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SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF LOS ANGELES

LONG BEACH REFORM COALITION, a California Political Action Committee; and IAN PATTON, an individual,

Petitioners and Plaintiffs,

v.

DEAN C. LOGAN, Los Angeles County Registrar-Recorder/County Clerk; and DOES 1 through 100, inclusive,

Respondents and Defendants.

Case No.: 20STCP01633

OPENING BRIEF OF PETITIONERS AND PLAINTIFFS LONG BEACH REFORM COALITION AND IAN PATTON IN SUPPORT OF VERIFIED PETITION FOR WRIT OF MANDATE

(Code of Civil Procedure, § 1085.)

Date: July 7, 2021
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Dep't: 86

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INTRODUCTION

In the March 3, 2020, primary, results indicated that 49,676 Long Beach voters voted "Yes" on Measure A, a local tax measure that would impact City tax rates starting January 2023, and 49,660 voted "No." After observing irregularities on election day, irregularities in the canvassing of votes, and seeing the tiny 16-vote difference out of nearly 100,000 votes cast, Petitioners Long Beach Reform Coalition and Ian Patton chose to exercise their right to a recount. The Elections Code requires a voter seeking a recount, before the recount is commenced and at the beginning of each subsequent day, to deposit with the elections official the amount of money estimated by Respondent Logan to cover the cost of the recount for that day. Respondent published a handbook on recounts that was available on Respondent Logan's official website after the March 3, 2020 election, called "Requesting a Recount 2020," which included estimated costs for a manual recount. Pursuant to those published costs, a manual recount of Measure A was estimated to cost between $15,000 and $24,000, depending on how fast votes could be recounted and on how many recount boards were used.

Relying on this information, Petitioners raised enough funds to start a recount. When they informed Respondent's staff that they wished to pursue a recount, staff confirmed that the published estimated costs were accurate. Hours before the recount was required to begin, Respondent's staff informed Petitioners that because of the inefficiencies in the County's new Voting Solutions for All People (VSAP) Version 2.0 election system, the new estimated costs for the manual recount would instead be a minimum of $187,000 and could cost well over $200,000—about ten times the published cost. The main reason for the increase in costs is that before the VSAP system, Respondent sorted all ballots—in-person and vote-by-mail—into precincts as part of the cost of conducting an election, but under VSAP, Respondent now passed along those exorbitant sorting costs to recount requesters.

Perhaps recognizing that these new prohibitive costs had the practical effect of denying Petitioners their right to a manual recount, Respondent Logan contemplated for the first time and offered Petitioners the option of a new "digital" process of recounting votes using monitor displays of unverified scanned images of physical ballots, but that process is not statutorily authorized, raised several legitimacy problems as detailed below, and was still financially prohibitive. It became clear after a few days of a trial of this system that it would still cost Petitioners approximately $150,000

using this unauthorized and flawed recount method. Despite seeing votes change during early recounting, Petitioners could not possibly afford these costs and were forced to abandon their request.

The VSAP system, designed with no regard for its impact on recount requesters, places a severe and discriminatory burden on voters' right to a recount by making them prohibitively expensive to all but the wealthiest candidates or committees. Severe burdens on voting rights that are based on voters' resources must be "'closely scrutinized' and found reasonably necessary to the accomplishment of legitimate state objectives in order to pass constitutional muster." (*Bullock v. Carter* (1972) 405 U.S. 134, 144.) While Petitioner will offer several state interests that he contends are compelling, he cannot show that the prohibitive recount cost is necessary to accomplish any of them. This is true in part because the high costs are an arbitrary byproduct of the flawed design process of the VSAP system and not intentionally designed as necessary for any purpose at all. It is true for the additional reason that any state interest that Respondent puts forward "must be achieved by a means that does not unfairly or unnecessarily burden" a recount requester's "equally important interest in the continued availability of political opportunity." (*Lubin v. Panish* (1974) 415 U.S. 709.) Respondent cannot make such a showing.

Respondent Logan therefore has a clear, mandatory, and ministerial duty to conduct a full manual recount of paper ballots at a cost that does not effectively deny voters the right to a recount. Petitioners respectfully request that the Court issue a traditional writ of mandamus ordering Respondent to conduct a legally compliant manual recount of Measure A at the reasonable costs presented in the County Handbook at the time the recount was requested.

STATEMENT OF FACTS

Design and Development of VSAP

The March 3, 2020 primary election marked the first time that Los Angeles County used its new VSAP system. (1 Joint Appendix ("JA") 6:7-11.) Under VSAP, voters could vote at any of 978 Vote Centers in the County, where they used a touchscreen Ballot Marking Device (BMD) to generate and print a physical paper ballot, which was then deposited into a ballot box. (1 JA 6:3-11, 21:10-14.) Vote-by-mail (VBM) ballots could either be returned by mail or be dropped off at these Vote Centers or other designated drop-off locations. (1 JA 26:4-11.) Under this new system, returned ballots were

not organized by precincts, but ended up in approximately 3,400 random boxes. (1 JA 74.)

The difficulty and expense associated with sorting ballots into precincts is well-known to Respondent. (1 JA 32:3-12.) But rather than streamlining that process, the VSAP system was designed to avoid physically gathering and sorting ballots by precinct altogether. (1 JA 32:11-12, 31:11-14.) This decision has severe implications for anyone requesting a recount. Recounts are conducted precinct-by-precinct, and a recount of a given precinct cannot begin until all of that precinct's votes have been gathered. (1 JA 43:21-24, 74.) Further, Code of Regulations section 20815 authorizes Respondent to recover "all" costs of a recount "that would not have been incurred but for the requestor's particular recount request."

Before VSAP, in-person ballots were pre-sorted by precinct, and VBM ballots, which accounts for more and more of the total votes cast, were sorted into precincts by a machine before storing. (1 JA 30:1-10.) Until the March 2020 election, recount requesters were not asked to pay for any costs associated with sorting ballots by precinct. (1 JA 22:23-23:6.) Though recount requesters were asked to pay for some of the staff time to physically retrieve ballots in preparation for a manual recount, this was a fairly simple and inexpensive task, handled by team of two "lower level" clerks. (1 JA 79.)

Despite knowing how expensive and time-consuming it is to sort ballots by precinct, Respondent gave no consideration during a 10-year design phase (1 JA 18:20, 19:8-10) as to how it would affect the cost of conducting a manual recount. (1 JA 32:19-24, 88:22-25 ["Reducing the costs of voter-requested manual recounts was not a consideration for the design of the [VSAP] or any other law to factor in the costs of voter-requested manual recounts in the design of voting systems to be approved and certified by the California Secretary of State."], 85:16-19, 95:11-13.)

So absent was any consideration of how the VSAP system would cause recount costs to skyrocket that Respondent Logan and his office did not even include the new costs in the estimates they published in their handbook—Requesting a Recount 2020 (County Handbook)—containing published costs for "manual" or "machine" recounts in Los Angeles County in 2020. (1 JA 8:10-13, 102.) The published estimates were orders of magnitude lower than the estimates Petitioners later received, revealing a complete lack of consideration of the financial impact of the VSAP system on recount requesters. Indeed, the County Handbook contained no indication that the costs of conducting

a manual recount would now require recount requesters to pay for thousands of man-hours of physical labor to locate, retrieve, and sort physical ballots into precincts. (1 JA 102.)

Petitioners' Requests for a Recount and Respondent's Cost Estimates

Respondent certified the vote count for Measure A on March 27, 2020, stating that it received 49,676 "Yes" votes, and 49,660 "No" votes, a difference of 16 votes or 0.016 percent. (1 JA 107.) In light of this minimal vote margin, documented irregularities on Election Day, and observed irregularities during canvassing of the votes, Petitioners decided to pursue a recount. (Declaration of Ian Patton in Support of Petition for Writ (Patton Dec.), ¶ 5.)

The County Handbook estimated manual recounts would cost between $4,163 (for one board) and $10,854.50 (for eight boards) per day, which were comparable to previous years. (1 JA 102.) Relying on the estimates published in the County Handbook and the counting-rate ranges provided by Respondent's staff, Petitioners estimated that a manual recount of Measure A would cost $15,000 to $24,000, depending on how fast votes could be recounted and on how many recount boards were used. (Patton Dec., ¶ 11.) They engaged in fundraising and were able to raise the estimated costs, allowing them ultimately to request that Respondent Logan conduct a recount. (Patton Dec., ¶ 12.)

Petitioner Patton emailed Respondent Logan on April 1, 2020, to formally request a recount of Measure A pursuant to Elections Code section 15620[1] on behalf of both Petitioners. (1 JA 109.) On April 6, 2020, Petitioner Patton spoke with Alex Olvera, Division Manager for Election Information and Preparation, regarding the cost estimates for the recount. (Patton Dec., ¶ 9.) During this call, Mr. Olvera informed Petitioners that Respondent Logan would follow the estimated cost schedule for a recount as published in the County Handbook. (Patton Dec., ¶ 9.)

However, on April 7, 2020—the day before the recount was required to begin pursuant to section 15626—Mr. Olvera emailed Mr. Patton highly inflated cost estimates compared to those in the County Handbook:

# of Boards	County Handbook Daily Cost Estimate	Revised Estimates Daily Cost Estimate
1	$4,163.00	$11,694.49
2	$4,563.00	$12,094.49

[1] Unless otherwise noted, all subsequent citations to "section" refer to the California Elections Code.

3	$5,557.15	$13,088.64
4	$5,957.15	$13,488.64
5	$9,060.35	$16,591.84
6	$9,460.35	$16,991.84
7	$10,454.50	$17,985.99
8	$10,854.50	$18,385.99

(Patton Dec., ¶ 15; 1 JA 77-82, 102.) Mr. Patton was then informed that simply sorting and extracting the physical ballots would take eight two-worker teams approximately 16 days at $11,694.49 per day, some of which would have to take place before recounting could begin. (1 JA 74, 82, 121.) Petitioners were expected, therefore, to commit to a minimum of $187,143.84 (16 days x $11,694.49 per day). (1 JA 74, 113:17-21, 121.) Based on the information provided to him, Mr. Patton estimated that a full recount would cost well over $200,000. (Patton Dec., ¶ 17.)

Perhaps recognizing that these exorbitant costs had the practical effect of denying Petitioners' their right to a manual recount, Respondent offered Petitioners the option of a new "digital" process of recounting unverified scanned images of physical ballots. (1 JA 51:7-8) Respondent suggested displaying these digital ballot images on screens, and also offered to print them all out for additional costs. (1 JA 81-82.) Electronic "fetching" of the digital ballot images from the VSAP system was estimated to cost $3,347.30 per board, per day in addition to regular recount costs. (1 JA 33, 41:20-42:11 [identifying staff responsible for fetching], 116-117 [estimating per-board costs of those staffers].) This alternative recount method was not a result of the 10-year VSAP design process, but was contemplated for the first time during negotiations with Petitioner. (1 JA 51:7-8.)

<u>Conducting the Recount Using the Digital Ballot Image Option</u>

With time running out and unable to afford the purported estimated costs of conducting a valid manual recount, Petitioners agreed to begin the recount using the digital ballot method. (Patton Dec., ¶ 22; 1 JA 119.) The digital method proved to be as practically problematic as it was unauthorized. There were no policies in place to conduct a recount under this new alternative. (1 JA 55:3-8, 85:6-10; Patton Dec., ¶ 23.) Ballots did not display simultaneously on recount board members' individual screens, creating dead time for which Petitioner was expected to pay and resulting in confusion regarding which ballots were being viewed and recounted. (Patton Dec., ¶ 23; 1 JA 64:17, 65:17 [Respondent does not dispute Petitioners' observations of delays of up to eight seconds].) Despite

1 clear, written regulations on vote-counting standards (*see* 2 Cal. Code. Reg. § 20982), instructions
2 were provided "just verbally" (1 JA 67-24), which resulted in errors.[2] (Patton Dec., ¶ ¶ 26-27.) At one
3 point, recounters failed to keep track of counted ballots, requiring the re-do of an entire precinct—
4 entirely avoidable, had Respondent's staff complied with state regulations governing the counting of
5 ballots. (2 Cal. Code. Reg. § 20832, subds. (a), (d), (g);1 JA 62:22-24.)[3] Inaccurate reporting made it
6 difficult for Petitioners and the public to keep track of how many votes had been changed as a result of
7 the recount—the most critical element of the process. It was also impossible to determine if
8 extraneous marks seen on screens were actually on the physical ballots or were the result of the
9 scanning machines used to scan the ballots, and there was no efficient or timely way to retrieve the
10 corresponding physical paper ballot. (Patton Dec., ¶ 28; 1 JA 93:4-8.)
11 And, on top of everything, the process proved to be financially prohibitive. Before the new
12 system, Mr. Olvera had estimated a recount board would be able to recount up to 10,000 ballots per
13 day (1 JA 79; Patton Dec., ¶ 11), and estimated the new digital ballot method would already reduce
14 that to 6,000 ballots per day (1 JA 79, Patton Dec., ¶ 21). However, Petitioners documented the
15 counting rate to be just over 1,500 ballots per recount board per day, meaning the actual counting rate
16 was far slower than Mr. Olvera had suggested it would be, effectively making a full recount under the
17 "digital" process nearly as economically out-of-reach as a true manual recount. (Patton Dec., ¶ 31.) It
18 was clear after a few days of a trial of this system that it would still cost Petitioners approximately
19 $150,000 using this unauthorized and flawed recount method. (Patton Dec., ¶ 32.)
20 The limited recount found inaccuracies in the Measure A vote totals. (1 JA 126-127.) Due to
21 financial burden, however, Petitioners were forced to halt the recount. (Patton Dec. ¶ 33.)
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[2] For example, one precinct's recounted votes were missing entirely from the Registrar's report. As to another precinct, the report listed the precinct but stated that no recounting had started for that precinct when it had not only started but had been completed. In another case, the precinct in which a ballot was challenged was recorded inaccurately. (Patton Dec., ¶ 29.)

[3] Regulations require that all ballots from a precinct be "separated into stacks" or certain sizes (2 Cal. Code. Reg. § 20832, subds. (a), (c)) and that members of the recount board must conduct checks, every 10-25 ballots, to ensure their records of recounted votes are identical. (*Id.* § 20832, subds. (d)-(g).) The purpose of these regulations is to ensure errors do not creep in and require a recount board to re-do an entire precinct—precisely the situation that occurred during the Measure A recount before Petitioners requested that Respondent comply with the above regulations. (Patton Dec., ¶ 30.)

ARGUMENT

I. RESPONDENT'S DISCRIMINATORY AND EXCLUSIONARY RECOUNT PRACTICES MUST BE CLOSELY SCRUTINIZED AND FOUND REASONABLY NECESSARY TO ACCOMPLISH COMPELLING STATE OBJECTIVES

Practices with a real impact on the exercise of the franchise that depends on voters' resources are subject to strict scrutiny. (*Bullock,* 405 U.S. at p. 144; *Harper v. Virginia State Bd. of Elections* (1966) 383 U.S. 663, 666 ["We conclude that a State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard."].) In *Bullock*, the U.S. Supreme Court considered statutory filing fees ranging as high as $8,900[4] required to appear on primary ballots, which "imposes a particularly heavy burden on candidates for local office." (*Id.* at pp. 138–139.) The Court noted that "the very size of the fees imposed . . . gives it a patently exclusionary character" and therefore raised equal protection concerns. (*Id*. at p. 144.) The Court concluded that because the filing-fee scheme "has a real and appreciable impact on the exercise of the franchise, and because this impact is related to the resources of the voters," it must be "'closely scrutinized' and found reasonably necessary to the accomplishment of legitimate state objectives in order to pass constitutional muster." (*Id*. at p. 144.)[5]

The heightened scrutiny standard in *Bullock* and *Harper* lives on in the framework for evaluating whether state election procedures violate constitutional rights, set out by the Supreme Court in *Anderson v. Celebrezze* (1983) 460 U.S. 780 and *Burdick v. Takushi* (1992) 504 U.S. 428, 434. Under *Anderson-Burdick*, courts facing constitutional challenges to a state election law "must first consider the character and magnitude of the asserted injury to the rights . . . that the plaintiff seeks to vindicate." (*Anderson*, 460 U.S. at p. 789; *Burdick*, 504 U.S. at p. 434.) Where the burden is "severe," the regulation must be "narrowly drawn to advance a state interest of compelling importance." (*Burdick*, 504 U.S. at p. 434, citing *Norman v. Reed* (1992) 502 U.S. 279, 289.) Only when a state election law provision imposes "reasonable, nondiscriminatory restrictions" is a lower

[4] $8,900 in February 1972 when *Bullock* was published is worth approximately $57,080.03 in present value according to the U.S. Bureau of Labor Statistics' CPI Inflation Calculator, available at https://www.bls.gov/data/inflation_calculator.htm.

[5] Notably, the restriction at issue in *Bullock* affected candidates, which the Court found has only an indirect impact on voters. Courts have generally found that restrictions on voters—such as the prohibitory cost of recounts placed on voters here—should be scrutinized more than those placed on candidates. (*Bullock*, 405 U.S. at pp. 142–143.)

standard of review that requires additional balancing appropriate. (*Burdick*, 504 U.S. at p. 434.)

A. Strict Scrutiny Applies Because Respondent's Infringement on Petitioner's Right to a Recount Is Severe and Discriminatory.

Respondent's prohibitive recount costs impose severe and discriminatory burdens that completely bar recounts for all but the wealthiest candidates and committees. Application of Respondent's election procedures meant the cost of a relatively small, 100,000-vote race would cost upwards of $200,000 (*supra*, p. 8)—far beyond the Petitioners' means. Considering the Supreme Court in *Bullock* found that "the very size of the [$8,900 or less] fees imposed . . . gives it a patently exclusionary character" (*id*. at p. 144) and justified strict scrutiny, there is no doubt the sheer cost of the price tag in this case merits close judicial scrutiny.

Further, courts analyzing the "severity" of an election regulation look to whether the right has been outright denied, or merely infringed. For example, the Sixth Circuit considered a Michigan law imposing a waiting period before a recount which, would have rendered it impossible for recount requester and presidential candidate Jill Stein to complete a requested recount before the deadline to certify electors. The court affirmed an order compelling the state to begin its recount immediately, explaining that the waiting period was a severe restriction warranting strict scrutiny: "Plaintiffs would have essentially lost their state-recognized recount right entirely if the waiting period law had been followed. This is a severe burden, and requires us to closely scrutinize the justifications put forward for the waiting period." (*Stein v. Thomas* (6th Cir. 2016) 672 Fed.Appx. 565, 570.)

Here, the Elections Code guarantees *any* voter a right to a recount. (§ 15620, subd. (a).) Yet not only were Petitioners unable to afford a legally compliant recount under Respondent's new system, they were also unable to afford Respondent's unauthorized and flawed digital ballot image method of conducting a recount. (Patton Dec. ¶¶ 22, 33.) Petitioners "essentially lost their state-recognized recount right entirely," which constitutes a "severe burden and requires us to closely scrutinize the justifications put forward. . . ." (*Stein*, 672 Fed.Appx at p. 570.)

Courts also consider whether restrictions provide an alternative means of exercising a voting-related right. In *Lubin*, the Supreme Court rejected a California candidate filing fee, and emphasized as problematic the absence of any alternative means:

> The absence of any alternative means of gaining access to the ballot inevitably renders the California system exclusionary as to some aspirants. . . . Selection of candidates solely on the

basis of ability to pay a fixed fee without providing any alternative means is not reasonably necessary to the accomplishment of the State's legitimate election interests. Accordingly, we hold that in the absence of reasonable alternative means of ballot access, a State may not, consistent with constitutional standards, require from an indigent candidate filing fees he cannot pay." (415 U.S. at pp. 717-718.)

Here, the Registrar admits that no alternative means exist for one lacking significant means to obtain a recount. (1 JA 34:15-25, 35:6 [admitting no alternative means exist and that "a candidate or committee must have a certain amount of money in order to get a recount"].)

Nor can Respondent expect candidates or committees to simply raise funds as an alternative, as *Bullock* rejected that argument:

> To the extent that the system requires candidates to rely on contributions from voters in order to pay the assessments . . . it tends to deny some voters the opportunity to vote for a candidate of their choosing; at the some [sic] time it gives the affluent the power to place on the ballot their own names or the names of persons they favor. . . . [W]e would ignore reality were we not to recognize that this system falls with unequal weight on voters, as well as candidates, according to their economic status. (405 U.S. at p. 144.)

Reliance on fundraising is even more unrealistic for a recount given that a voter would have at most five days to raise funds before a recount must begin. (§ 15620, subd. (a).)

Finally, the *discriminatory* nature of Respondent's recount costs is obvious—only the wealthiest candidates or committees can afford the exorbitant costs. *Any* voter has the right to a recount, regardless of their wealth. (§ 15620.) "Wealth, like race, creed, or color, is not germane to one's ability to participate intelligently in the electoral process." (*Harper*, 383 U.S. at 668.) Respondent's recount costs therefore impose severe, discriminatory burdens on voters.

B. Limiting Recounts to the Wealthy Infringes the Fundamental Right to Vote

The law is clear that severe burdens on the right to recount must be closely scrutinized because the right to a *recount* is inseparable from the right to *vote*. "The right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise. Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another." (*Bush v. Gore* (2000) 531 U.S. 98, 104–105 [holding that Florida's recount procedures violated the Equal Protection Clause because they resulted in "arbitrary and disparate treatment of the members of its electorate"], citing *Harper*,383 U.S. at p. 665 ["[O]nce the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause."].) The Supreme Court found that the Florida recount

mechanisms "do not satisfy the minimum requirement for ***nonarbitrary treatment*** of voters necessary to secure the ***fundamental right***." (*Bush*, 531 U.S. at p. 105, emphasis added; see also *Reynolds v. Sims* (1964) 377 U.S. 533, 554–555 ["It has been repeatedly recognized that all qualified voters have a constitutionally protected right to vote, [citation], and to have their votes counted . . . ."].)

The connection between the right to vote and recounts—and specifically, state-recognized rights of recount—was made similarly clear in *Stein*, which emphasized that where the state creates a right to a recount, it may not use "arbitrary or unreasonable procedural rules to make that right a nullity." (*Stein*, 672 Fed.Appx. at p. 569 ["once a state legislature vests its citizens with election rights, those rights are fundamental and are protectable by the First and Fourteenth Amendments"].)

The right to a recount is safely guarded in California as a fundamental component to the right to vote. Article II, section 2.5, of our Constitution guarantees that "[a] voter who casts a vote in an election in accordance with the laws of this State shall have that vote counted." Section 15702 clarifies that "[f]or purposes of Section 2.5 of Article II of the California Constitution, 'vote' includes ***all action*** necessary to make a vote effective in any primary, special, or general election, including, but not limited to, . . . ***having the ballot counted properly*** and included in the appropriate totals of votes cast with respect to candidates for public office and ballot measures." (Emphasis added.)

The Legislature recognizes that the purpose that recounts serve—accurate tallying of election results—safeguards the right to have one's ballot cast and counted correctly. When passing legislation to fund recounts in certain statewide races, it made clear that the right to recount is crucial to maintaining the legitimacy of fair elections and that to provide recounts only to those who could afford them "raises the question of fairness: Should the person with the deepest pockets be able to 'out-recount' his opponent?" (1 JA 132) "The obvious answer is 'No,'" because "[e]nsuring accurate election outcomes should be a priority for the state . . . ." (*Ibid*.)

Finally, our own Supreme Court has recognized that barriers to recounts prolong public doubt and replace public confidence with suspicion. (*Enter. Residents etc. Comm. v. Brennan* (1978) 22 Cal. 3d 767, 774 ["It is the primary purpose of the election contest provisions to ascertain the will of the people and to make certain that mistake or fraud has not frustrated the public volition."].)

Because Respondent's prohibitive recount costs place a severe and discriminatory burden on

voters' right to a recount, this Court must apply strict scrutiny.

II. RESPONDENT'S EXCLUSIONARY RECOUNT PROCEDURES ARE NOT NARROWLY TAILORED AND BEAR NO RESEMBLANCE TO THE OBJECTS OF THE VSAP SYSTEM.

Where strict scrutiny is warranted, as here, the government bears the burden of establishing the regulation is "narrowly drawn to advance a state interest of compelling importance." (*Burdick*, 504 U.S. at p. 434; *Ashcroft v. ACLU* (2004) 542 U.S. 656, 666.) Respondent cannot meet his burden.

A. Respondent Cannot Identify Any Compelling Government Interest

First, Respondent has never offered *any* government interest it sought to achieve by raising the costs of conducting a recount, let alone a *compelling* one. However, rather than justify its burden on Petitioners' rights, Petitioner expects Respondent will blame the massive new increase in costs on VSAP—the system Respondent spent a decade designing without once considering whether the new protocols would shift massive costs onto the shoulders of recount requesters. (*Supra*, p. 6.)

The high costs of a recount in Los Angeles County are not the result of the intentional design of the VSAP system, but are instead an arbitrary byproduct of the failure to consider the impact of the new system on voters' right to a recount. The Registrar's person most qualified, who participated in the entirety of the design process of the VSAP system, indicated that at no point was he ever concerned "that it would be expensive to physically gather ballots by precinct under the VSAP system," and stated that he had no recollection of the Registrar expressing any such concern. (1 JA 32:8-24.) There is no dispute that recount requesters are asked under the VSAP system to incur an exorbitant expense to sort and locate paper ballots for recount purposes and that this cost was previously not passed along to requesters. (1 JA 34:10; see also *supra*, p. 6.)

Nor does compliance with the Voter's Choice Act, the state law allowing voters to cast ballots at Vote Centers rather than assigned polling places, create any compelling justification for the severe burden on Petitioners' rights. Respondent has admitted that the VCA does not preclude it from sorting and storing ballots by precinct.[6]

Nor are the Secretary of State regulations authorizing Respondent to seek reimbursement of

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[6] (Compare Answer to Verified Petition, p. 18:12-14 ["as a result of the Voter's Choice Act and the manner by which returned ballots are stored thereunder, the costs to conduct a recount for manual retrieval of paper ballots changed"] with 1 JA 96:2-3 ["Respondent admits that the Voter's Choice Act does not address or specify the manner of storage of VBM Voted Ballots and BMD Voted Ballots"].)

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"actual costs" of the recount any legitimate justification, let alone a compelling one. These regulations do not *justify* the costs in terms of the government interest Respondent seeks to achieve. As in *Bullock*, Respondent's exorbitant recount costs are "a natural consequence" of the County's election system "that places the burden of financing" on participants "rather than on the governmental unit." (405 U.S. at pp. 138–139.) If regulatory compliance were a valid justification, then there is no cost that could possibly ever be too high so long as Respondent could label the cost a recount-only cost.

Courts have consistently rejected cost-saving, efficiency, and administrative convenience as valid bases for discriminatory voting restrictions. (See e.g. *Bullock*, 405 U.S. at pp. 146-148 [cost-savings not a compelling interest].) Nor are courts moved by the fact that by making the filing fees affordable, more costs will be passed along to taxpayers. (*Id*. at pp. 148-149; see also *Shapiro v. Thompson* (1969) 394 U.S. 618, 633 ["[C]osts cannot justify an otherwise invidious classification."]; see also *Frontiero v. Richardson* (1973) 411 U.S. 677, 690 (plurality) ["[W]hen we enter the realm of 'strict judicial scrutiny' there can be no doubt that 'administrative convenience' is no shibboleth, the mere recitation of which dictates constitutionality."]; *Stewart v. Blackwell* (6th Cir. 2006) 444 F.3d 843, 869, vacated and superseded on other grounds, 473 F.3d 692 (6th Cir. 2007) ["Administrative convenience is simply not a compelling justification in light of the fundamental nature of the right."].)

B. Respondent Cannot Show That Discriminatory Recount Costs Are Necessary

Even if Respondent's interests were all deemed sufficiently compelling, he has no basis to demonstrate that its means were narrowly tailored to minimize the extreme financial burdens on recount requesters because its decisions were arbitrary. Had Respondent considered VSAP's impact on recounts, he could have taken steps to lower recount costs. For example, Respondent previously relied on readable images on ballots or envelopes, together with sorting machines and scanners to sort ballots into precincts. (1 JA 24:20; 28:2.) Registrar staff admit that BMD and VBM ballots still have scannable images with the capability of using those images to sort by precinct. (1 JA 25:4-21, 29:6-16.) Respondent could have used these technologies to keep recount costs low, but arbitrarily chose not to.[7] When asked why they don't, staff's response was only "that's not efficient." (1 JA 28:2.)

[7] Out of deference to Petitioner's reasonable reliance on Respondent's own Handbook—not to mention Petitioner's right to a recount and voters' rights to have their ballots accurately tallied—

1 Even the specific charges that Respondent decides to pass along to recount requesters is
2 arbitrary upon close inspection. For example, internal documents of cost estimates clearly indicate
3 certain staff recount costs are passed along to recount requesters, whereas others are denoted "built in
4 to our [overhead] rates" (1 JA 39:1-4, 116, 139.) However, when the Registrar's person most qualified
5 was asked to explain, he responded, "I'm not sure why we do that." (1 JA 39:9; 40:21-23.)

6 However compelling the interests Respondent puts forward to justify the astronomical costs on
7 recount requesters, those goals cannot be accomplished by discriminating against other voters on the
8 basis of wealth. Any state interest that Respondent puts forward "must be achieved by a means that
9 does not unfairly or unnecessarily burden" a recount requester's "equally important interest in the
10 continued availability of political opportunity." (*Lubin*, 415 U.S. at p. 716; *see also Bullock*, 405 U.S.
11 at p. 145.) Here, however, the "means" that Respondent has chosen excludes all but the very wealthy
12 from pursuing even small-scale recounts in races decided by a mere 16 votes. "To introduce wealth or
13 payment of a fee as a measure of a voter's qualifications is to introduce a capricious or irrelevant
14 factor." (*Harper*, 383 U.S. at p. 668; *Crawford v. Marion County Election Bd.* (2008) 553 U.S. 181,
15 189 [explaining that in *Harper,* "[a]lthough the State's justification for the [poll] tax was rational, it
16 was invidious because it was irrelevant to the voter's qualifications"].)

17 Even if this Court concludes that strict scrutiny does not apply, it must nevertheless "identify
18 and evaluate the precise interests put forward by the State as justifications for the burden imposed by
19 its rule," "determine the legitimacy and strength of each of those interests," and "consider the extent to
20 which those interests make it necessary to burden the plaintiff's rights." (*Anderson*, 460 U.S. at p.
21 789.) Respondent cannot satisfy this standard, either. His failure to document *any* steps to minimize
22 the new costs on recount requesters—let alone, even *consider* the foreseeable significant impacts of
23 VSAP on recount requesters (*supra*, pp. 6-7)—precludes it from arguing that *any* interests "ma[d]e it
24 *necessary* to burden the plaintiff's rights." (*Ibid.,* emphasis added.) Respondent is therefore unable to
25 meet his burden to show that its severe and discriminatory recount fees are necessary to achieve a
26 compelling government interest.
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28 Respondent could have adhered to his published cost estimates to avoid creating, on the fly, a whole new set of procedures, standards, and systems for conducting a recount using an untested new method.

C. Respondent Had a Duty to Sort Ballots By Precinct to Comply With State Law Regarding the 1% Manual Tally

It is improper to pass along the costs of sorting ballots by precinct to recount requesters for the additional reason that Respondent should already be sorting by precinct to conduct a compliant 1% manual tally. Elections Code section 336.5 states, "In an election conducted using vote centers, a 1 percent manual tally can be conducted using the batch process set forth in Section 15360." But "the batch process" described in Elections Code section 15360 is part of a "two-part public manual tally" alternative that requires ***both*** a manual tally of the ballots in 1 percent of the precincts chosen at random ***and*** a manual tally of not less than 1 percent of the batches of vote by mail ballots. Section 336.5 authorizes the use of batches in the 1% manual tally, but it does not authorize an election official to violate the dual requirements of section 15360. (See 1 JA 149 [Secretary of State letter from January 2020 stating that Respondent was required to conduct a manual tally of 1% of the precincts].)

III. Respondent's Proposed "Digital Ballot Image" Recount Is Unauthorized and Does Not Relieve Respondent of His Constitutional Obligations

Respondent, perhaps recognizing that he had excluded all but the wealthiest candidates and campaign committees from obtaining recounts under its new system, proposed an unauthorized, novel alternative recount method on the eve of the recount relying on digital ballot images rather than actual paper ballots. The Elections Code authorizes only two recount options: the ballots can be recounted "manually, or by means of the voting system used originally." (§ 15627, subd. (a).) Respondent concedes that the digital ballot image alternative is not "by means of the voting system used originally," but that it is a manual tally. (1 JA 52:18.) The Elections Code, however, only authorizes manual recounts of *ballots*, not *images* of ballots. This limit is evident from the statutory text; Elections Code section 301 defines "ballot" absent any reference to an *image* of a ballot. Furthermore, courts have long understood that "[i]n case of a contest, the ballots are the primary and best evidence of the number of votes." (*Coglan v. Beard* (1885) 67 Cal. 303, 306; *People ex rel. Budd v. Holden* (1865) 28 Cal. 123, 132 [ballots "are recognized by the law not only as a part of the election returns, and therefore evidence of what transpired at the election, but as evidence of a higher and more satisfactory grade than the tally paper."].)

Likewise, regulations governing recounts where the voting system generates paper ballots, like VSAP, make clear that the recount is to be performed using actual paper ballots. (See 2 C.C.R.,

§ 20832 [requiring separating ballots into stacks, placing counted ballots in a particular way on tables, and prohibiting physical contact with ballots by the public].) One cannot comply with these regulations *unless* the recount is conducted using physical paper ballots. "Digital ballot images" are only authorized in conjunction with recounts of *direct recording voting systems*—and, even there, a digital image may be used *only* if "there is no legible voter verified paper audit trail paper copy for a ballot due to a malfunction of the voter verified paper audit trail printer." (*Id*. at § 20842, subd. (c).)

In addition to being unauthorized, Respondent's new recount method was untested, inefficient, and because of its arbitrary, standardless procedures, "value[d] one person's vote over that of another." (*Bush*, 531 U.S. at pp. 104–105 [enjoining standardless recount].) It was not a part of the VSAP design, but was first contemplated "[d]uring the course of the discussions with Mr. Patton" (1 JA 51:7-8), with no guidance from the Secretary of State (1 JA 54:3-10), no advanced planning, no standards, and insufficient training. (1 JA 85:6-10, 55:3-8; Patton Dec., ¶ 23.) The lack of standards failed to satisfy "the minimum requirement for nonarbitrary treatment of voters necessary to secure the fundamental right." (*Bush*, 531 U.S. at p. 105.) As here, "[t]he problem inheres in the absence of specific standards" and "[t]he formulation of uniform rules . . . is practicable, and . . . necessary." (*Id*., at p. 106.) Respondent had no recount procedures specifically for digital ballot image recounts at the time of the recount, none today, and sees no need to update procedures written for manual recounts of physical ballots. (1 JA 55:3-8, 58:1-22.) As discussed, *supra*, pp. 8-9, the botched recount exemplified the risks of conducting standardless recounts: unanticipated delays costing time and money, unclear instructions requiring do-overs, reporting errors, regulatory noncompliance, and confusion.

Most crucially, the costs were prohibitive even under this unauthorized method. (*Supra*, p. 9.)

CONCLUSION

Los Angeles County voters have a right to a recount in a way that does not violate their constitutional rights. Respondent Logan has a clear, mandatory, and ministerial duty to conduct a full manual recount of paper ballots at a cost that does not effectively deny voters the right to a recount. Petitioners respectfully request that the Court issue a traditional writ of mandamus ordering Respondent to conduct a legally compliant manual recount of Measure A at the daily costs presented in the County Handbook at the time the recount was requested.

DATED: May 7, 2021

Respectfully submitted,

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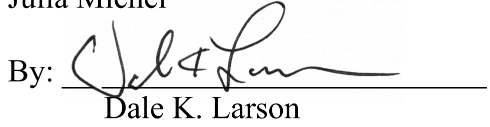
By: 
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