LONG BEACH REFORM COALITION v. LOGAN
Case Number: 20STCP01633
Hearing Date: August 13, 2021

ORDER DENYING WRIT OF MANDATE

On March 3, 2020, voters in the City of Long Beach (the City) approved Measure A, a tax measure effective January 1, 2023. The County of Los Angeles conducted the election through its Secretary of State certified Voting Solutions for All People (VSAP) version 2.0 election system. The County also conducted the election pursuant to the Voter's Choice Act (VCA) set forth in Elections Code[1] sections 4005 and 4007.

With nearly 100,000 votes cast, the City's voters passed Measure A with a 16-vote margin.

After the election, Petitioners, Long Beach Reform Coalition and Ian Patton, initiated a vote recount of the measure pursuant to section 15620. As parties seeking a vote recount, state law required them to deposit with the County funds necessary to cover the County's daily cost of the recount. (§ 15624.) Under the circumstances presented, the law allocated the actual cost of the vote recount to Petitioners.

Petitioners contend the County's use of the VSAP system greatly increased the cost of their requested vote recount. Their petition alleges Respondent, Dean Logan, the County's Registrar-Recorder, has a mandatory, non-discretionary and ministerial duty to conduct a full manual recount of the Measure A paper ballots cast at a cost that does not effectively deny voters the right to a recount. Petitioners seek an order from this court compelling Respondent to conduct the recount at costs consistent with the estimate set forth in materials provided by the County in advance of the election.

Respondent opposes the petition.

The petition is denied.

Evidentiary Objections

Respondent's objections to the Declaration of Ian Patton:

Objection number 1 is sustained in part. The following language is stricken: "several election day irregularities" and "saw reports that . . . as voters waited to vote."

---

[1] All unspecified statutory references are to this Code.

Objection number 2 is sustained in part. The following language is stricken: The first sentence, "the poll worker . . . that request," and the last sentence.

Objection number 3 is sustained in part. The following language is stricken: "the documented . . . canvassing of the votes."

Objection numbers 4 and 5 are sustained.

Petitioner's evidentiary objections to various declarations:

The following objections are overruled: Objection numbers 1, 2, 3, 5, 9 and 11.

The following objections are sustained: Objection numbers 7 and 8.

The following objections are sustained in part: Objection numbers 4 (as to "and the recount requester . . . complaints"), 6 (as to "and an improvement . . . paper ballots") and 10 (as to "in accordance with . . . section 20982 et seq.").

STATEMENT OF THE CASE[2]

Respondent acted as the elections official responsible for conducting the March 3, 2020 Presidential Primary Election (the Election) which included Measure A on the ballot for voters of the City. (Logan Decl., ¶ 2.) The County used its Secretary of State certified VSAP system for the first time to conduct the Election. The VSAP system consists of hardware and software components that enable voters to cast their votes on a paper ballots using a ballot marking device. The VSAP system also electronically processes, organizes, interprets and tabulates voted ballots. (Logan Decl., ¶ 3.)

The County also conducted the Election pursuant to the VCA set forth in sections 4005 and 4007. (Logan Decl., ¶ 3.) The VCA uses a County-wide vote center model for voting instead of limiting voters to assigned polling places to cast their votes. The VCA allows a voter to submit his/her ballot at any vote center in the County. For example, a voter of the City may permissibly return his/her ballot to a vote center in the Pomona or Lancaster. That is, there are no limitations on the location where a voter in the County may return his/her ballot so long as the voted ballot is returned to a vote center within the County.

Respondent certified the vote count for Measure A on March 27, 2020. Respondent reported voters of the City passed Measure A with 49,676 "Yes" votes and 49,660 "No" votes—a

[2] The parties submitted two compendiums of evidence referred to as Joint Appendix Volume 1 (1 JA) and Joint Appendix Volume 2 (2 JA).

difference of only 16 votes. (1 JA 107.) Thereafter, Petitioners requested a recount of Measure A pursuant to section 15620.[3] (1 JA 109; Patton Decl., ¶ 5.)

Prior to the Election, the County issued its Requesting A Recount 2020 bulletin (the County Handbook). The County Handbook "estimated" manual vote recounts would cost between $4,163 (for one board) and up to $10,854.50 (for eight boards) per day. (1 JA 102.) Based on the County Handbook's estimates, Petitioners estimated a manual recount of Measure A votes would cost from $15,000 to $24,000. (Patton Decl., ¶ 11.)

On April 7, 2020, the County provided Petitioners with estimated daily recount costs significantly greater than the estimated costs set forth in the County Handbook. (Patton Decl., ¶ 15; 1 JA 77-82, 102.) The revised estimated manual recount costs ranged from $11,694 (for one board) to $18,386 (for eight boards) per day. (Patton Decl., ¶ 16.)

Given the high estimated cost, Petitioners opted to begin the recount using a digital ballot retrieval and review system. (Patton Dec., ¶ 22; 1 JA 119.) Due to defects with the digital recount system and the high costs associated with it, Petitioners decided they could not "continue the recount using the digital ballot image method." (Patton Decl., ¶¶ 33, 23-32.)

This action ensued.

STANDARD OF REVIEW

Petitioner seeks relief pursuant to Code of Civil Procedure section 1085.

A writ of mandate will lie "to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust or station; or to compel the admission of a party to the use and enjoyment of a right or office to which he is entitled. . . ." (Code Civ. Proc. § 1085.)

Thus, the two requirements for mandamus are (1) a clear, present and usually ministerial duty on the part of the respondent and (2) a clear, present and beneficial right in the petitioner to performance of that duty. (*Hutchinson v. City of Sacramento* (1993) 17 Cal.App.4th 791, 796.) While mandamus is not available to control the discretion exercised by a public official or board, it is available to correct an abuse of discretion by such party. (*Glendale City Employees' Assn., Inc. v. City of Glendale* (1975) 15 Cal.3d 328, 344.)

---

[3] Section 15620 states: "[f]ollowing completion of the official canvass, any voter may, within five days thereafter but not later than 5 p.m. on the fifth day, file with the elections official responsible for conducting an election in the county wherein the recount is sought a written request for a recount of the votes cast for candidates for any office, for slates of presidential electors, or for or against any measure, if the office, slate, or measure is not voted on statewide." (§ 15620, subd. (a).)

"Mandamus is clearly the proper remedy for compelling an officer to conduct an election according to law." (*Jolicoeur v. Mihaly* (1971) 5 Cal.3d 565, 570, fn. 2; *Wenke v. Hitchcock* (1972) 6 Cal.3d 746, 751.) "Mandamus is also appropriate for challenging the constitutionality or validity of statutes or official acts." (*Id.*)

ANALYSIS

The dispute here arises in the context of the VCA. The Legislature adopted the VCA to facilitate voting and increase voter participation:

> "In 2014, California voters made a poor showing at the polls. Turnout was historically low: only 25% of registered voters participated in the June 2014 primary, and only 42% in the November 2014 general election. To increase voluntary participation in the democratic process—a right that people around the world are willing to die for—California enacted the VCA.
>
> To solve the problem of California voters 'mailing in' recent elections, California decided to adopt an all-mailed ballot election system. Under this system, which is modeled after Colorado's successful election system, a ballot is automatically mailed to every registered voter twenty-nine days before the election date. [Citation.] A voter may cast a completed ballot in one of three ways: by (1) mailing it in; (2) depositing the ballot at a designated 'ballot dropoff location' (a large located mailbox); or (3) turning in the ballot at a 'vote center' (a voting-resource hub that replaces traditional polling places) [Citations.] The voter may cast his ballot by mail or at a dropoff location as soon as he receives it." (*Short v. Brown* (2018) 893 F.3d 671, 674.)

Like the VCA, the VSAP system was designed to make voting easier and more accessible to the public. (Logan Decl., ¶ 4.) The VSAP system modernized elections in the County and improved the public's voting experience with a focus on usability, accessibility and transparency. (Logan Decl., ¶ 4.) The VSAP system's "storage and organization of in person ballots by vote centers is a result of the VCA and the vote center model, not [the] VSAP." (Logan Decl., ¶ 6.)

A natural "consequence of" the VCA and the VSAP system "is that ballots are no longer delivered or collected by precinct . . . ." (Pet., ¶ 25.) Petitioners, however, do not directly challenge the VCA or the VSAP system. They also do not attack the statutory process—including how costs are allocated to vote recount requestors—for the state's vote recount process.

Instead, Petitioners argue, using Code of Civil Procedure section 1085, Respondent "has a clear, mandatory, and ministerial duty to organize the voted ballots in a manner that would allow him to comply with the law, to conduct a one-percent manual tally consistent with the requirements in Elections Code section 15360, and to conduct a full manual recount of paper ballots at a cost that does not effectively deny voters the right to a recount." (Pet., ¶ 75.) They also claim the amount of costs imposed for the recount for Measure A—not the fact of

imposing a cost for the recount—violates the Equal Protection Claus of the Fourteenth Amendment as well as the fundamental right to vote. Based on claims of severe and discriminatory impingement, Petitioners assert they are entitled to a manual paper ballot recount based on the costs set forth in the County Handbook.

During argument, as the court understood it, Petitioners clarified they challenged Respondent's actions of adopting the VSAP system to the extent it affected the cost of a voter's right to a recount. Petitioners asserted Respondent's change in policy—the manner Respondent implemented an election under the VCA—and his collection of ballots at vote centers without segregating voted ballots by precinct was arbitrary and capricious. As discussed during argument, however, such a claim exceeds the scope of the petition. The petition does not allege Respondent acted arbitrarily, capriciously or in degradation of the applicable legal standards when he failed to segregate voted ballots at vote centers by precinct. Petitioners did not allege in their petition Respondent exercised a discretionary duty in an arbitrary fashion.

The petition is instead grounded in Respondent's alleged duties:

> "Respondent [] has a clear, mandatory, and ministerial duty to organize the voted ballots in a manner that would allow him to comply with the law, to conduct a one-percent manual tally consistent with the requirements in Elections Code section 15360, and to conduct a full manual recount of paper ballots at a cost that does not effectively deny voters the right to a recount." (Pet., ¶ 75.)

Finally, the court notes Petitioners do not claim (and there is no evidence) the costs imposed by the County to conduct the recount for Measure A were not the actual costs incurred by the County associated with the recount. That is, there is no suggestion the County somehow profits from the vote recount process.

Mandatory, Non-Discretionary and Ministerial Duty:

Petitioners' Opening Brief does not once cite Code of Civil Procedure section 1085—their purported grounds for bringing this action. Other than the introductory and concluding sections in the brief, Petitioners do not reference an alleged mandatory and ministerial duty owed by Respondent to Petitioners. Petitioners' Reply Brief is similar. It makes no reference to Code of Civil Procedure section 1085 and makes no argument Respondent owes them a duty.

In their petition, however, Petitioners assert Respondent 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." (Pet., ¶ 75.)[4] Petitioners have not identified any

[4] In their Opening Brief and during argument, Petitioners suggest Respondent had some ministerial duty associated with his alleged failure to consider the impact of the new VSAP system on a voter's right to a recount. (See Opening Brief 14:12-20.) As noted, such a claim exceeds the scope of the petition which does not use the word arbitrary or capricious.

source for the alleged duty. In fact, there is no dispute the law specifically allocates the actual costs incurred by a County for a vote recount under these circumstances on the requestor. Petitioners also do not identify any other mandatory, non-discretionary duty with which Respondent allegedly failed to comply related to Petitioners' abandoned Measure A recount.

To be sure, the law imposes certain duties upon Respondent. Two of those duties can be found at section 15624 and Title 2 of the California Code of Regulations at section 20815 (CCR Section 20815).

Section 15624 provides in relevant part:

> "The voter . . . filing the request seeking the recount shall, before the recount is commenced and at the beginning of each day following, deposit with the elections official a sum as required by the elections official to cover the cost of the recount for that day."

Consistent with section 15624, CCR Section 20815 states in relevant part:

> "(a) The elections official shall estimate the costs necessary to produce relevant material and the requestor shall pay an advance deposit of the estimated amount at least one day prior to the materials being produced.
>
> (b) The requestor shall pay the advance deposit using cash, cashier's check or money order. At the elections official's discretion, electronic payment by credit or debit card may be accepted.
>
> . . . .
>
> (e) All actual costs of the recount that would not have been incurred but for the requestor's particular recount request shall be directly recoverable from the requestor and may include, but are not limited to, additional supervision hours, security guard hours, the elections official's staff hours, space rental, transportation of ballots and materials and administrative costs.
>
> (f) The elections official shall issue a receipt for payment of the deposits and shall maintain a daily log of estimated costs, deposits, actual expenses and amount of refund due, if any.

Nonetheless, their undeveloped argument does not—on its face—appear to state a claim for writ relief and lacks any legal analysis. This argument is only somewhat more developed in reply, citing numerous cases not raised in the Opening Brief thereby precluding Respondent from responding. (Reply 6:16-7:21.) The court finds Petitioners did not properly raise the issue of Respondent arbitrarily exercising a discretionary duty in these proceedings.

(g) If the advance deposit is not paid by a particular requestor, the elections official will terminate the recount of precincts specified by that requestor.

(h) When the recount is completed or discontinued, any amount collected from a voter requesting the recount, which exceeds the actual costs, shall be refunded to that requestor.

(i) If upon completion or discontinuation of the recount actual costs exceed the prepaid estimated costs, the elections official shall charge and the requestor shall pay the additional amount."

Respondent provides evidence demonstrating recount requestors—consistent with the Elections Code and applicable regulations—have always been required to pay the County's recount preparation costs, including those costs related to retrieving and organizing voted ballots. (2 JA 240.) Nothing different occurred here. That is, consistent with his obligations under the law, Respondent required Petitioners to deposit sufficient funds with the County to cover the County's actual costs associated with the vote recount.

Petitioners essentially concede Respondent does not actually have the duty they assert. They recognize Respondent complied with the law in connection with Petitioners' vote count request. Petitioners admit as much when they suggest, "even if [Respondent] were 'following the law' from a technical perspective," the court must consider and find Respondent's denial of Petitioner's right to a recount was arbitrary. (Reply 5:25-27.)

First, Respondent did not deny Petitioners their statutory right to a vote recount. Instead, it was the actual cost of the recount incurred by the County and allocated to Petitioners by state law that precluded Petitioners from proceeding with their recount.

The notion Respondent complied with the law in connection with the Measure A recount undermines any claim Respondent acted arbitrarily—Respondent followed his mandatory, non-discretionary duty.[5] While the court may deem a law invalid, the court cannot find Respondent's compliance with a valid and unchallenged law creating a non-discretionary, mandatory duty arbitrary. Code of Civil Procedure section 1085 does not permit the court to order Respondent to ignore relevant and applicable statutes and regulations. The law is clear. Respondent is required to collect from and allocate to a requestor the County's costs of a vote

[5] During argument, Petitioners took issue with the court's position Respondent followed the law and therefore did not act arbitrarily. As noted, Petitioners did not allege in their petition Respondent had a *discretionary* duty—conduct of the Election—and he exercised that discretionary duty in an arbitrary fashion. "Where a statute leaves room for discretion, a challenger must show the official acted arbitrarily, beyond the bounds of reason or in derogatoi of the applicable legal standards." (*Excelsior College v. Board of Registered Nursing* (2006) 136 Cal.App.4th 1218, 1239.)

recount in advance of the recount. Respondent complied with his mandatory, non-discretionary duty.

Finally, Petitioners' broad assertion any voter has right to a recount—seemingly without restriction—is overstated. (Opening Brief 11:19.) Section 15620 provides a voter with the right to *request* a recount. Other statutes condition the voter's ability to obtain that recount, including the statutory requirement a requestor advance the costs of the recount to Respondent. (§ 15624.)[6]

Thus, the court finds Petitioner has not demonstrated any failure by Respondent to comply with any mandatory, ministerial duty. Petitioners are therefore not entitled to writ relief.

Equal Protection and the Fundamental Right to Vote:

Stated generally, Petitioners assert a recount that exceeds some unspecified amount is unconstitutional. Petitioners accept the County may allocate its recount costs (or some portion of those costs) to a requestor. Petitioners do not, however, provide a bright line dividing a constitutional and unconstitutional recount cost. For reasons that are not entirely clear to the court, Petitioners concede a recount cost of $4,163 to $10,854 per day (depending on the number of recount boards) is appropriate and presumably constitutional. (Opening Brief 18:27-28.) That Petitioners do not articulate some defined standard and fall back on the estimates provided by the County Handbook demonstrates the weakness of their constitutional arguments.

Relying on *Anderson v. Celebrezze* (1983) 460 U.S. 780 and *Burdick v. Takushi* (1992) 504 U.S. 428,[7] Petitioners argue the County's financially "prohibitive recount" process is subject to strict scrutiny review by this court. Their contention then is that the County's recount process—that is, the state's statutory recount process—severely burdens the right to vote subjecting it to strict scrutiny review. (See *Short v. Brown, supra,* 893 F.3d at 677.)

Using strict scrutiny review, Petitioners contend Respondent's process (based on the Elections Code) violates equal protection and fundamental right to vote principles. Petitioners argue:

---

[6] In reply, Petitioners argue "the Legislature has opined that recounts should be affordable because "[e]nsuring accurate election outcomes should be a priority for the state." (Reply 9:18-19 [citing 1 JA 132].) As Respondent notes, however, Petitioner's reliance on the legislative history of Assembly Bill 44 is misleading. That the legislature enacted a mechanism for state-funded recounts under certain circumstances, but did not do so with voter requested recounts, demonstrates the Legislature's intent to have requestors assume recount costs under certain circumstances. Moreover, even assuming Petitioners correctly report the Legislature's intent, Respondent's duty pursuant to statute is to allocate the actual vote recount costs to a requestor. That is precisely what Respondent did here.

[7] Petitioners also cite *Bullock v. Carter* (1972) 405 U.S. 134 and *Harper v. Virginia State Bd. of Elections* (1966) 383 U.S. 663.

> "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 standard of review that requires additional balancing appropriate. (*Burdick*, 504 U.S. at p. 434.)" (Opening Brief 10:19-23.)

The authorities relied upon by Petitioners, however, concern laws directly impacting and burdening an individual's right to cast a vote or a voter's choice of candidates. *Bullock v. Carter, supra,* 504 U.S. at 143 recognizes some laws related to voting are subject to strict scrutiny while other are subject to rational basis review. Those laws subject to strict scrutiny review are those that have a direct impact on a voter and his/her right to cast a ballot such as poll taxes, financial limitations on candidates or dilution of votes.[8] (*Id.* at 142-143.)

No authorities relied upon by Petitioners inform on a voter's right to a recount. Similarly, none of the authorities suggest a voter has a fundamental right to a vote recount.[9]

---

[8] This is true of *Bush v. Gore* (2000) 531 U.S. 98 as well. In *Bush v. Gore,* the issue as framed by the United States Supreme Court was about "arbitrary and disparate treatment" where one person's vote could be valued over that of another. (*Id.* at 104-105.) Florida's vote recount process and lack of standards resulted in "unequal evaluation of ballots in various respects." (*Id.* at 106.) Lack of specific standards for a recount did "not satisfy the minimum requirement for nonarbitrary treatment of voters necessary to secure the fundamental right." (*Id.* at 105.) The recount process violated equal protection principles because the lack of uniform rules "led to unequal evaluation of ballots in various respects." (*Id.* at 106.)

[9] *Stein v. Thomas* (9th Cir. 2016) 672 Fed.Appx. 565 offers the most assistance to Petitioners. The court specified, however, "We do not decide there is a freestanding constitutional right to a recount." (*Id.* at 570.) As noted by Petitioners, *Stein v. Thomas* did state "once a legislature vests its citizens with election rights, those rights are fundamental and are protectable by the First and Fourteenth Amendments." *Stein v. Thomas* relied upon *League of Women Voters of Ohio v. Brunner* (6th Cir. 2008) 548 F.3d 463, 476 as support for its statement. Like the other cases relied upon by Petitioners, *League of Women Voters of Ohio v. Brunner* concerned allegations of a direct infringement of a voter's right to cast a ballot. (*Id.* at 467.) *Stein v. Thomas* clarified once the state provided a "right to a recount," the state "could not use arbitrary or unreasonable procedural rules to make that right a nullity." (*Stein v. Thomas, supra,* 672 Fed.Appx. at 569-570.) The *Stein v. Thomas* court concluded for purposes of reviewing a temporary restraining order the plaintiffs had made "colorable arguments that their state-created recount right was being arbitrarily abridged, and the relatively minimal stakes involved in staring the recount slightly earlier than it otherwise would have . . ." supported the district court's order. (*Id.* at 570.) Here, in this writ proceeding, the court cannot find allocating the

Petitioners' complaint here centers on the County's practice under the VCA of collecting ballots for any voter of the County at any voting center in the County. The VCA thus leads to the County not segregating ballots by precinct. Instead, the voted ballots are collected and segregated by vote center. A manual paper vote ballot recount for a City measure in an election conducted by the County requires the County to cull through the paper ballots cast throughout the County to "extract the original ballots" for the City—a time consuming process. (Patton Decl., ¶ 17.)

"The VCA does not burden anyone's right to vote." (*Short v. Brown, supra,* 893 F.3d at 677.) The VCA does not prevent anyone from exercising their fundamental right to vote. The VCA makes it easier to vote. The VCA does not dilute votes through an allocation system. The VCA has nothing to do with a voter's choice of candidates.

Petitioners argue the right to a recount is an election right. Petitioners note the California Constitution defines "vote" as "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." (Cal. Const., art. II, § 2.5)

As noted earlier, it is well settled that every law affecting elections is not subject to strict scrutiny. The United States Supreme Court in *Burdick v. Takushi, supra,* 504 U.S. at 433 explained:

> "Election laws will invariably impose some burden upon individual voters. . . . Consequently, to subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest, as petitioner suggests, would tie the hands of States seeking to assure that elections are operated equitably and efficiently. [] Accordingly, the mere fact that a State's system 'creates barriers . . . tending to limit the field of candidates from which voters might choose . . . does not of itself compel close scrutiny."

The right to vote is separate and distinct from the right to request and obtain a recount. Similarly, a right to obtain a vote recount is separate and distinct from the right to ensure one's vote is properly counted in the first instance.[10] Absent authority otherwise, on Petitioners'

County's actual cost of a vote recount to a requestor—as required by state law—is an arbitrary or unreasonable procedural rule eliminating a voter's right to a recount.

[10] Article II, section 2.5, of the California Constitution provides 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

showing, the court does not find laws related to the allocation of costs for vote recounts are subject to strict scrutiny because recount laws do not severely burden a voter's fundamental right to vote.[11]

Further, aside from the bald assertion, the court finds Petitioners have made no showing requiring a requestor to pay the County's actual costs for a vote recount request is "severe and discriminatory."[12] Petitioners suggest: "The severity and discriminatory nature of the minimum estimated recount cost is clear, as it is over three times higher than the filing fees adjusted for inflation (Opening Brief, fn. 4) that the Supreme Court held to be 'patently exclusionary' because of their 'very size.' (*Bullock v. Carter*, 405 U.S. at 144.) Petitioners could not afford any recount method." (Reply 11:5-9; Opening Brief 10, fn. 4.)

The United States Supreme Court's invalidation of the fee required to place a candidate on the ballot in *Bullock v. Carter*, however, directly denied some voters the opportunity to vote for a candidate thereby directly burdening the fundamental right to vote. Allocating the County's actual costs for a vote recount to the requestor does not burden the requestor's right to cast a ballot or limit candidates placed on the ballot. Petitioners' comparison of the cost of a recount to costs associated with placing a candidate on the ballot is not persuasive—one implicates the fundamental right to vote while the other does not.

Accordingly, the court finds Petitioners have not demonstrated the state statutes addressing cost allocation for vote recounts is subject to strict scrutiny review.

Compliance with Section 15360:

Section 15360, subdivision (a) provides:

> "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 devices, including vote by mail ballots . . . ."

Section 336.5 defines a "one percent manual tally" as follows:

> "the public process of manually tallying votes in 1 percent of the precincts, selected at random by the elections official, and in one percent for each race not

---

measures." Thus, having the ballot counted properly is different from a vote recount of the voted ballots.

[11] The allocation of costs is a policy decision—who should be responsible for a vote recount, the requestor or the taxpayers?

[12] Further, Respondent submits evidence that daily vote recount cost estimates ranging from $6,450.51 to $11,694.49 a day are reasonable and comparable to recount cost estimates in other counties. (Logan Decl., ¶ 10; 2 JA 375, 377-380.) Moreover, as noted earlier, nothing suggests the costs allocated to a requestor are not the County's actual costs of a vote recount.

included in the randomly selected precincts. This procedure is conducted during the official canvass to verify the accuracy of the automated count." (Elec. Code § 336.5, subd. (a).)

Section 336.5 continues at subdivision (b):

"In an election conducted using vote centers, a 1 percent manual tally can be conducted using the batch process set forth in Section 15360."

The batch process in section 15360 is described in the context of vote by mail ballots. (§ 15360, subd. (a)(2)(B)(i).) The batch system allows Respondent to select batches of ballots by random. (*Ibid.*) "[A] 'batch' means a set of ballots tabulated by the voting system devices, for which the voting system can produce a report of the votes cast." (*Id.* at subd. (a)(2)(B)(ii).)

Petitioners argue Respondent had a duty under section 15360 to conduct the one percent manual tally at the precinct level. Petitioners allege Respondent failed to do so. (Pet., ¶ 74.) According to Petitioners, Respondent's failure to manually sort ballots by precinct for the one percent manual tally operated "to pass along the costs of sorting ballots by precinct to recount requesters." (Opening Brief 17:2.)

Despite section 336.5, subdivision (b)'s instruction that a batch process may be used for the one percent manual tally where the election used vote centers, Petitioners contend section 15360 requires *both* a manual tally of the ballots in one percent of the precincts chosen at random and a manual tally of not less than one percent of the batches of vote by mail ballots.

Respondent argues Petitioners have misinterpreted the applicable statutes. Respondent asserts Petitioners' interpretation of the one percent manual tally process would render section 336.5, subdivision (b) superfluous. According to Respondent, section 336.5, subdivision (b) authorizes a batch process for all ballots for the manual tally where the election was conducted through vote centers authorized by the VCA.

The court agrees with Respondent. Section 336.5, subdivision (b) authorized the manner in which Respondent complied with section 15360.[13]

Propriety of the "Digital Ballot Image" Recount:

Petitioners argue the "digital ballot image" system (electronic retrieval and review of voted ballots) to conduct a vote recount is not authorized by the Elections Code. Petitioners maintain the electronic system cannot relieve Respondent of his obligation to provide a vote recount consistent with the Elections Code. Petitioners assert the Elections Code authorizes manual recounts of voted ballots only.

[13] Petitioners do not address the manual tally issue in reply. Thus, they do not suggest Respondent's interpretation and how he harmonizes the statutory scheme is inaccurate.

Petitioners explain the definition of "ballot" under section 301 contains no reference to an image of a ballot. The notion of ballots as something physical is also supported by the regulations governing recounts where the voting system discusses the physical handling of ballot cards suggesting the use of the actual paper ballots. (See e.g., 2 Cal. Code Regs. § 20832. ["Prior to counting the ballots, and in the clear view of the requestor, spokespersons and observers, all ballots for the precinct shall be separated into stacks that do and do not contain the contest. Those that contain the contest shall be sorted as follows . . . the counted ballot shall be placed on the table . . . ."])

Respondent refutes Petitioners' position arguing Petitioners' interpretation of section 301 is overly restrictive. Respondent explains section 301 defines "ballot" broadly, and ballots can be in paper or in electronic form. (See § 301, subd. (d). ["(d)(1) An electronic touchscreen upon which appears the names of candidates and ballot titles of measures to be voted on by touching the designated area on the screen for systems that do not contain a paper ballot. [¶] (2) An electronic touchscreen may qualify as a ballot even for systems that contain paper ballots if the votes are tabulated manually or by optical scanning equipment."])

The court need not resolve the parties' dispute as the issue is not relevant to the relief requested by Petitioners. Even assuming electronic retrieval and review of voted ballots is not a method of vote recount authorized by statute, Respondent did not suggest the method to supersede the vote recount method specified in the Elections Code. (Olvera Decl., ¶ 7. ["At all times during the Measure A recount, Petitioners had all of the recount options available to them, including the manual recount with paper ballot option and the machine recount option in addition to the ballot image on screen and in print options."]) That Respondent offered an alternative means by which Petitioners could obtain a vote recount is not material to the question of whether Respondent's estimated charge for a vote recount is permissible, or whether Respondent failed to comply with section 15360.

CONCLUSION

Based on the foregoing, the petition for writ of mandate is denied.

IT IS SO ORDERED.

August 13, 2021

Hon. Mitchell Beckloff
Judge of the Superior Court