vote in the Democratic primary without including the "magic word" "crossover," the poll workers were "trained" to give those NPP voters a "regular" Democratic ballot containing races, such as those for candidates for Democratic Central Committee, in which NPP voters are not legally permitted to vote. Common sense would have dictated that the poll workers should have been"trained" instead to give those NPP voters "Democratic crossover ballots" — the only ballot on which they would have been legally entitled to vote in the first place. Had they done so, those "crossover" ballots could and should have been treated as "regular ballot(s)" under Section 14300 and there would have been vastly fewer provisional ballots for the Registrar to contend with. Furthermore, those "Democratic crossover ballots" would have initially been scanned as with all the other precinct ballots, and thus would already have been included in the one percent samples, and would not have been the subject of contention in this lawsuit. (Declaration of Ben D. Cooper)

It has not escaped the Plaintiffs' attention and concern that the Registrar's gratuitous manufacture of so many thousands if not hundreds of thousands of these unnecessarily created provisional ballots and his subsequent and continuing insistence on excluding them from the one percent manual tally designed to reveal anomalous results has opened the door to the possibility of just the kind of mischief that Section 15360 was intended to prevent.

Despite his pleas of impossibility and substantial compliance, the Registrar can comply

with both the spirit and the intent of the one percent manual tally. The one percent manual tally can detect machine malfunction and fraud if it is used correctly, and it should be used this way. Why would any reputable and honorable Registrar not want to detect machine malfunction and fraud?

One methodology which can detect some types of central tabulator fraud using the one percent manual tally follows:

The one percent of precincts chosen would apply to the ballots cast at the precincts and vote by mail ballots already received and processed by election night. This is essentially what the Registrar finally wound up doing, even though his staff initially chose sample precincts and batches, but then those batches were ignored and conveniently forgotten. The Registrar has the ability to sort the vote-by-mail ballots down to the individual precinct using their Pitney Bowes ReliaVote sorting machine before they are pulled out of their envelopes. Thus, the vote-by-mail ballots initially received could have been sorted in this manner and then scanned as a group, just as ballots cast at the precincts are scanned. Additionally, a paper-tape paper trail could have been generated for those vote-by-mail ballots scanned in this manner. Then, as more vote-by-mail and provisional ballots are processed, they could be grouped either by precinct or batches. Thus, each group of ballots would have been processed in the following six steps:

1. Group them into batches and scan each batch until all batches are scanned for this group. If feasible, create a paper-tape audit trail for each batch scanned;
2. Secure the batches so they cannot be modified;
3. Create a computer report detailing the results for each batch, and for all batches, and make this report available to the public. Preferably also transfer this to a third party for safekeeping;
4. Select random batches;
5. Manually tally each batch pulled;
6. Compare with the frozen computer result.

This procedure would give the one percent manual tally 100% effectiveness and comply with the requirement of Section 15360. (Lutz Supp, para 21) Plaintiffs are not suggesting that

the Registrar wait until all of the vote-by-mail ballots have been processed and included in the official canvass. Section 15360(a)(2) provides a method by which the vote-by-mail ballots can be included in the one percent manual tally without delaying the process. No one ever has suggested that the Registrar wait for completion or delay of the "official canvass" as it is the "unofficial canvass" with which the one percent manual tally is compared. Given that any audit methodology may have some likelihood of detecting fraud, if one increases the scope of that audit methodology and includes more data over time, the likelihood of detecting fraud will increase. That is the spirit and intent of Elections Code Section 15360

D. Losing the ability to audit the last election will cause substantial harm.

In terms of this motion, the Court should note that if the Defendants are not enjoined from certifying the recent election until they fully comply with Section 15360, citizens like Plaintiffs will be deprived of the full verification required by law and the integrity of the election results will have been irrevocably compromised, as it may already have been.

In the June 2016 primary, the set of precinct ballots was approximately 210,000 ballots split among the 1522 precincts. The set of vote-by-mail ballots processed by the end of election night were approximately 290,000 ballots. (Lutz Supp, para 19) According to figures on election night, there were an additional 285,000 Vote-by-mail and provisional ballots that remained uncounted. (Id.) Leaving out 285,000 ballots from the one percent manual tally leads to a false result, is incomplete at best, and invalid as a matter of law. If the Court does not require compliance with the one percent manual tally, the June 7, 2016, results will be certified by the Registrar as is and the voters of this County will have been cheated of a required step for election integrity.

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V.

CONCLUSION

In sum, omitting all of the provisional ballots and half of the vote by mail ballots from the 1 percent manual tally is in direct violation of California Elections Code Section 15360. The Court must enjoin the Registrar from certifying the June 7th Primary Election until he has complied fully with Section 15360.

Respectfully Submitted,

Dated: July 5, 2016

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