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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN DIEGO

In the Matter of the Contested Election of Dick
Murphy, for the Office of City of San Diego
Mayor,

STEVEN CURRIE and LOU CONDE,

Contestants,

v.

MAYOR DICK MURPHY, in his capacity as the
certified winner of the November 2, 2004, City of
San Diego General Municipal Election for the
Office of Mayor,

Defendant.

BRIAN LAWRENCE, GAIL ROJAS and
SANDRA ZATT,

Contestants,

v.

DICK MURPHY,

Defendant..

Case Nos. GIC 840576
GIC 840839

**TRIAL BRIEF OF
CONTESTANTS
LAWRENCE, ROJAS, AND
ZATT**

Date: January 31, 2005
Time: 9:30 a.m.
Dept: Presiding Dept.
Hon. Michael Brenner

CONTENTS

TABLE OF AUTHORITIES	iii
INTRODUCTION	1
I. SAN DIEGO CITY LAW GOVERNS THE COUNTING OF VOTES IN THIS ELECTION, AND UNDER CITY LAW, WRITE-IN VOTES ARE TO BE COUNTED AS LONG AS A QUALIFIED WRITE-IN CANDIDATE'S NAME IS WRITTEN ON THE LINE PROVIDED FOR THAT PURPOSE	7
A. The Only Requirement for Counting a Write-in Ballot in a Municipal Election Under San Diego City Law Is That the Name of a Qualified Write-in Candidate Be Written in the Blank Space Provided for That Purpose	8
B. Under San Diego's Constitutional "Home Rule" Authority, City Law Governs the Counting of Write-in Ballots in This Municipal Election Even If It Had Been Consolidated with the Statewide General Election	10
C. The November 2004 Mayoral Election Was Not in Fact Lawfully Consolidated with the Statewide General Election. Rather, the Registrar of Voters Simply Rendered "Specified Services" in Conducting the Municipal Election for the City Clerk	16
D. Every Other Aspect of the City's November 2004 Election, Including the Nomination of Write-in Candidates, Was Governed by City Law, Not State Law	21
II. PROPERLY INTERPRETED, ELECTIONS CODE SECTION 15342 DOES NOT PROHIBIT THE COUNTING OF WRITE-IN VOTES DURING A MANUAL RECOUNT WHEN THE VOTER'S INTENT IS CLEAR, EVEN IF THE OVAL NEXT TO THE WRITE-IN LINE HAS NOT BEEN FILLED IN	24
A. The Legislative History of Section 15342 Gave No Indication That Its Enactment Would Result in Disenfranchising Any Voters Simply for Failing to Fill in the Oval Next to the Write-in Space	25
B. The Placement of Section 15342 in the Chapter of the Elections Code Governing the Official Canvass Is Consistent With an Interpretation That the Prohibition Against Counting Write-in Votes Without the Oval Filled Applies Only to the Automated Tabulation of Ballots During the Canvass, Not During Any Subsequent Manual Recount	27
C. Section 15342 Should Be Construed in Light of the Purposes for Which It Was Enacted and in Relationship to the Whole Statute of Which It Is a Part	28

1	D.	Interpreting Section 15342 to Permit the Counting of “Unbubbled”	
2		Write-in Ballots During a Manual Recount Is Consistent with the	
3		Fundamental Principle That Election Statutes Must Be Construed	
		Liberally So as Not to Disenfranchise Voters If Any Such Construction	
		Is Possible	31
4	E.	Other States Require the Counting of Write-in Ballots During a Manual	
5		Recount Even When the Optical-Scan Oval Is Not Filled In	32
6	F.	To Avoid Any Doubts about Its Constitutionality, Section 15342 Must	
7		Not Be Construed to Require the Disenfranchisement of Thousands of	
		Voters for Merely Neglecting to Fill in the Oval Next to the Write-in	
		Voting Space	35
8	III.	BECAUSE THE FAILURE TO FILL IN THE OVAL NEXT TO THE	
9		WRITE-IN LINE DOES NOT THREATEN THE INTEGRITY OF THE	
10		ELECTORAL PROCESS OR THE SECRECY OF THE BALLOT, THE	
		VOTERS’ INTENT MUST BE GIVEN EFFECT DESPITE THEIR	
11		NONCOMPLIANCE WITH THE TECHNICAL REQUIREMENTS OF THE	
		STATUTE	36
12	IV.	IF ELECTIONS CODE SECTION 15342 WERE INTERPRETED TO	
13		PROHIBIT THE COUNTING OF THOUSANDS OF WRITE-IN VOTES	
14		DURING A MANUAL RECOUNT JUST BECAUSE THE VOTERS	
15		NEGLECTED TO FILL IN AN OVAL NEXT TO THE WRITE-IN	
		CANDIDATE’S NAME, IT WOULD DENY THOSE VOTERS THEIR	
		CONSTITUTIONAL RIGHTS TO VOTE AND TO THE EQUAL	
		PROTECTION OF THE LAWS	43
16	CONCLUSION		48

TABLE OF AUTHORITIES

Federal Cases

<i>Black v. McGuffage</i> (N.D. Ill. 2002) 209 F.Supp.2d 889	4
<i>Burdick v. Takushi</i> (1993) 504 U.S. 428	45
<i>Bush v. Gore</i> (2000) 531 U.S. 98	4, 35, 46
<i>Carrington v. Rash</i> (1965) 390 U.S. 89	46
<i>Davis v. Bandemer</i> (1986) 478 U.S. 109	44
<i>Dunn v. Blumstein</i> (1971) 405 U.S. 330	45
<i>Harper v. Virginia State Bd. Of Elections</i> (1966) 383 U.S. 663	45
<i>Norman v. Reed</i> (1992) 502 U.S. 279	36
<i>Partnoy v. Shelley</i> (S.D. Cal. 2003) 277 F.Supp.2d 1064	45
<i>Reynolds v. Sims</i> (1964) 377 U.S. 533	2
<i>Wesberry v. Sanders</i> (1964) 376 U.S. 1	2

State Cases

<i>Assembly v. Deukmejian</i> (1982) 30 Cal.3d 638	40
<i>Association for Retarded Citizens v. Department of Developmental Services</i> (1985) 38 Cal.3d 384	36
<i>Bruce v. Gregory</i> (1967) 65 Cal.2d 666	30
<i>California Fed. Savings & Loan Assn. v. City of Los Angeles</i> (1991) 54 Cal.3d 1	13
<i>Castagnetto v. Superior Court</i> (1922) 189 Cal. 673, 209 P. 549	41
<i>Castro v. State of California</i> (1970) 2 Cal.3d 223	45
<i>City of Redwood City v. Moore</i> (1965) 231 Cal.App.2d 563	14
<i>County of Contra Costa v. East Bay Municipal Utility District</i> (1964) 229 Cal.App.2d 556	17
<i>Enterprise Residents Legal Action Against Annexation Committee v. Brennan</i> (1978) 22 Cal.3d 767	1, 37
<i>Escalante v. City of Hermosa Beach</i> (1987) 195 Cal.App.3d 1009	39

1	<i>Fair v. Hernandez</i> (1981) 116 Cal.App.3d 868	42
2	<i>Fair v. Hernandez</i> (1982) 138 Cal.App.3d 578	38, 43
3	<i>Freedom Newspapers, Inc. v. Orange County Employees Retirement System</i>	
4	(1993) 6 Cal.4th 821	25
5	<i>Harder v. Denton</i> (1935) 9 Cal.App.2d 607	14
6	<i>Hedlund v. Davis</i> (1956) 47 Cal.2d 75	2, 37
7	<i>In re Election of Medina City Council Position 4</i>	
8	King Co. [Wash.] Super. Ct. No. 03-2-41552-9 (Dec. 18, 2003)	34
9	<i>In re Gray-Sadler</i> (N.J. 2000) 164 N.J. 468, A.2d 1101	40
10	<i>Johnson v. Bradley</i> (1992) 4 Cal.4th 389	13, 14
11	<i>Knowles v. Yates</i> (1866) 31 Cal. 82	39
12	<i>Lawing v. Faull</i> (1964) 227 Cal.App.2d 23	15
13	<i>Mackey v. Thiel</i> (1968) 262 Cal.App.2d 362	12, 14
14	<i>McFarland v. Spengler</i> (1926) 199 Cal. 147, 248 P. 521	41, 42
15	<i>McMillan v. Siemon</i> (1940) 36 Cal.App.2d 721	32
16	<i>Otsuka v. Hite</i> (1966) 64 Cal.2d 596	37
17	<i>People v. Davenport</i> (1939) 13 Cal.2d 681	29
18	<i>Rees v. Layton</i> (1970) 6 Cal.App.3d 815	14
19	<i>Rideout v. City of Los Angeles</i> (1921) 185 Cal. 426	38
20	<i>San Diego Union v. City Council</i> (1983) 146 Cal.App.3d 947	25
21	<i>Scheafer v. Herman</i> (1916) 172 Cal. 338	15, 16
22	<i>Scott v. Kenyon, supra</i> , 16 Cal.2d at 202	38
23	<i>Socialist Party v. Uhl</i> (1909) 155 Cal. 776	12
24	<i>Trader Sports, Inc. v. City of San Leandro</i> (2001) 93 Cal.App.4th 37	12
25	<i>Walters v. Weed</i> (1988) 45 Cal.3d 1	37
26	<i>Wilks v. Mouton</i> (1986) 42 Cal.3d 400	2, 33, 38, 39

State Statutes

1	1 Fla. Admin. Code, Rule 1S-2.027(3)	35
2	Fla. Stats. Annot., § 102.166(5)(b)	35
3	Cal. Const., art. XI, § 5	11
4	Cal. Admin. Code, § 439.1	18
5	Cal. Elec. Code,	
6	§ 362	33
7	§ 8600(b)	21
8	§ 8604	21
9	§ 10102	22
10	§ 10220	21
11	§ 10228	21
12	§ 10401	17
13	§ 10418	22
14	§ 13107	22
15	§ 14251	30
16	§ 15154	31
17	§ 15210	31
18	§ 15342	<i>passim</i>
19	§ 15342, subd. (a)	5, 34
20	§ 19001	2, 37
21	Cal. Stats. 1998, ch. 1073 (SB 627)	25
22	Wash. Rev. Code,	
23	§ 29.04.180	33
24	§ 29A.60.021	34
25		
26	Miscellaneous	
27	Cal. Governor’s Office of Planning and Research,	
28	Enrolled Bill Report for SB 627	25

1	San Diego Co. Admin. Code, § 439.1	17, 18
2	San Diego City Charter,	
3	art. II, § 8	8, 19
4	art. II, § 10	19, 21
5	art. III, § 13	19
6	art. VII, ch. 2	8
7	art. XI, § 5, subd. (b)	11
8	San Diego Muni. Code,	
9	§ 27.0101	8, 9, 13, 14, 21
10	§ 27.0111	20
11	§ 27.0106, subd. (a)	20
12	§ 27.0106, subd. (d)	9
13	§ 27.0311, subd. (c)	21
14	§ 27.0603	23
15	§ 27.0636	5, 9
16	Washington Secretary of State, Procedural Guidelines for Manual Recount,	
17	Governor Race	34
18		
19		
20		
21		
22		
23		
24		
25		
26		
27		
28		

INTRODUCTION

Twenty-five years ago, the Supreme Court emphasized that the court's foremost obligation in an election contest is to determine and implement the will of the people as expressed at the ballot box: "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." (*Enterprise Residents Legal Action Against Annexation Committee v. Brennan* (1978) 22 Cal.3d 767, 774.)

The "public volition" in this case has been frustrated by the unlawful and arbitrary refusal of the San Diego County Registrar of Voters to count the votes of more than 5,500 San Diego voters who unambiguously marked their ballots for write-in candidate Donna Frye in the November 2004 mayoral election, but who neglected to also fill in the little oval in front of the write-in line. The failure to count these votes has not only resulted in the unconstitutional disenfranchisement of these 5,500 voters, but it has thwarted the will of the entire San Diego electorate, for more voters cast their ballots for Donna Frye — over 160,000 in total — than for any other candidate in the November mayoral election.

In most elections, the number of votes separating the candidates is sufficiently great that the outcome would not be affected by disputes over the counting of particular ballots. Occasionally, however, an election is so close — or the number of disputed ballots so great — that the outcome hinges upon a determination as to how certain identified ballots should be counted. The November 2004 San Diego mayoral election was such an election, and this election contest is the judicial proceeding that the Legislature has established for the purpose of resolving the dispute. In cases like this, it is the Court's responsibility to rule on any ballots that are brought to it for resolution, to modify the certified vote total to reflect any changes resulting from the Court's rulings, and to declare the candidate with the greatest number of votes the winner.

In making its determinations on the disputed ballots in this case, the Court must be guided by the overriding principle that the election laws must be *liberally construed* so that *the true will* of the voters will not be defeated by their failure to comply with every technical

1 requirement of the Elections Code. In a democratic society, elections are supposed to be the
2 mechanism for determining which candidate has the greatest popular support among the
3 voters. While certain rules are necessary to protect the integrity of the process and must
4 therefore be strictly enforced to guard against voter fraud or to preserve the secrecy of the
5 ballot, other rules — like the “fill in the oval” requirement at issue in this case — exist solely
6 for the convenience of the elections officials in tabulating the votes and are not essential to
7 safeguarding the fairness of the election or determining the popular will. The Supreme Court
8 has consistently distinguished between these two different types of requirements, holding
9 that “where there has been no fraud, tampering or coercion, departure from the technical
10 requirements of the statute will not disenfranchise voters who had no knowledge that they
11 had failed to comply.” (*Wilks v. Mouton* (1986) 42 Cal.3d 400, 412.) The Legislature has
12 likewise warned against an unnecessarily strict interpretation and application of the Elections
13 Code, qualifying the rules therein with the explicit caveat that they “shall be liberally
14 construed so that the real will of the electors will not be defeated by any informality or
15 failure to comply with all of the provisions of the law.” (Elec. Code, § 19001.)

16 The Legislature and the courts have developed this principle of liberal construction
17 in appreciation of the fundamental nature of the right to vote and in recognition that it would
18 violate the Constitution to deprive citizens of their franchise based upon their failure to
19 comply with some technical requirement that was not necessary to preserve the integrity of
20 the elections process. “The right to vote freely for the candidate of one’s choice is the
21 essence of a democratic society, and any restrictions on that right strike at the heart of
22 representative government.” (*Reynolds v. Sims* (1964) 377 U.S. 533, 555 fn. 28.) “No right
23 is more precious in a free country than that of having a voice in the election of those who
24 make the laws under which, as good citizens, we must live. Other rights, even the most
25 basic, are illusory if the right to vote is undermined.” (*Wesberry v. Sanders* (1964) 376 U.S.
26 1, 17.) Accordingly, “every reasonable presumption and interpretation is to be indulged in
27 favor of the right of the people to exercise the elective process.” (*Hedlund v. Davis* (1956)

1 47 Cal.2d 75, 81.)

2 The evidence at trial will establish that there are more than 5,500 ballots with Donna
3 Frye’s name clearly written on them that were not counted as votes for candidate Frye solely
4 because the voters had neglected to also fill in the oval next to her name. Contestants
5 presented these ballots to the Registrar during the course of a manual recount, so that each
6 ballot could be examined individually to determine the voter’s intent. Yet despite the voters’
7 unambiguous expression of their intent to cast their ballots for Donna Frye by writing her
8 name on the space provided for that purpose, the Registrar still refused to count any of these
9 ballots as votes for Frye — relying on the “fill in the oval” requirement that not only has no
10 bearing on the integrity of the elections process, but which serves *absolutely no purpose* in
11 the context of a recount, when each ballot is being counted by hand rather than by machine.
12 By refusing to count these votes without any rational, much less compelling, justification,
13 the Registrar unconstitutionally denied thousands of San Diego voters their fundamental right
14 to vote — and to have their vote counted — in the mayoral election.

15 These voters were also deprived of a second fundamental constitutional right: their
16 entitlement to the equal protection of the laws. Precisely because the law requires that every
17 effort be made to *give effect* to the will of the voters in order to protect their right to vote,
18 election officials — with the blessing, if not at the express direction, of the Elections Code
19 — routinely disregard the voters’ failure to follow the voting instructions and will
20 nevertheless *count* their ballots when the voter’s intent can be ascertained from a manual
21 examination of the ballot. Indeed, as will be demonstrated by the testimony in this case,
22 election officials often go to *extraordinary lengths* to count these ballots, going so far as to
23 correct the voters’ mistakes for them — by “enhancing” incomplete markings and “taping
24 over” extraneous marks — all to ensure that the ballot will be properly counted consistent
25 with the voter’s intent.

26 Yet the Registrar of Voters refused to employ the same “intent of the voter” standard
27 to count the 5,500 write-in ballots cast for Donna Frye in which the voters had similarly
28

1 failed to comply fully with the voting instructions by not filling in the little oval next to the
2 write-in line. The Registrar claims that she was required to reject these ballots by the state
3 Elections Code. Contestants disagree, and we will demonstrate that the section relied upon
4 by the Registrar — section 15342 — was intended to apply only to the *machine tabulation*
5 of ballots that occurs during the official canvass, not during any subsequent manual recount
6 of the ballots. But whether the Registrar’s action was consistent with state law or not, her
7 refusal to apply the same “intent of the voter” standard to these “unbubbled” write-in ballots
8 as she applied to every other “defective” ballot in the mayoral election violates the equal
9 protection guarantee. As was the case in the Florida recount condemned by the U.S.
10 Supreme Court in *Bush v. Gore* (2000) 531 U.S. 98, the procedures and standards employed
11 by the Registrar resulted in the “arbitrary and disparate treatment” of the votes cast in this
12 election, unconstitutionally “valu[ing] one person’s vote over that of another.” (*Id.*, at
13 p. 104-05.)¹

14 The failure to count the 5,500 “unbubbled” write-in ballots cast for Donna Frye in this
15 election thus violated two of the constitutional pillars of our democratic system of
16 government. But, consistent with the principle that courts should avoid adjudicating
17 constitutional disputes unless absolutely necessary, this Court need not address the
18

19
20 ¹The Registrar’s interpretation of state law implicates the Equal Protection Clause in
21 another way, too, for it makes the determination of whether a large class of write-in votes
22 will count depend not on the intent of the voter, but on the particular type of voting
23 technology used in the election. In elections using punchcard systems, Inka-Vote, or
24 touchscreen technologies — as San Diego elections had employed for *every election prior*
25 *to this one* — voters are not required to *both* write in a name and fill in an oval next to it.
26 That additional requirement is imposed only with the type of optical-scan voting system used
27 in the November 2004 mayoral election, and — if the Registrar’s interpretation were to be
28 upheld — it would result in the disqualification of almost 3.5% of the write-in ballots
containing Donna Frye’s name. The use of these different voting systems with their different
requirements and substantially varying disqualification rates treats write-in voters differently
and makes it less likely that voters casting write-in ballots on an optical-scan system will
have their vote counted — a violation of the Equal Protection Clause under *Bush v. Gore*.
(See *Black v. McGuffage* (N.D. Ill. 2002) 209 F.Supp.2d 889.)

1 constitutionality of the Registrar’s actions or of the Elections Code section on which she
2 relied, because this election contest can readily be resolved on any of three alternative
3 grounds.

4 First, the law that applies in determining whether the “unbubbled” write-in votes
5 should be counted in this municipal election is not state law, but San Diego’s own municipal
6 law, which expressly requires that “[a]ny name written upon a municipal election or special
7 election ballot . . . **shall be counted** for the office for which it was written, *if it is written in*
8 *the blank space provided therefor.*” (San Diego Municipal Code (“SD Muni. Code”),
9 § 27.0636.) As a charter city, San Diego’s laws governing municipal elections prevail over
10 any conflicting state laws, so even if the state Elections Code were to be interpreted as
11 requiring voters to fill in the oval next to the write-in candidate’s name in order to have the
12 ballot counted during a manual recount in a consolidated election, San Diego’s conflicting
13 municipal code provision — which requires only that the voter write in the candidate’s name
14 on the appropriate line in order for the vote to be counted — prevails and mandates that the
15 5,500 “unbubbled” Frye votes be counted.²

16 Second, even if state law were deemed to be applicable to the November mayoral
17 election, the provision of the state Elections Code relied upon by the Registrar — Elections
18 Code section 15342, subdivision (a) — does not preclude the counting of “unbubbled” write-
19 in ballots *during the course of a manual recount*, as was conducted following the completion
20 of the canvass in this election at the request of Contestants. As the legislative history of the
21 bill (SB 627) amending section 15342 makes abundantly clear, its intent was to make
22 technical and noncontroversial changes “to bring the *election day and canvassing procedures*
23 into conformance with modern election administration procedures and technology.” The

24
25 ²Furthermore, as is discussed in greater detail below, the San Diego mayoral election
26 was never actually consolidated with the statewide general election in November, and thus
27 the state statutes purporting to apply state law to all aspects of the consolidated elections
28 were never triggered in the first place. Rather, the San Diego Registrar of Voters was merely
retained by the City of San Diego to provide “specified services” in conducting the city
election, with the city law still governing in case of any conflict with state law.

1 Legislature was never advised — and never intended — that the bill would alter the
2 longstanding “intent of the voter” standard that had always governed election officials when
3 examining ballots during a manual recount, somehow carving out a single exception to that
4 rule and requiring the disenfranchisement of voters who had cast write-in ballots but had
5 neglected to fill in the oval next to the write-in candidate’s name. When properly construed
6 in light of the purposes for which it was enacted and in relation to the whole of the Elections
7 Code — as the established canons of statutory interpretation require — section 15342 only
8 requires the oval next to the write-in candidate’s name be filled in for the vote to be counted
9 in the *machine tabulation* of ballots as part of the official canvass, when the oval must indeed
10 be filled in so that the optical scanners can properly “read” and record the vote. Section
11 15342 does not similarly require — and it would be absurd to read such a requirement into
12 the statutory scheme — that the oval be filled in for the vote to be counted during any
13 subsequent *manual recount*, when each ballot is reviewed individually by hand. In this
14 context, imposing a requirement that the oval be filled in for the vote to be counted serves
15 no rational purpose at all, but would only impose an unwarranted burden on the
16 constitutional rights of write-in voters, because the ballots are not being read by a machine
17 and the voter has made his or her intent clear by the much more demonstrative act of writing
18 in the candidate’s name itself in the appropriate space on the ballot.

19 Finally, as the Supreme Court has held on numerous occasions, the 5,500 voters who
20 made the effort to write Donna Frye’s name on their ballots but neglected to fill in the
21 accompanying oval should not be deprived of their fundamental right to vote where, as here,
22 they substantially complied with the statutory scheme. As noted above, the requirement to
23 fill in the oval next to the write-in space, in addition to writing in the candidate’s name,
24 exists solely to aid the elections officials in efficiently tabulating the votes during the canvass
25 period; a voter’s failure to comply with that requirement does not threaten the integrity of
26 the election or violate the secrecy of the ballot. Especially given the circumstances of the
27 present case, in which San Diego voters were using an optical-scan system for the first time
28

1 and the instructions issued to them by the elections officials were incomplete, confusing, and
2 at times simply incorrect, the voters' departure from the technical requirements of the statute
3 will not provide grounds for disenfranchising those voters and preventing the "fair expression
4 of the popular will" from being implemented.

5 While this case may require the Court to become immersed in many of the details of
6 election law and procedures, the Court's task will be simplified by the relative absence of any
7 real factual disputes and, perhaps more fundamentally, by the agreement of all parties that
8 this election contest is indeed the appropriate vehicle to resolve the legal issues that have
9 arisen regarding these disputed ballots. In the end, therefore, the Court will be left standing
10 on comfortable terrain, being asked to perform the traditional judicial function of dispensing
11 justice appropriate to the circumstances of this case and in accordance with the
12 Constitution's requirements and the Legislature's intent. And when the Court performs that
13 function, it will be clear that the 5,500 ballots that so clearly indicate the voters' intent to cast
14 their ballots for Donna Frye must indeed be counted, and that Donna Frye is entitled to be
15 declared elected to the office of Mayor of San Diego.

16 **I. SAN DIEGO CITY LAW GOVERNS THE COUNTING OF VOTES IN**
17 **THIS ELECTION, AND UNDER CITY LAW, WRITE-IN VOTES ARE**
18 **TO BE COUNTED AS LONG AS A QUALIFIED WRITE-IN**
19 **CANDIDATE'S NAME IS WRITTEN ON THE LINE PROVIDED FOR**
20 **THAT PURPOSE**

21 As noted in the Introduction, the Registrar misinterpreted and unconstitutionally
22 applied Elections Code section 15342³ to disenfranchise 5,500 San Diego voters by refusing
23 to count the "unbubbled" write-ballots cast for Donna Frye even when those ballots were
24 being individually reviewed by hand to determine the voters' intent. The Court need not
25 reach those issues, however, because the Registrar and the San Diego City Council should
26 not even have been looking to this provision of state law to govern the counting of write-in
27 ballots in the first place. The City of San Diego has a municipal law that expressly addresses
28 the issue of when write-in votes should be counted, and that law unambiguously states that

³Unless otherwise noted, all statutory references are to the California Elections Code.

1 write-in votes “shall be counted” whenever the name of a qualified write-in candidate like
2 Donna Frye has been written in the blank space provided on the ballot for that purpose —
3 regardless of whether or not an oval is filled in. Because, as a “home rule” charter city, San
4 Diego’s municipal laws governing its municipal elections prevail over any conflicting state
5 laws, the “unbubbled” write-in votes cast for Donna Frye must be counted.

6 **A. The Only Requirement for Counting a Write-in Ballot in a**
7 **Municipal Election Under San Diego City Law Is That the Name of**
8 **a Qualified Write-in Candidate Be Written in the Blank Space**
9 **Provided for That Purpose**

10 Pursuant to its “home rule” authority as a charter city, the City of San Diego has
11 enacted its own laws governing write-in candidacies in all municipal elections. Notably,
12 these laws do not require that an oval be filled in before the write-in candidate’s name in
13 order for the vote to be counted. To the contrary, San Diego city law is explicit that all the
14 voter need do in order for his or her write-in vote to be counted is to write in a qualified
15 candidate’s name on the line provided for that purpose on the ballot.

16 San Diego City Charter article II, section 8 declares that “the Council shall adopt an
17 election code ordinance, providing an adequate *and complete procedure* to govern municipal
18 elections, including the nomination of candidates for all elective offices. *All elections*
19 *provided for by this charter, whether for choice of officers or submission of questions to the*
20 *voters, shall be conducted in the manner prescribed by said election code ordinance.”*
21 (Emphasis added.) The election code ordinance mandated to be adopted by the City Charter
22 is found in chapter 2, article 7 of the San Diego Municipal Code. Significantly, section
23 27.0101 states that the Election Code’s purpose is “to provide an expeditious *and complete*
24 *procedure* for the people’s right to exercise the vote,” and that “[i]f there is any ambiguity
25 or contradiction between the provisions of general law and the provisions of this article, *the*
26 *provisions of this article shall govern.”* (Emphasis added.)

27 The City’s election code ordinance includes a comprehensive set of procedures
28 governing write-in candidacies. Division 3 (commencing with section 27.0301) is entitled
“Write-In Candidates” and sets forth in great detail what an individual needs to do in order

1 to qualify as a write-in candidate. Division 6 (commencing with section 27.0601) deals with
2 ballots and ballot materials, explaining that its intent is, *inter alia*, “to provide uniform
3 procedures to better ensure a fair and impartial administration of these requirements.”
4 Included in Division 6 of the City’s Election Code is section 27.0636, entitled “Counting of
5 Write-In Votes,” which declares:

6 “To clarify the process for selection of candidates described in Section 10 of
7 the Charter of the City of San Diego as modified by *Canaan v. Abdelnour*, 40
Cal.3d 703 (1986), the following shall apply:

8 “Write-in candidates are permitted in all municipal elections and special
9 elections. *Any name written upon a municipal election or special election*
10 *ballot, including a reasonable facsimile of the spelling of such name, **shall be***
11 ***counted** for the office for which it was written, if it is written in the blank*
space provided therefor, unless prohibited by the provisions of Section
27.0637 of this article [requiring the filing of a declaration of write-in
candidacy].” (Emphasis added.)

12 It could hardly be more clear, then, that under city law, *all* that is required for a write-
13 in vote to be counted is that the name of a qualified write-in candidate be written in the blank
14 space on the ballot provided for that purpose. There is no requirement anywhere in the
15 City’s comprehensive Election Code that an oval must be filled in next to the write-in
16 candidate’s name in order for the vote to be counted; any such requirement is contained (if
17 at all) solely in *state* law, which by the express terms of Municipal Code section 27.0101
18 must yield to the provisions of the Municipal Code in case of a “contradiction.”⁴
19

20 ⁴Defendant Murphy argues in his Trial Brief that Municipal Code section 27.0636 was
21 enacted at a time when the City of San Diego used punch-card ballots that had no boxes or
22 ovals to fill in for write-in candidates, and that with the abolition of punch-card ballots, the
23 section should no longer be deemed to be “controlling” and state law — namely, section
24 15342(a) — should be relied upon “for guidance” pursuant to Municipal Code section
25 27.0106(d). (See Murphy Trial Brief (“Murphy TB”), pp. 41-44.) Regardless of the original
26 motivation behind section 27.0636’s enactment, however — and Defendant has presented
27 *no actual evidence* to support the suggestion in his Trial Brief that the section was intended
to apply *only* to punch-card ballots — the fact remains that section 27.0636 remains on the
City’s books (indeed, it was amended as recently as 1999) and explicitly sets forth the
requirements for counting write-in votes. If the City wishes to impose different or additional
requirements, they must amend section 27.0636.

1 **B. Under San Diego’s Constitutional “Home Rule” Authority, City**
2 **Law Governs the Counting of Write-in Ballots in This Municipal**
3 **Election Even If It Had Been Consolidated with the Statewide**
4 **General Election**

5 Defendant Murphy asserts that Elections Code section 15342 applies to the counting
6 of write-in ballots in the November 2004 San Diego mayoral election, notwithstanding the
7 contradictory provisions of the San Diego Municipal Code, because (a) the City allegedly
8 consolidated its municipal election with the statewide election held that same date, and
9 (b) the state law supposedly says that, once consolidated, state law governs with respect to
10 all election issues. (Murphy TB, pp. 14-17.) Judge Helgesen, in a single sentence in his
11 ruling on Petitioners’ ex parte TRO application in the *League of Women Voters* case,
12 likewise concluded that because the municipal election had apparently been conducted as a
13 consolidated election, the state Elections Code was the controlling authority. (See Murphy
14 TB, p. 18 (quoting from Judge Helgesen’s ruling).)

15 Both Defendant Murphy and Judge Helgesen err in their reasoning, however, because
16 the consolidation of the municipal election with the statewide election (assuming only for
17 the sake of the present argument that such a consolidation in fact occurred) does not *end* the
18 analysis of which law applies to the municipal election, but only *begins* that analysis. That
19 is, the alleged consolidation is what *sets up the conflict* between city law and state law in the
20 first place; in the absence of consolidation, there would be no doubt that all of the provisions
21 of city law govern this municipal election. It is *only* because the city election was
22 supposedly consolidated with the state election that the question *even arises* as to which law
23 now governs the city election. Consolidation therefore *raises* the question; it does not

24 _____
25 Contestants would also note that although the San Diego City Attorney’s recently-
26 issued memorandum also traces the derivation of section 27.0636 back to the days when the
27 City used punch-card ballots for its municipal elections, the memorandum does not suggest
28 that the provision is no longer applicable in municipal elections, but instead expressly states
that “the SDMC procedures for write-in voting do not require any marks to be made on the
ballot other than writing of the candidate’s name in the appropriate space.” (San Diego City
Attorney’s January 21, 2005 Memorandum of Law (“City Atty. Memo”), p. 4.)

1 *answer* it.

2 Instead, the *answer* follows from a traditional “municipal affairs” analysis of a
3 purported conflict between state and city law under the “home rule” provisions of the
4 California Constitution. Neither Defendant Murphy in his Trial Brief nor Judge Helgesen
5 in his *League of Women Voters* decision performed any such analysis, but if they had, the
6 answer would be quite clear: When it comes to the conduct of municipal elections and the
7 “manner” in which city officers are elected, city law prevails over any conflicting provisions
8 of state law — no matter how much the Legislature may have intended or desired for state
9 law to apply.⁵

10 Article XI, section 5, of the California Constitution grants “home rule” authority to
11 charter cities like San Diego. With respect to “municipal affairs,” the laws of a charter city
12 prevail over and supersede any inconsistent state laws. In particular, article XI, section 5,
13 subdivision (b) grants charter cities “plenary authority” over four “core” subject matters,
14 including the “conduct of city elections” and “the manner in which, the method by which,
15 the times at which, and the terms for which the several municipal officers . . . shall be
16 elected.”⁶

17 _____
18 ⁵To its credit, the City Attorney’s Memorandum recognized that the conflict between
19 the provisions of state and city law regarding the counting of write-in votes must be resolved
20 using a “municipal affairs,” but it then engaged in an incomplete and incorrect analysis of
21 the issue, concluding that the conduct of the municipal election should be considered a
22 “statewide concern.” (City Atty. Memo, pp. 5-9.) Inexplicably, the City Attorney’s
23 Memorandum contained absolutely no mention of article XI, section 5, subdivision (b) —
24 which, as set forth below, grants charter cities “plenary authority” over the manner in which
25 city officers are elected, to the exclusion of any conflicting state law provisions.

26 ⁶Article XI, section 5, subdivision (b) provides:

27 “It shall be competent in all city charters to provide, in addition to those
28 provisions allowable by this Constitution, and by the laws of the State for:
(1) the constitution, regulation, and government of the city police force
(2) subgovernment in all or part of a city (3) *conduct of city elections* and
(4) *plenary authority is hereby granted*, subject only to the restrictions of this
article, *to provide therein* or by amendment thereto, *the manner in which, the*

1 A long line of cases, both older and more recent, makes clear that this constitutional
2 grant of plenary “home rule” authority means that the laws of charter cities dealing with
3 municipal elections prevail over any conflicting state laws, no matter how justified the state
4 law may be as a matter of “statewide concern” and no matter how much the state Legislature
5 may want state law to apply. In *Mackey v. Thiel* (1968) 262 Cal.App.2d 362, for example,
6 the court held that the provisions of local law regarding the form of ballots and the contents
7 of sample ballot pamphlets prevailed over conflicting general state law provisions because
8 “local municipal elections are strictly municipal affairs.” (*Id.*, at p. 364.) Consequently,
9 since there was no provision in the City of Los Angeles’ Election Code that provided for the
10 mailing of candidate qualification statements to the voters along with the sample ballots, the
11 state Elections Code provision allowing candidates to include such statements in the ballot
12 pamphlets did not apply.⁷

13 Similarly, in *Trader Sports, Inc. v. City of San Leandro* (2001) 93 Cal.App.4th 37, the
14 court held that a state Government Code requirement that any ordinance proposing a local
15 tax increase must first be approved by a two-thirds vote of the city council did not supersede
16 the provisions of the City of San Leandro’s charter and municipal code permitting a tax

18 *method by which, the times at which, and the terms for which the several*
19 *municipal officers and employees whose compensation is paid by the city shall*
20 *be elected or appointed, and for their removal, and for their compensation, and*
21 *for the number of deputies, clerks and other employees that each shall have,*
22 *and for the compensation, method of appointment, qualifications, tenure of*
office and removal of such deputies, clerks and other employees.” (Emphasis
added.)

23 ⁷The Court of Appeal in *Mackey* did not dispute that the state Elections Code’s
24 provision authorizing the distribution of candidate qualification statements to each voter
25 reflected a legitimate statewide concern for “the creation of an informed and educated
26 electorate on a statewide basis.” (*Id.*, at p. 365.) The court nevertheless concluded that the
27 state was precluded from enforcing the provision in charter city elections because “California
28 courts have already determined that the conduct of municipal elections is a municipal affair
and subject to municipal control.” (*Ibid.* [citing *Socialist Party v. Uhl* (1909) 155 Cal. 776,
788].)

1 measure to be placed on the ballot by a simple majority vote of the Council. As the Court
2 of Appeal there explained:

3 “[U]nder California’s Constitution, charter cities have been specifically
4 granted the power to manage certain of their own affairs without interference
5 from the State Legislature. In particular, subdivision (b) of this constitutional
6 provision directly grants to charter cities the power and authority to legislate
7 in four “core” areas “that are by definition, ‘municipal affairs.’ When a
8 charter city’s enactment falls within one of these core areas, it supersedes any
9 conflicting state statute. Our Constitution is most explicit. The ‘conduct of
city elections’ is one of the few specifically enumerated core areas of
autonomy for home-rule cities. A statute purporting to define the number of
votes required for putting a local tax measure on the ballot contravenes this
explicit constitutional grant of authority to charter cities, such as San Leandro,
over the conduct of its municipal elections.” (93 Cal.App.4th at pp. 46-47
(citations omitted).)

10 *Mackey* and a number of other cases holding the election of municipal officers to be
11 strictly a municipal affair were discussed with approval by the Supreme Court in *Johnson*
12 *v. Bradley* (1992) 4 Cal.4th 389, in which the Court explained the distinction between the
13 “municipal affairs” analysis performed under subdivision (b) of article XI, section 5, and
14 subdivision (a) of that section. Under subdivision (a) — the “general” municipal affairs
15 clause (see *Johnson*, 4 Cal.4th at p. 398) — the court performs a two-step analysis, focusing
16 first on whether the conflicting state law qualifies as a matter of “statewide concern,” and
17 if so, then considering whether it is both reasonably related to the resolution of that concern
18 and “narrowly tailored” to limit incursion into legitimate municipal interests. (*Id.*, at
19 pp. 403-04 (citing *California Fed. Savings & Loan Assn. v. City of Los Angeles* (1991) 54
20 Cal.3d 1).)⁸ Under subdivision (b), however, no such balancing of municipal vs. statewide
21

22 ⁸The Supreme Court cautioned that before resolving a putative conflict between a state
23 statute and a charter city measure, the court initially must satisfy itself that a genuine conflict
24 actually exists that is “unresolvable short of choosing between one enactment and the other.”
25 (4 Cal.4th at p. 399.) In the present case, as is discussed below, any purported conflict
26 between Elections Code section 15342(a) and the San Diego city law requiring write-in votes
27 to be counted as long as the candidate’s name is written in the space provided for that
28 purpose can be avoided by interpreting section 15342(a) to prohibit the counting of
“unbubbled” write-in ballots *only* during the official canvass, and not during a manual
recount of the ballots. Such an interpretation would then be consistent with Municipal Code
section 27.0636 in that the write-in ballots would ultimately be counted, if need be, in

1 concerns is necessary: “Whereas subdivision (a) of article XI, section 5, articulates the
2 general principle of self-governance, subdivision (b) sets out a non-exclusive list of four
3 ‘core’ categories that are, by definition, ‘municipal affairs.’ . . . The final category gives
4 charter cities exclusive power to regulate the ‘manner’ of electing ‘municipal officers.’” (4
5 Cal.4th at p. 398.)⁹ The City of San Diego Municipal Code provisions governing the
6 counting of write-in votes in municipal elections plainly relate to “the conduct of city
7 elections” and the “manner” of electing “municipal officers,” and they are thus *by definition*
8 “municipal affairs” under article XI, section 5, subdivision (b), superseding the conflicting
9 provisions of state law. (See, e.g., *Rees v. Layton* (1970) 6 Cal.App.3d 815 [state statute
10 permitting candidate to designate principal profession, vocation or occupation on ballot does
11 not apply to charter city that had enacted its own ordinances providing “for the manner in
12 which” its municipal officers are elected]; *Mackey v. Thiel, supra*; *City of Redwood City v.*
13 *Moore* (1965) 231 Cal.App.2d 563 [“‘election procedures’ in a chartered city are municipal
14 affairs”]; *Lawing v. Faull* (1964) 227 Cal.App.2d 23 [state law does not infringe on charter
15 city’s control of its own initiative and referendum procedures]; *Harder v. Denton* (1935) 9
16 Cal.App.2d 607 [charter city has control over order in which candidates are listed on the
17 ballot].) It is difficult to conceive of a provision of city law that relates more directly to the
18 “manner in which” city officers are elected than Municipal Code section 27.0636’s direction

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20 _____
21 accordance with the city law’s standard.

22 ⁹In *Johnson v. Bradley*, the Court was “hesitant” to conclude that the City of Los
23 Angeles’ partial public campaign financing law related to the “manner” in which the city
24 elected its officers so as to fall within the “core” definition of a “municipal affair” within the
25 constitutional provision. (4 Cal.4th at p. 403.) The Court was likewise “reluctant” to
26 interpret the word “manner” narrowly, to exclude all local election regulations except those
27 that may be labeled “procedural.” (*Ibid.*) Ultimately, the Court determined that it need not
28 decide whether Los Angeles’ partial public financing ordinance was by definition a “core”
municipal affair under subdivision (b) of article XI, section 5, because it had no difficulty
concluding that the charter section was enforceable as a municipal affair under
subdivision (a) of that section. (*Id.*, at pp. 403-04.)

1 as to how write-in votes are to be counted in municipal elections.¹⁰

2 The present circumstance is thus directly analogous to that confronting the Supreme
3 Court in *Scheafer v. Herman* (1916) 172 Cal. 338. In that case, the Court held that San
4 Francisco’s city charter, which required recall petition signers to include their name and
5 address on the petition, but said nothing about adding the date of signing, prevailed over a
6 requirement in state law that signers of recall petitions include the date on which they signed
7 the petition. The Court found that the city law purported to contain “a complete scheme” for
8 the recall of municipal officers, so that the additional requirement under state law to include
9 the date of signing created a conflict with the city law. (*Id.*, at p. 340.) And because the
10 subject of “the removal of officers of a city” was a “municipal affair” within the meaning of
11 the Constitution’s “home rule” guarantee, “the general law cannot control the exercise of the
12 power in that manner, or change the procedure required by the charter.” (*Ibid.*) As the
13 Supreme Court explained: “Any addition to the things required to effect a recall would be

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15 ¹⁰Even if the city law governing the counting of write-in votes were not, by definition,
16 to be considered a “municipal affair” under article XI, section 5, subdivision (b), an analysis
17 under the “general” municipal affairs clause of subdivision (a) would yield the same
18 conclusion. There is little, if any, “statewide concern” that could justify the incredible
19 intrusion into the city’s municipal affairs that would result from disenfranchising thousands
20 of San Diego’s voters from participating in the election of their own mayor merely because
21 they neglected to fill in the oval next to the write-in line on their ballot. The only
22 conceivable statewide concern that might be furthered by the application of section 15342
23 in a consolidated election is minimizing the burden on the Registrar of Voters’ staff in having
24 to apply a different standard for counting write-in votes cast in San Diego’s election than for
25 the other elections included on the same ballot, potentially affecting the canvass of votes in
26 the statewide election. Yet even that burden disappears if, as Contestants urge, section
27 15342 is construed to require the counting of “unbubbled” write-in votes only during a
28 manual recount of the ballots — which not only occurs *after the canvass is completed* and
relates to just a single election in a single jurisdiction, but whose cost is paid for by the
parties requesting the recount (and, in the case of the County’s arrangements with the City
of San Diego, is charged back to and reimbursed by the City in any event). Imposing the
restrictive requirements of section 15342 over the conflicting provisions of city law would
thus inevitably fail the second prong of the analysis under subdivision (a) of article XI,
section 5, in that the statute is not “narrowly tailored” to limit its incursion into legitimate
municipal concerns.

1 an additional burden upon the right and would be inconsistent with the charter which gave
2 the right without compliance with further conditions. The provisions of the general law
3 requiring him to add the date of his signature being, therefore, inconsistent with the
4 provisions of the charter which allowed him to make a recall petition without such date, it
5 follows that it does not apply to or affect proceedings for recall under the charter.” (172 Cal.
6 at p. 343.)¹¹

7 So, too, in this case, San Diego’s Election Code, which sets forth the “complete
8 procedure” governing municipal elections, dictates that write-in votes *shall be counted* if the
9 qualified write-in candidate’s name is written in the blank space provided for that purpose.
10 Imposing an additional requirement pursuant to Elections Code section 15342,
11 subdivision (a), that the oval next to the write-in line must also be filled in for the vote to
12 count would be inconsistent with the city law and would impose a burden on the right to cast
13 a write-in vote that is not found in city law. It therefore follows that section 15342(a) “does
14 not apply to or affect proceedings” for counting write-in votes for the mayoral election.

15 **C. The November 2004 Mayoral Election Was Not in Fact Lawfully**
16 **Consolidated with the Statewide General Election. Rather, the**
17 **Registrar of Voters Simply Rendered “Specified Services” in**
Conducting the Municipal Election for the City Clerk.

18 Despite the Municipal Code’s explicit mandate that *city law* shall control in case there
19 is any ambiguity or contradiction between city and state law, Defendant Murphy has argued
20 that the provisions of the state Elections Code should nevertheless apply to the counting of
21 write-in votes in the mayoral election because the City Council ordered the election to be
22 “consolidated” with the statewide election being held the same date, thereby supposedly
23 triggering the operation of Elections Code section 10418 and its requirement that “ballots

24
25 ¹¹The Court reached this conclusion even while acknowledging that the lack of a date
26 to the signature would inconvenience the election board in determining the validity of the
27 signatures when examining the sufficiency of the petition. Yet “matters of inconvenience
28 do not affect the argument that recall proceedings are to be controlled by reference to the
provisions of the charter and not with regard to other provisions that might be more
convenient or might tend to prevent fraud.” (*Ibid.*)

1 [be] counted and returned, . . . and all other proceedings incidental to and connected with the
2 election [be] regulated and done in accordance with the provisions of law regulating the
3 statewide . . . election.” (Murphy TB, pp. 13-17.) In truth, however, the city’s election was
4 not in fact consolidated with the statewide election — at least not in a manner that triggered
5 the operation of section 10418.

6 For a true “consolidation” to take place under the state Elections Code, not only must
7 the San Diego City Council adopt and file with the County Board of Supervisors a resolution
8 requesting the consolidation, but *the Board of Supervisors* must then enact a resolution
9 *ordering* the consolidation. (See Elec. Code, §§ 10401.) As the Court of Appeal noted in
10 *County of Contra Costa v. East Bay Municipal Utility District* (1964) 229 Cal.App.2d 556,
11 “where an election called for by a district, city or other political subdivision is to be
12 consolidated with a statewide election the order of consolidation *must* be made by the county
13 board of supervisors.” (*Id.*, at p. 562 (emphasis in original).) Moreover, “section [10401] of
14 the Elections Code, providing for consolidation where one of the elections to be consolidated
15 is a statewide election, is permissive only, and, pursuant to its provisions, the board of
16 supervisors is not required to order a consolidation.” (*Ibid.*)¹²

17 In the present case, although the San Diego City Council adopted a resolution
18 requesting the “consolidation” of the municipal general election with the November 2, 2004,
19 statewide general election, the San Diego Board of Supervisors *never adopted a resolution*
20 *ordering consolidation*. Rather, a copy of the City Council’s July 26, 2004, resolution
21 requesting the Registrar’s assistance in conducting the election was sent to the Registrar, and
22 she agreed to do so pursuant to County Administrative Code Section 439.1, which states that
23 the Registrar of Voters may “render specified services relating to the conduct of an election

24
25 ¹²Section 10401 provides: “Where one of the elections to be consolidated is a
26 statewide election, the board of supervisors of the county in which the consolidation is to be
27 effected may order the consolidation.” As the *County of Contra Costa* decision explains, the
28 statute is written in discretionary terms because the county board of supervisors is not
required to grant a city’s or other jurisdiction’s consolidation request. But in order for the
consolidation to occur, the board *must* adopt a resolution so ordering.

1 to any city or district the governing body of which has by resolution requested the Board of
2 Supervisors for the County of San Diego to permit the Registrar of Voters of the County of
3 San Diego to render such services.” (See Exhibit 6004, p. 4.) In essence, the County
4 Registrar was acting as a hired hand for the City and the City Clerk to assist in conducting
5 the city’s election.

6 Rendering “specified services” relating to the conduct of the city’s municipal election
7 is different than formally consolidating the municipal election with the statewide election.
8 The City Council and the County Registrar acted in accordance with Elections Code section
9 10002, which states that “[t]he governing body of any city or district may by resolution
10 request the board of supervisors of the county to permit the county elections official to render
11 specified services to the city or district relating to the conduct of an election. Subject to
12 approval of the board of supervisors, these services shall be performed by the county
13 elections official.” County Administrative Code section 439.1 was likewise enacted pursuant
14 to section 10002, not pursuant to the consolidation statutes. As the Registrar of Voters’
15 March 8, 1976, Memorandum to the Board of Supervisors recommending the adoption of
16 Administrative Code section 439.1 explained, that code section was adopted to implement
17 then-section 22003 of the Elections Code, which was renumbered to section 10002 in the
18 1994 omnibus reorganization of the Code. (See Exh. 6004, p. 1 [quoting the text of then-
19 section 22003, which is identical to the present language of section 10002].)

20 To say that the November 2, 2004, San Diego municipal election was never formally
21 or lawfully “consolidated” with the statewide general election held on that same date does
22 not mean that the Registrar of Voters could not conduct the two elections together, with the
23 same precincts and pollworkers, and a single ballot. Contestants are unaware of any law or
24 judicial decision that would prohibit two elections from being held together in the absence
25 of the Board of Supervisors’ adoption of a resolution ordering consolidation. The critical
26 difference is that none of the *legal* consequences that might otherwise flow from the formal
27 consolidation of the two elections would be triggered. In particular, there is no basis for
28

1 asserting that the municipal election must be conducted in accordance with *state* — rather
2 than *city* — law, since the Elections Code provisions upon which Defendant Murphy relies
3 for that proposition are expressly conditioned upon the formal consolidation having occurred.
4 (See Elec. Code, § 1301(b)(2) [*“In the event of consolidation, . . .”*]; *id.*, §10418 [*“If*
5 *consolidated, . . .”*].)¹³

6 Moreover, the San Diego City Council would not have the authority under the City
7 Charter in any event to abnegate city law by consolidating the municipal elections with the
8 statewide elections. As noted above, the San Diego City Charter explicitly mandates that
9 “[a]ll elections provided for by this charter, whether for choice of officers or submission of
10 questions to the voters, shall be conducted in the manner prescribed by said election code
11 ordinance.” (City Charter, art. II, § 8.)¹⁴ The Council cannot, by a subsequently adopted
12 ordinance — much less by a *resolution*, which is not even a legislative enactment (see San
13 Diego City Charter, art. III, § 13 [*“all legislative action shall be by ordinance”*]) — override
14 or repeal the City Charter’s mandate and make state law applicable to the mayoral election,
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18 ¹³Defendant’s reliance on section 1301 is misplaced for an additional reason. That
19 section was added to the Elections Code in order to permit general law cities within a county
20 to change their regular municipal election dates to coincide with the statewide primary or
21 general elections as a matter of administrative convenience and efficiency. Section 1301,
22 subdivision (b)(1) requires that any ordinance adopted by a city moving its election to the
23 statewide election date “shall become operative upon approval by the board of supervisors.”
24 San Diego’s general municipal election date was established to coincide with the statewide
25 general election *prior* to the enactment of section 1301, and Contestants have been informed
by County Counsel that there has never been any action taken by the San Diego County
Board of Supervisors to “approve” any San Diego city ordinance moving its election to the
November statewide election date.

26 ¹⁴While article II, section 10 of the Charter calls for the city’s primary and general
27 elections to be held “on the same date in each election year” as the statewide primary and
28 general elections, there is no provision in the City Charter or election ordinance that
authorizes the formal consolidation of the city’s election with the statewide elections.

1 instead.¹⁵

2 What the City Council could and *did* do, however, was to request the County
3 Registrar to *assist* in conducting the municipal election, while still having it governed by *city*
4 law. This course of action was perfectly consistent with the City Charter and the Municipal
5 Code. Although Municipal Code section 27.0106, subdivision (a), states that “all elections
6 shall be conducted by the city clerk,” section 27.0111 declares that “[t]he City Clerk may
7 delegate to the Registrar those duties assigned to the City Clerk by this article which can
8 more properly be performed by the Registrar.” In delegating the responsibility for
9 conducting the mayoral election to the Registrar, however, neither the City Clerk nor the City
10 Council ever agreed that the election would be conducted under state law rather than city
11 law, and they did not have the authority to do so in any event.

12 Finally, Defendant’s contention that the City Council’s request to consolidate the
13 municipal election with the statewide general election means that state law governs the
14 conduct of all aspects of the election would effectively render the entire city election
15

16 ¹⁵There was certainly no indication in the Council’s deliberations that their routine
17 request to have the Registrar of Voters conduct the city’s upcoming general election was
18 intended to mean that state law would suddenly govern all aspects of the city’s election. The
19 *ordinance* adopted by the City Council said nothing whatsoever about that, indicating only
20 that the election precincts, polling places, and precinct officers for the municipal election
21 should be the same as those for the state general election, and that the County Registrar was
22 authorized to canvass returns of the municipal election and to communicate the results of the
23 canvass to the San Diego City Clerk. Even the resolution adopted by the Council at the same
24 time said only that the Registrar was authorized to canvass the returns of the Municipal
25 General Election and was requested “to conduct the election in all respects as if there were
26 only one election using only one form of ballot.” Neither the ordinance nor the resolution
27 directed that the provisions of state law would govern the city’s election to the exclusion of
28 the provisions of the City Charter and Municipal Code. Any implied waiver of the city’s
inherent “home rule” authority should not lightly be found, just as a repeal by implication
of all of the City’s Election Code provisions is highly disfavored. Notably, while requesting
the County Registrar to conduct the election for the city, the ordinance adopted by the City
Council made clear that it was still the responsibility of the City Clerk — not the County
Registrar — to certify the election results to the Council, confirming that this was ultimately
a *city* election to be conducted in accordance with *city* law.

1 ordinance a nullity. Under article II, section 10 of the City Charter, *all* regular municipal
2 elections are held on the same date as the statewide primary and general elections. *For*
3 *years*, the City Council has adopted election resolutions and ordinances virtually identical
4 to those adopted for the November 2004 municipal election requesting the Registrar of
5 Voters to “consolidate” the city election with the statewide election being held that same
6 date. If Defendant were correct that the effect of these resolutions is to require the city
7 elections to be conducted under state law, then there would be no elections left for the city
8 election laws to apply to — since *every* city election is now held on the same date as a
9 statewide election. This is surely an absurd consequence that is to be avoided in interpreting
10 the council’s actions and authority.

11 **D. Every Other Aspect of the City’s November 2004 Election,**
12 **Including the Nomination of Write-in Candidates, Was Governed**
by City Law, Not State Law.

13 Defendant’s assertion that state law — not city law — should apply to the counting
14 of the write-in ballots for the November 2004 mayoral election is also disproved by the fact
15 that *in every other instance in which city law differs from state law*, it was the city law — not
16 the state law — that was applied in conducting the mayoral election.

17 Most significantly, it was the *city’s* law governing write-in candidacies, not the state
18 Elections Code provisions, that was held to apply to Donna Frye’s write-in candidacy. For
19 example, in accordance with San Diego Municipal Code section 27.0311, subdivision (c),
20 Frye was required to submit nominating petitions containing the signatures of at least 200
21 registered voters of the City in order to qualify as a write-in candidate; if state law had
22 applied, Frye would have been required to submit only 20 signatures on her nomination
23 papers. (See Elec. Code, §§ 8600(b) & 10220.) Similarly, pursuant to Municipal Code
24 section 27.0321, Frye was required to pay an election nominating fee for a write-in candidate
25 of \$500, or submit a sufficient number of in-lieu signatures pursuant to section 27.0322 to
26 offset the nominating fee (which she did); if state law had applied, Frye could not have been
27 required to pay a filing fee exceeding \$25. (See Elec. Code, §§ 8604 & 10228.) If the city
28

1 laws governing write-in candidacies apply to the nominating petitions and the filing fees that
2 write-in candidates must file to qualify for this consolidated election, why would the city law
3 setting forth the rules for counting write-in votes not likewise apply in the election? After
4 all, the Elections Code consolidation provision on which Defendant purports to rely —
5 section 10418 — makes no distinction between the nomination of candidates and the
6 counting of ballots: both, according to Defendant’s theory, are supposedly governed by state
7 law in the event of consolidation.¹⁶

8 Another example is found in the rules governing the candidates’ ballot designations.
9 Under state Elections Code section 13107 (which, according to section 10102, “shall apply
10 to municipal elections, whether held in a general law or chartered city”), candidates may
11 include under their names on the ballot “no more than *three* words” designating their current
12 principal professions, vocations, or occupations.” Under San Diego Municipal Code
13 section 27.0603, however, the candidates’ occupational designations “shall not be more than
14 *four* words.” There is thus a direct conflict between city and state election law on this
15 subject: City law says the ballot designation may be up to four words, and state law says
16 only three.

17 Once again, the conflict was resolved by applying *city* law. City Attorney candidate
18 Michael Aguirre, for example, was listed on the ballot with the *four-word* occupational ballot
19 designation “San Diego Consumer Fraud Attorney.” (All geographical names, such as “San
20 Diego,” are counted as one word for these purposes.) Thus, notwithstanding state Elections
21 Code section 10102’s express command that section 13107’s three-word limit is to apply to

22
23 ¹⁶Elections Code section 10418 provides in pertinent part:

24 “If consolidated, the consolidated election shall be held and conducted,
25 election officers appointed, voting precincts designated, *candidates nominated*,
26 ballots printed, polls opened and closed, *ballots counted* and returned, returns
27 canvassed, results declared, certificates of election issued, and all other
28 proceedings incidental to and connected with the election shall be regulated
and done in accordance with the provisions of law regulating the statewide or
regularly scheduled election.” (Emphasis added.)

1 *all* municipal elections, and despite the fact that the November Municipal General Election
2 was conducted by the Registrar of Voters, it was recognized that *city law prevails over state*
3 *law* when it comes to those aspects of the election that are governed by different city and
4 state election rules.

5 If the *city* law governed the November municipal election in this and other contexts
6 (such as the rules for the nomination of candidates in the March primary election, which was
7 also “consolidated” with the statewide election held that same date), there is no legitimate
8 reason why the *city* law governing the rules for counting write-in ballots should not likewise
9 apply to the November mayoral election. The rules for ballot designations (Muni Code,
10 § 27.0603) and the rules for counting write-in votes (*id.*, § 27.0636) are contained in the very
11 same division of the Municipal Code — a division whose “purpose and intent” is “to provide
12 *uniform* procedures to better ensure a fair and impartial administration of these requirements,
13 and in order that an informed voter may intelligently elect officeholders (*id.*, § 27.0601).”
14 Indeed, there is even more reason to honor and to require adherence to the city law regarding
15 the counting of write-in votes than the rule on the number of words permitted in a
16 candidate’s ballot designation, for the former is a *substantive* law affecting the voter’s
17 fundamental right of the franchise, whereas the latter arguably relates only to a *procedural*
18 aspect of the election. Moreover, the fact that the city law regarding occupational ballot
19 designations was held to apply in the November municipal election *prior* to Frye’s qualifying
20 as a write-in candidate and prior to any voting and vote-counting, establishes that no one is
21 now suddenly asking for city law to be applied to the counting of write-in ballots only *after*
22 the election has occurred, but that the City Clerk and the Registrar of Voters have *always*
23 applied the city’s election laws to govern the conduct of this municipal election, well before
24 any dispute arose over the counting of the “unbubbled” write-in ballots.

25 In sum, *City law governs this municipal election, and city law unambiguously requires*
26 *the counting of these ballots*. This election contest can and should be resolved on this
27 ground alone.
28

1 **II. PROPERLY INTERPRETED, ELECTIONS CODE SECTION 15342**
2 **DOES NOT PROHIBIT THE COUNTING OF WRITE-IN VOTES**
3 **DURING A MANUAL RECOUNT WHEN THE VOTER’S INTENT IS**
4 **CLEAR, EVEN IF THE OVAL NEXT TO THE WRITE-IN LINE HAS**
5 **NOT BEEN FILLED IN**

6 The Registrar of Voters based her refusal to count the 5,500 “unbubbled” Donna Frye
7 write-in ballots on Elections Code section 15342, subdivision (a), which states that “[f]or
8 voting systems in which write-in spaces appear directly below the list of candidates for that
9 office and provide a voting space, no write-in vote shall be counted unless the voting space
10 next to the write-in space is marked or slotted as directed in the voting instructions.”
11 Because the voting instructions on the top of each ballot for the November 2004 mayoral
12 election directed voters to “write the person’s name on the blank line at the end of the list of
13 candidates for the contest *and then completely darken the oval next to the written name*”
(emphasis added), the Registrar took the position that she was precluded from counting the
“unbubbled” write-in ballots by the language of section 15342.

14 At first glance, the Registrar’s determination might appear to be supported by the
15 literal language of section 15342. After all, there is admittedly no limiting language to the
16 phrase “no write-in vote shall be counted” Upon closer inspection, however — and
17 especially when the section is considered in light of the purposes for which it was enacted
18 and in relation to the whole electoral scheme of which it is a part — it becomes clear that
19 section 15342 was intended and should be interpreted to apply only in the context of the
20 *machine tabulation* of the ballots by the optical scan readers during the semifinal and official
21 canvass, and that the section should not be read to preclude the counting of write-in votes
22 *during a subsequent manual recount* of the ballots when the voter’s intent is clear, even if
23 the oval next to the write-in line had not been filled in. Indeed, virtually every accepted
24 principle of statutory construction supports this construction of section 15342. By contrast,
25 an interpretation that would require the disqualification of the “unbubbled” write-in ballots
26 with unambiguous expressions of voter intent even during the course of a manual recount
27 would only lead to absurd results.
28

1 **A. The Legislative History of Section 15342 Gave No Indication That**
2 **Its Enactment Would Result in Disenfranchising Any Voters Simply**
3 **For Failing to Fill in the Oval Next to the Write-in Space.**

4 “When interpreting a statute our primary task is to determine the Legislature’s intent.”
5 (*Freedom Newspapers, Inc. v. Orange County Employees Retirement System* (1993) 6
6 Cal.4th 821, 826.) A statute “must be given a reasonable and common sense interpretation
7 consistent with the apparent purpose and intention of the lawmakers, practical rather than
8 technical in nature, which, upon application, will result in wise policy rather than mischief
9 or absurdity.” (*San Diego Union v. City Council* (1983) 146 Cal.App.3d 947, 954.) The
10 legislative history of section 15342 reveals that the Legislature’s intent in enacting the
11 provision was merely to modernize the procedures for counting votes on Election Day and
12 during the canvass, and was certainly *not* to unfairly or unreasonably disenfranchise any
13 voters for minor oversights or technical errors in completing their ballots.

14 Elections Code section 15342 was enacted in 1998 as part of an omnibus bill
15 (Stats.1998, ch. 1073 (SB 627)) that recodified and made various technical and clarifying
16 changes to the Elections Code in order “to bring election day and canvassing procedures into
17 conformance with modern election administrations procedures and technology.” (Governor’s
18 Office of Planning and Research, Enrolled Bill Report for SB 627, p. 10.) As that analysis
19 explained, “[t]his bill would make numerous technical and clarifying changes to the existing
20 statutes that govern elections. The intent of this bill is to provide noncontroversial changes
21 and corrections to the elections process on both the state and local level. As a result of these
22 changes, the elections process would operate more effectively and efficiently.” (*Ibid.*)

23 The legislative history of SB 627 is replete with references to the nonsubstantive and
24 technical nature of its changes, as well as references to the code sections merely being
25 modernized and re-organized to address the new technologies for voting and vote tabulation,
26 and to assist elections officials in efficiently processing ballots and counting votes. The
27 legislative history also emphasizes that all of the changes being made by SB 627 relate to the
28 procedures for the processing of ballots *during the semifinal official canvass and the official*

1 *canvass*.¹⁷ There is no suggestion in the legislative history that SB 627's amendments were
2 intended to or would have the effect of changing the *substantive* legal principles governing
3 the “intent of the voter” standard for counting votes in the context of a manual recount, or
4 that the bill might in any way result in the disenfranchisement of voters.

5 Indeed, the specific comments regarding the provisions of SB 627 dealing with the
6 processing of write-in ballots actually suggested that the bill would *remove* archaic
7 restrictions that might have *prevented* the counting of certain write-in ballots. Thus, for
8 example, the Legislative Counsel’s Digest that accompanied the chaptered version of the bill
9 explained, “Existing law requires that a write-in vote for a candidate be marked with a rubber
10 stamp or marking device, permits the use of a pen or pencil in writing in the name of a
11 candidate on a ballot, and specifies the use of a stamp or other marking device in marking
12 a ballot. This bill would repeal those provisions.” Similarly, the Senate Rules Committee’s
13 Analysis prepared for the Senate’s final floor vote, dated August 13, 1998, stated: “[SB 627]
14 [e]nacts a new chapter that specifies elements of the official canvass (Sec. 31). Requires that
15 absentee ballots be processed and counted in the same manner prescribed for the semi-final
16 official canvass. Reorganizes write-in provisions into one coherent article. *Deletes a*
17 *requirement that the voter mark the write-in voting space, in addition to writing in the*
18 *candidate’s name.*” (*Id.*, p. 4, ¶ 15 (emphasis added).)

19 Thus, from all that the Legislature was told about SB 627, it was a noncontroversial,
20 nonsubstantive omnibus bill that re-organized and made technical changes in the procedures
21 for processing and counting ballots in the semi-final and official canvass. To the extent the

22
23 ¹⁷The “semifinal official canvass” — previously misnamed the “semi-official canvass”
24 — is the process of collecting, processing, and tallying ballots on election night; the
25 semifinal canvass may include some absentee and provisional ballots, but mainly consists
26 of precinct ballot vote counts. The “official canvass,” or “canvass” for short, includes the
27 processing of all of the ballots received in an election, performing all the reconciliations and
28 audits required to account for all ballots, updating voter files, and conducting a manual tally
of 1% of the precincts as a check on the machine-tabulated returns. The canvass begins the
day after the election and may take several weeks to complete, concluding with the election
official’s certification of the election results.

1 bill made any changes in the procedures governing the processing of write-in votes, the bill
2 was advertised as *deleting* the requirement that a voter must mark the write-in voting space,
3 in addition to writing in the candidate's name, in order for the write-in vote to be counted.
4 An interpretation of section 15342 that would preclude such write-in votes from being
5 counted in the context of a manual recount, even if the voter's intent is otherwise clear from
6 the face of the ballot, would be contrary to the understanding that the Legislature had in
7 enacting SB 627.

8 **B. The Placement of Section 15342 in the Chapter of the Elections**
9 **Code Governing the Official Canvass Is Consistent With an**
10 **Interpretation That the Prohibition Against Counting Write-in**
11 **Votes Without the Oval Filled Applies Only to the Automated**
12 **Tabulation of Ballots During the Canvass, Not During Any**
13 **Subsequent Manual Recount.**

14 As noted above, SB 627 was expressly intended only to clarify and to modernize
15 election day and canvassing procedures, not to make any substantive changes in the standards
16 for counting write-in ballots or other votes. The placement of section 15342 within the
17 reorganized Elections Code divisions is consistent with an interpretation that restricts its
18 application to the machine tabulation of ballots, not to the individualized review and hand-
19 counting of ballots that would occur during the course of a manual recount.

20 Section 15342 is found in article 3 ("Processing Write-In Votes") of chapter 4 of
21 Division 15 of the Elections Code, which is entitled "Official Canvass." There is a
22 completely separate chapter in that division, Chapter 9, entitled "Recount," which sets forth
23 the rules for manual recounts. The very placement of section 15342 in the portion of the
24 Elections Code dealing with the rules and procedures for counting votes *during the official*
25 *canvass*, while placing the rules for manual recounts in an entirely different chapter, supports
26 the conclusion that the rules and procedures for the automated official canvass are not
27 necessarily the same as those for a manual recount, and that section 15342's limitation was
28 intended to apply only in the former context, not the latter.

 Moreover, there is an explicit statutory provision (section 15153) included in
chapter 3 ("Semifinal Official Canvass") of Division 15 stating that "[d]uring the semifinal

1 official canvass, write-in votes shall be counted in accordance with Article 3 (commencing
2 with Section 15340) of Chapter 4.” There is no similar cross-reference contained in
3 chapter 9, dealing with recounts, that would require write-in votes to be recounted in
4 accordance with the canvass rules and procedures. The existence of the express cross-
5 reference in the semifinal official canvass chapter would, of course, be unnecessary if section
6 15342 were intended of its own force to apply in each and every context in which votes are
7 to be counted, and the failure of the Legislature to have included any such cross-reference
8 in the chapter governing recounts while including such a cross-reference in the chapter
9 governing the semifinal official canvass suggests that different standards were intended to
10 apply in these two contexts.

11 **C. Section 15342 Should Be Construed in Light of the Purposes for**
12 **Which It Was Enacted and in Relationship to the Whole Statute of**
13 **Which It Is a Part.**

14 As indicated above, the evident purpose of section 15342’s requirement that voters
15 must fill in the oval in addition to writing in the name of the qualified write-in candidate in
16 order to have their vote counted in the official canvass is to ensure that the ballots can be
17 read by the optical scanning equipment used with some newer voting systems. As the
18 legislative history suggests, section 15342 was intended to bring the rules and procedures for
19 processing write-in ballots into line with the needs of modern voting technologies. Optical
20 scan readers can typically only detect and count votes when the oval — or at least a
21 significant portion of the oval — is filled in; absent any requirement to fill in the oval,
22 election officials would have to manually review each and every ballot in order to determine
23 whether it contained any write-in votes — a laborious and time-consuming process that
24 might prevent the officials from completing the other tasks required of them in the canvass
25 period immediately following the election, potentially even leading to delays in certifying
26 the results of the election. Moreover, the reality is that in most elections, write-in candidates
27 fail to attract much popular support, so if a few write-in votes were to miss being detected
28 by the optical scanners during the official canvass as a result of the voters’ failure to

1 completely fill in the oval in addition to writing in the candidate’s name, it generally would
2 have no bearing on the overall accuracy of the election results.

3 This rationale and evident purpose of the “fill in the oval, too” requirement vanishes
4 entirely, however, in the context of a manual recount. A manual recount is conducted *after*
5 the election results are certified, and by definition, it requires that each ballot be inspected
6 and reviewed *individually* to ascertain the intent of the voter. Indeed, the entire purpose of
7 a manual recount is to identify any ballots containing valid votes that the machine count
8 might have missed, but on which the intent of the voter can be discerned through a visual
9 inspection. Furthermore, the expenses of conducting the manual recount are paid for by the
10 person requesting the recount. It thus serves no purpose — and certainly not the purpose
11 intended by enforcing section 15342’s “fill in the oval” requirement during the official
12 canvass — to refuse to count valid write-in ballots during the course of a manual recount
13 solely because the oval next to the write-in candidate’s name was not also filled in.

14 “It is a settled principle of statutory interpretation that language of a statute should not
15 be given a literal meaning if doing so would result in absurd consequences which the
16 Legislature did not intend.” (*Bruce v. Gregory* (1967) 65 Cal.2d 666, 673.) Although courts
17 should not rewrite a statute to conform to a legislative intent that is not apparent, “words of
18 general import may be given a contracted meaning dependent upon the connection in which
19 they are employed, and considering the general purpose or scheme entertained by the
20 legislature in passing the statute, and . . . words will not be given their literal meaning when
21 to do so would evidently carry the operation of the enactment far beyond the legislative
22 intent and thereby make its provisions apply to transactions never contemplated by the
23 legislative body.” (*Id.*, at p. 674 (quoting *People v. Davenport* (1939) 13 Cal.2d 681, 685).)

24 Applying section 15342 according to its literal terms so as to *forever* preclude the
25 counting of “unbubbled” write-in ballots — thereby carrying its operation far beyond the
26 Legislature’s stated intent of merely bringing *election day* and *canvass* procedures into
27 conformance with modern voting technologies — would, as this very case demonstrates,
28

1 result in absurd consequences that the Legislature could not possibly have contemplated.
2 Under what twisted logic does it make sense to say that, simply because a write-in ballot
3 does not contain the marking (the filled-in oval) that would allow it to be read by an optical
4 scan machine during the canvass, we will *also* refuse to count the vote even when the ballot
5 is being reviewed by hand in a manual recount *whose very objective* is to find and count any
6 valid votes that the machine tabulation might have missed? It is only by reading into section
7 15342 an implicit restriction that the “unbubbled” write-in ballots are not to be counted *only*
8 *during the machine canvass* that the section will make any rational sense.

9 Moreover, it is only through such an interpretation that section 15342’s prohibition
10 against the counting of certain otherwise valid write-in votes can be harmonized with the
11 myriad other provisions of the Elections Code and of the state Constitution directing that
12 every effort be made to protect the people’s exercise of the franchise and to count as many
13 votes as possible. Article II, section 2.5, of the Constitution declares that “A voter who casts
14 a vote in an election in accordance with the laws of this State shall have that vote counted.”
15 Elections Code section 19001, which governs voting systems like the optical scan system
16 used in San Diego’s November 2004 mayoral election, explicitly says: “This division shall
17 be liberally construed so that the *real will* of the electors will not be defeated by any
18 informality or failure to comply with all of the provisions of the law.” (Emphasis added.)
19 Likewise, section 14251, dealing with challenges to voters’ qualifications, reiterates that
20 “[a]ny doubt in the interpretation of the law shall be resolved in favor of the challenged
21 voter.” Section 13, subdivision (b), declares that the requirement that prospective write-in
22 candidates file a declaration of candidacy should not be construed as “preventing or
23 prohibiting any qualified voter of this state from casting a ballot for any person by writing
24 the name of that person on the ballot, or from having that ballot counted or tabulated.”
25 Indeed, the first sentence of section 15342 itself states that any “reasonable facsimile of the
26 spelling” of a write-in candidate’s name should be sufficient to have the vote counted,
27 confirming the legislative intent not to disenfranchise voters for technical violations where
28

1 their intent to vote for a specific candidate is clear.

2 Other provisions of the Elections Code go even further in helping to prevent the
3 disenfranchisement of voters that might result from their inadvertent errors and omissions.
4 Section 15210 requires election officials to “correct” or to prepare duplicates of torn, bent
5 or otherwise “defective” ballots “so that every vote cast by the voter shall be counted,” and
6 section 15154 directs that votes should be counted unless “the choice of the voter is
7 impossible to determine.” Pursuant to these provisions, the Secretary of State has issued
8 guidelines for manual recounts that require ballots to be counted, notwithstanding the voters’
9 failure to have followed all of the instructions in marking their ballots, in a variety of
10 circumstances in which the intent of the voter may nevertheless be ascertained. The
11 Registrar relied on these guidelines to “enhance” and to count hundreds, if not thousands,
12 of ballots in the November mayoral election that were not cast in strict compliance with the
13 law, in several instances even creating *entirely new ballots* for voters who had marked up and
14 mailed in their sample ballot booklets instead of their voted absentee ballots.

15 A literal reading of section 15342 simply cannot be reconciled with these legislative
16 expressions of support for ascertaining and implementing the will of the voters. In order to
17 harmonize section 15342 with the remainder of the Elections Code, it must be interpreted
18 to prevent the counting of “unbubbled” write-in ballots only when those ballots are being
19 counted by machines during the semi-final and official canvass, and to require write-in votes
20 to be counted during the manual recount even if the oval is not filled in, as long as the intent
21 of the voter is otherwise clear.

22 **D. Interpreting Section 15342 to Permit the Counting of “Unbubbled”**
23 **Write-in Ballots During a Manual Recount Is Consistent with the**
24 **Fundamental Principle That Election Statutes Must Be Construed**
Liberally So as Not to Disenfranchise Voters If Any Such
Construction Is Possible.

25 Interpreting section 15342 to apply only to the machine tabulation of write-in votes
26 during the official canvass, and not to the counting of such ballots during a subsequent
27 manual recount, is also consistent with the fundamental principle that election statutes must
28

1 not be construed so as to disenfranchise voters if any other interpretation is reasonably
2 possible. As the Court of Appeal admonished in *McMillan v. Siemon* (1940) 36 Cal.App.2d
3 721, for example: “The provisions of the Constitution must receive a liberal, practical
4 common-sense construction and new provisions must be considered with reference to the
5 situation intended to be remedied or provided for. . . . The exercise of the franchise is one
6 of the most important functions of good citizenship, and *no construction of an election law*
7 *should be indulged that would disenfranchise any voter if the law is reasonably susceptible*
8 *of any other meaning.”* (*Id.*, at p. 726 (emphasis added); accord, *Wilks v. Mouton, supra*,
9 42 Cal.3d at p. 412 [“Even mandatory provisions [of the Elections Code] must be liberally
10 construed to avoid thwarting the fair expression of popular will.”].)

11 In this instance, section 15342 is perfectly susceptible of an interpretation that would
12 not disenfranchise any voter and yet would completely remedy the situation that was
13 intended to be addressed by the passage of SB 627: Construe section 15342 to apply *only*
14 in the context of the machine tabulation of votes during the official canvass, but *not* to apply
15 during a manual recount of the ballots, where each ballot must be reviewed by hand anyway
16 to ascertain the voter’s intent, and where the disqualification of write-in votes due solely to
17 the voter’s failure to have filled in the oval next to the write-in line would result in the
18 disenfranchisement of those voters without any rational basis.

19 **E. Other States Require the Counting of Write-in Ballots During a**
20 **Manual Recount Even When the Optical-Scan Oval Is Not Filled In**

21 Although the issue of whether “unbubbled” write-in votes should be counted during
22 a manual recount of ballots even if they would not be counted during a machine tabulation
23 presents a case of first impression here in California, the identical issue arose last year in the
24 State of Washington, and the Secretary of State has now issued regulations directing that the
25 voters’ failure to fill in the oval next to the write-in candidate’s name on an optical-scan
26 ballot should not prevent the vote from being counted during a manual recount of ballots.

27 In November 2003, a write-in candidate for the Medina City Council lost the election
28 by three votes, but during the course of a subsequent recount, she discovered that another 29

1 ballots had her name written on them but had been declared invalid under a state law (RCW
2 29.04.180) that — just like Elections Code section 15342 — required voters using “optical-
3 scan mark sense ballot systems” to fill in the oval for a write-in vote in order to have the vote
4 be counted. The write-in candidate filed an election contest, contending that because the
5 optical scan was not used in the manual recount, the statutory limitation should not apply.
6 A Superior Court judge agreed and ordered the additional write-in votes to be counted. (*In*
7 *re Election of Medina City Council Position 4* (King County Super. Ct. No. 03-2-41552-9
8 Dec. 18, 2003).)¹⁸ The circumstances in the City of Medina election, of course, are identical
9 to those in the present case. Here, too, the optical scan “voting system” is no longer
10 employed when the paper ballots are being reviewed by hand in a manual recount of the
11 votes, and so section 15342’s limitation is not applicable in that context. (Compare Elec.
12 Code, § 15342(a) [“For *voting systems* in which write-in spaces appear directly below the
13 list of candidates for that office”] with *id.*, § 362 [“‘Voting system’ means any
14 mechanical, electromechanical, or electronic system and its software, or any combination of
15 these used to cast or tabulate votes, or both.”].)

16 Equally interesting was the Secretary of State’s response to the Superior Court’s
17 decision. Apparently persuaded by its logic, if not its manifest equity, the Secretary of State
18 amended the state’s Manual Recount Guidelines to include an explicit directive to count
19 write-in votes on optical-scan ballots even if the oval is not filled in. Updated Procedural
20 Guidelines for Manual Recount were recently released in connection with the recount that
21 occurred in the Governor’s race. Those guidelines provide in pertinent part:

22 “As a reminder, the following situations are counted under the existing
23 statewide standards:

- 24 • A write-in vote is valid if the voter included the candidate’s
25 name, office, and party. For optical scan counties, the voter
indicates the office by writing in the name in the spot for write-

26
27 ¹⁸A copy of the Superior Court’s order, as well as a copy of a news release providing
28 additional background information regarding the case, is included as Exhibits B and C,
respectively, to Contestants’ Request for Judicial Notice in Support of Trial Brief.

1 ins under the office heading. RCW 29A.60.021

2 * * *

- 3 • In an optical scan county, the oval or arrow does not need to be
4 marked for the write-in to be valid.” (Washington Secretary of
5 State, Procedural Guidelines for Manual Recount, Governor
Race, pp. 2-3.)¹⁹

6 Washington is not the only state that requires write-in votes to be counted during
7 manual recounts in counties using optical scan voting systems even when the oval is not
8 filled in. Following the U.S. Supreme Court’s decision in *Bush v. Gore, supra*, which
9 chastised Florida for not having a uniform set of procedures to determine when votes would
10 be counted in manual recounts using the “intent of the voter” standard, the state adopted a
11 series of regulations addressing the issue of what constituted, for each certified voting
12 system, “a clear indication on the ballot that the voter has made a definite choice.” (See
13 F.S.A. § 102.166(5)(b).) For an optical scan ballot, the regulations provide in pertinent part:

14 “Subject to the provisions of (4)(f) [addressing overvote situations], the
15 written name of a qualified write-in candidate in the write-in space or the
16 written name of a candidate whose name is on the ballot in that race in the
17 write-in space, *whether or not the oval or arrow designating the selection of*
a write-in candidate has been marked, constitutes a valid vote for the
candidate.” (1 Fla. Admin. Code, Rule 1S-2.027(3) (emphasis added).)²⁰

18 Washington’s and Florida’s manual recount guidelines thus confirm both that the
19 “intent of the voter” standard has traditionally been used in those states, just as it is in
20 California, to determine whether to count a disputed ballot, and that the failure to fill in the
21 oval or arrow next to the write-in space is no barrier to counting a write-in ballot during a
22 manual recount when applying the “intent of the voter” standard. Elections Code section
23 15342 should likewise be interpreted to permit the counting of write-in votes during a manual
24 recount where the intent of the voter is clear, despite the voter’s failure to have filled in the

25 ¹⁹A copy of the Guidelines is included as Exhibit D to Contestants’ Request for
26 Judicial Notice.

27 ²⁰A copy of Rule 1S-2.027 is included as Exhibit E to Contestants’ Request for
28 Judicial Notice.

1 oval that is used to read the ballot by the optical scanner.

2 **F. To Avoid Any Doubts about Its Constitutionality, Section 15342**
3 **Must Not Be Construed to Require the Disenfranchisement of**
4 **Thousands of Voters for Merely Neglecting to Fill in the Oval Next**
5 **to the Write-in Voting Space**

6 A final pertinent principle of statutory interpretation requires that a statute be
7 construed to avoid all doubts as to its constitutionality. “When faced with a statute
8 reasonably susceptible of two or more interpretations, of which at least one raises
9 constitutional questions, we should construe it in a manner that avoids any doubt about its
10 validity.” (*Association for Retarded Citizens v. Department of Developmental Services*
11 (1985) 38 Cal.3d 384, 394.) As is discussed further below, an interpretation of section
12 15342 that prohibited the counting of “unbubbled” write-in votes even in the context of a
13 manual recount would raise very serious constitutional concerns. The right to vote is perhaps
14 the most fundamental right in our democratic society, and restrictions on that right must be
15 “narrowly drawn to advance a state interest of compelling importance.” (E.g., *Norman v.*
16 *Reed* (1992) 502 U.S. 279, 289.) Yet there is *no state interest at all* — compelling,
17 important, reasonable, or otherwise — that is advanced by refusing to count write-in votes
18 during a manual recount of ballots when the voter’s intent is clear, merely because the voter
19 neglected to fill in an oval next to the write-in candidate’s name — a requirement that exists
20 only to assist in counting the ballot with an optical scan machine. An interpretation of
21 section 15342 that prohibited the counting of such ballots in the course of a recount would
22 also raise serious equal protection concerns, because write-in ballots would be treated
23 differently than any other type of ballots, which are counted during manual recounts when
24 the intent of the voter can be discerned even if the voter did not properly follow the voting
25 instructions and, for example, placed a check-mark in the oval rather than filling it in
26 completely, or circled the name of the candidate instead of making a mark in the voting
27 square. Equal protection issues would also arise due to the different treatment accorded to
28 write-in ballots and write-in voters depending upon the different voting systems used; with
touch-screen machines or in Los Angeles County, which uses the Inka-Vote system, for

1 example, voters are not required to fill in an oval next to the write-in line, but are only
2 required to write-in (or type in) the candidate's name in the appropriate location.

3 In sum, section 15342's requirement that voters both write the candidate's name in
4 the space provided for that purpose *and also* fill in the oval next to the write-in line exists
5 solely for the administrative convenience of the elections officials to assist in expeditiously
6 counting write-in ballots during the official canvass. No purpose is served by imposing such
7 a requirement when the ballots are being manually reviewed during the course of a recount
8 — the very purpose of which is to find any ballots that might not have been counted properly
9 (i.e., consistent with the voters' intent) during the canvass' machine tabulation. The
10 Legislature never intended to impose such a nonsensical restriction on the right to have one's
11 vote counted, and Elections Code section 15342 should not be construed to prevent the
12 counting of these write-in ballots where the voters' intent is otherwise clear.

13 **III. BECAUSE THE FAILURE TO FILL IN THE OVAL NEXT TO THE**
14 **WRITE-IN LINE DOES NOT THREATEN THE INTEGRITY OF THE**
15 **ELECTORAL PROCESS OR THE SECRECY OF THE BALLOT, THE**
16 **VOTERS' INTENT AS EXPRESSED ON THEIR WRITE-IN BALLOTS**
MUST BE GIVEN EFFECT DESPITE THEIR NONCOMPLIANCE
WITH THE TECHNICAL REQUIREMENTS OF THE STATUTE

17 As noted in the Introduction, the primary purpose of an election contest is to ascertain
18 and implement the true will of the voters. (*Enterprise Residents Legal Action, supra*, 22
19 Cal.3d at p. 774.) In an effort to achieve this objective, the courts and the Legislature have
20 developed two complementary principles for adjudicating election disputes.

21 The first principle is that "every reasonable presumption and interpretation is to be
22 indulged in favor of the right of the people to exercise the elective process." (*Hedlund v.*
23 *Davis, supra*, 47 Cal.2d at p. 81.) As a consequence of both the exalted position accorded
24 the right to vote in the pantheon of our constitutional rights, as well as the Legislature's
25 repeated admonitions that election statutes "shall be liberally construed so that the real will
26 of the electors will not be defeated by any informality or failure to comply with all of the
27 provisions of the law" (Elec. Code., § 19001), the courts have repeatedly held that election
28 laws must be construed, wherever possible, to preserve the right to vote:

1 “The exercise of the franchise is one of the most important functions of good
2 citizenship, and no construction of an election law should be indulged that
3 would disenfranchise any voter if the law is reasonably susceptible of any
4 other meaning.” (*Otsuka v. Hite* (1966) 64 Cal.2d 596, 603-04 (quoting
McMillan v. Siemon, supra, 36 Cal.App.2d at p. 726); accord, *Walters v.*
Weed (1988) 45 Cal.3d 1, 14.)

5 In election contests, this principle has resulted in the courts’ ruling that “where there
6 has been no fraud, tampering or coercion, departure from the technical requirements of the
7 statute will not disenfranchise voters who had no knowledge that they had failed to comply.”
8 (*Wilks v. Mouton, supra*, 42 Cal.3d at p. 412.) In particular, the courts have refused to
9 countenance the denial or infringement of citizens' right to vote because of mistakes or errors
10 on the part of the election officials. (See *Scott v. Kenyon* (1940) 16 Cal.2d 197, 202
11 (“Ordinarily, courts are reluctant to throw out votes where it can be told for whom the vote
12 was intended and where the irregularity complained of is that of one of the election officials
13 for which the voter is not to blame.”))

14 The second fundamental principle of elections law is that no matter how indulgent the
15 courts may be of the right to vote, certain restrictions must be imposed on the manner in
16 which the franchise is exercised in order to preserve the integrity of the process. Thus, the
17 Legislature is free to enact — and the courts are bound to enforce — statutory requirements
18 that are necessary to prevent fraud and to protect the purity and secrecy of elections. As the
19 court in *Fair v. Hernandez* (1982) 138 Cal.App.3d 578 explained in invalidating absentee
20 ballots that had been returned to the city clerk by someone other than the voter, in violation
21 of the Elections Code, “the integrity and secrecy of the process are such important interests
22 that ballots may be voided even though it is not shown that the ballots were actually
23 tampered with.” (*Id.*, at p. 583; accord, *Scott v. Kenyon, supra*, 16 Cal.2d at p. 202.)

24 These two complementary principles lie at the root of the important distinction that
25 has developed between “mandatory” and “directory” provisions in election laws. A directory
26 provision is one that does not necessarily serve to protect the integrity and purity of the
27 ballot, but is intended primarily to facilitate an orderly and efficient election by, for example,
28 aiding the clerk in the expeditious processing of the ballots; consequently, a departure from

1 a directory provision does not render an individual vote or the entire election void as long
2 as there has been a substantial observance of the law and no showing that the rights of voters
3 have been injuriously affected by the deviation. (See *Wilks v. Mouton*, *supra*, 42 Cal.3d at
4 p. 404; *Rideout v. City of Los Angeles* (1921) 185 Cal. 426, 430.) By contrast, a mandatory
5 provision is one that the Legislature has deemed necessary to prevent fraud or other abuses
6 of the electoral process; although even mandatory provisions must be liberally construed to
7 avoid thwarting the fair expression of the popular will (*Wilks v. Mouton*, *supra*, 42 Cal.3d
8 at p. 404), where the legislative purpose is to preserve the integrity of the process and the
9 statutory mandate is clear, a vote cast in violation of such a provision cannot be counted.²¹

10 In the present case, there can be no serious argument that section 15342's requirement
11 that voters fill in the oval next to the write-in line in addition to writing in the name of the
12 candidate can be considered anything other than directory. Only one purpose has ever been
13 identified as being served by the requirement — to assist the Registrar of Voters in being
14 able to swiftly identify and count write-in votes through the use of an optical scan reader.²²
15 There is thus absolutely no threat posed to the integrity or secrecy of the election process
16 from a violation of that section, and the voters' inadvertent failure to fill in the oval cannot

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18 ²¹The distinction between a “mandatory” and “directory” provision does not depend
19 upon the language used by the Legislature in commanding compliance, but in the purposes
20 served by the requirement and its importance in the legislative scheme. Thus, “directory”
21 provisions frequently use the word “shall,” but their violation will nonetheless not result in
22 the disqualification of the vote. (See, e.g., *Escalante v. City of Hermosa Beach* (1987) 195
23 Cal.App.3d 1009, 1015-17 (absentee ballots marked with pen, rather than being punched or
marked with pencil, are valid notwithstanding statute's use of the word “shall,” because
violation of statute does not abrogate legislative scheme or undermine the secrecy, uniformity
and fairness of the vote, or the integrity of the voting process).)

24 ²²In this election, the Registrar did not even seek to take advantage of this marginal
25 assistance, because she had the precinct workers and office staff manually review and hand-
26 segregate any ballots that had a name written in the write-in space, whether or not the oval
27 had been filled in. And even when the filled-in oval is used to machine-segregate ballots that
28 have write-in votes cast on them, the Registrar's staff must still go through each of these
ballots one at a time to determine for whom the write-in vote was cast, and whether the
recipient was a qualified write-in candidate.

1 justify the disqualification of their ballot and the resulting disenfranchisement of the voters.

2 This is particularly so where, as here, the elections officials are at least partly
3 responsible for the widespread lack of compliance. The very fact that over 5,500 voters —
4 over 3.4% of all of those who attempted to vote for Donna Frye — did not fill in the oval
5 next to the write-in line is *prima facie* proof that the instructions were inadequate to educate
6 all voters on the two-step process needed to be employed in order to cast a write-in vote on
7 these optical scan ballots. And, indeed, the evidence at trial will confirm that despite every
8 effort made by the Frye campaign and her supporters to inform the voters, the requirement
9 was not sufficiently publicized or adequately explained by the Registrar’s staff and the
10 precinct workers. This was a completely new voting system for San Diegans, who had never
11 before been required to do anything other than to simply write (or type) in a name in order
12 to cast a write-in vote. Perhaps most shockingly, there was absolutely no information
13 provided in the sample ballots about how voters could cast write-in votes. In fact, the sample
14 ballot voters received prior to the election did not even contain an accurate replica of the type
15 of ballot that was actually used in the election. And many voters reported that when they
16 affirmatively sought information from the Registrar’s staff or their pollworkers, they were
17 given incorrect advice, frequently told simply to “write the candidate’s name on the blank
18 line on the ballot.” The law will not be applied in a manner that would frustrate the free
19 expression of the voters’ will when the election officials are at least partly to blame for the
20 voters’ failure to comply with the law’s technical requirements. (See, e.g., *Assembly v.*
21 *Deukmejian* (1982) 30 Cal.3d 638, 651 (refusing to invalidate referendum petitions that did
22 not comply with Elections Code’s requirements because sample petition in Secretary of
23 State’s handbook contained same error); *In re Gray-Sadler* (N.J. 2000) 164 N.J. 468, 753
24 A.2d 1101 (write-in votes should not have been rejected where evidence showed that voters’
25 mistakes were due to inadequate and confusing instructions regarding write-in votes).)

26 Defendant Murphy takes a different view of the prevailing legal principles, contending
27 that “California courts have, in every instance, held that voter intent cannot overcome non-
28

1 compliance with mandatory elections provisions.”²³ (Murphy TB, p. 24.) The reported
2 decisions he cites, however, are both distinguishable on their facts in the respect that is most
3 critical to their outcomes, as well as outdated — predating the California Supreme Court’s
4 decision in *Wilks v. Mouton*, which ushered in a new and more enlightened era in
5 recognizing that not every violation of the election laws warranted disenfranchising the
6 voters.

7 Consideration of two of the cases cited by Defendant will demonstrate these points.
8 Defendant describes *McFarland v. Spengler* (1926) 199 Cal. 147, 248 P. 521, as a case with
9 “parallels to the case at hand.” In *McFarland*, the Supreme Court upheld the trial court’s
10 exclusion of 701 write-in ballots that had been cast using “stickers” instead of actually
11 writing the candidate’s name on the ballot. The Court acknowledged that the “stickers” were
12 evidence of the voters’ intent, but nevertheless concluded that “it is not enough to find out
13 generally the voters’ intention. Such intention must be expressed in the manner prescribed
14 by law.” (199 Cal., at pp. 152-53.) Defendant draws from this case the general proposition
15 that anytime a voter does not cast his or her ballot “in the manner prescribed by law,” it must
16 be excluded, notwithstanding the manifestation of the voters’ intent.

17 Four years earlier, however, the Supreme Court had reached just the opposite
18 conclusion in *Castagnetto v. Superior Court* (1922) 189 Cal. 673, 209 P. 549, refusing to
19 disqualify certain ballots that had not been stamped with a cross using the official marking
20 device, as explicitly required by the Elections Code, but which had been marked with a
21 pencil cross instead. The Court explained:

22 “Notwithstanding the use of the words ‘stamping,’ ‘stamp,’ and
23 ‘stamped’ in the section, the provision therein that ‘no ballot shall be rejected
24 for any technical error which does not render it impossible to determine the
25 voter’s choice,’ to our mind, is sufficiently liberal in its terms to permit the
acceptance and counting of a ballot which the voter has marked with a

26 ²³Defendant’s phrasing of the question provides him with the answer he desires, since
27 — as explained above — the characterization of an Elections Code provision as “mandatory”
28 or “directory” is precisely what generally determines whether non-compliance is deemed
fatal to the validity of a vote or election.

1 penciled cross. While the use of such penciled cross by the voter in primary
2 elections is a departure from the requirements of the foregoing section, it is,
3 in our opinion, a merely technical error on the part of the voter, which does
4 not render it impossible to determine the voter's choice." (209 P. at 550.)

5 What accounted for the different results in these two cases? It wasn't simply that the
6 voters had not marked their ballots "in the manner prescribed by law," as Defendant would
7 suggest; in both cases, the voters had violated the unequivocal requirements of the statute.
8 Rather, the difference was that the voter's use of a penciled cross in *Castagnetto* was not
9 seen as posing any threat to the integrity of the election, but was deemed by the Court to be
10 merely a technical error that did not require rejection of the ballot. In *McFarland*, by
11 contrast, the Court believed that the use of stickers could be subject to abuse. Indeed, the
12 Court engaged in an extensive review of the history of the election laws governing write-in
13 voting and concluded that the Legislature had specifically refused to authorize the use of
14 stickers based upon two objections: "First, their liability to come off; second, their liability
15 to be fraudulently taken off." (248 P. at p. 523.) The Court was therefore unwilling to
16 second-guess the Legislature's judgment that the sticker votes should be prohibited in the
17 interest of secrecy and uniformity of the ballot.

18 The most recent case Defendant cites, *Fair v. Hernandez* (1981) 116 Cal.App.3d 868,
19 rests upon similar grounds. In that case, as Defendant notes, the Court of Appeal likewise
20 refused to count four write-in ballots where there was "no dispute" regarding the intent of
21 the voters, but where the voters' will was not expressed "in the manner prescribed by law."
22 Again, Defendant would have this Court draw a hard-and-fast rule, but the case does not
23 support such a bright line. Rather, the problem with the write-in ballots rejected in *Fair v.*
24 *Hernandez* was not simply that they did not comply with the law, but that "[t]he deviation
25 from the statutory scheme is here so considerable that the ballots cannot be saved." (*Id.*, at
26 p. 877.) The voting system used in the election at issue in *Fair* was a punchcard system, in
27 which there was no space included on the punchcard ballot itself for casting a write-in vote,
28 but the voters were supposed to write the names of any write-in candidates on the separate
 "secrecy envelope" they received with their ballot. (*Id.*, at p. 875.) The four voters in *Fair*

1 did not use the designated write-in space on the envelope to cast their write-in ballots; in
2 fact, they didn't use the envelope at all, and instead wrote the name of the candidate on the
3 punchcards. As the Court of Appeal explained, this was just a bridge too far; if these write-
4 in votes were to be accepted, where the entire write-in ballot was left blank, then "write-in
5 votes might be cast in as many different ways as there write-in voters. Such unfettered
6 variety would undermine the secrecy, uniformity and fairness of the vote, to say nothing of
7 the integrity of the voting process itself." (*Id.*, at p. 877.)

8 The facts in *Fair* are a far, far cry from the facts in the present case. Here, 5,500
9 voters actually wrote the name of Donna Frye exactly where they were supposed to — on
10 the blank write-in line beneath the names of the printed candidates. There was no "great
11 deviation" from the statutory scheme, and no risk that the secrecy, uniformity or fairness of
12 the vote would be undermined. All that these voters either forgot or did not realize they had
13 to do was to also fill in the little oval before the write-in candidate's name — a requirement
14 that, as it turned out, served utterly no purpose in this election other than to constitute a trap
15 to disenfranchise the voters, and deprive candidate Frye of the victory to which she is
16 entitled.

17 Contestants seriously doubt that the *Fair* court would have invalidated the
18 "unbubbled" write-in ballots in the present case rather than "saving" them from
19 disqualification based upon their minimal deviation from the statutory scheme. (After all,
20 in no other type of voting system would the voters even have been asked to do anything other
21 than simply write the candidate's name in the write-in space.) But we are certainly confident
22 that the Court of Appeal would uphold these ballots based upon the analysis and ruling
23 issued by the state Supreme Court approximately five years later in *Wilks v. Mouton, supra*.
24 In that case, the Court rejected a request to disqualify some 46 absentee ballots that had been
25 delivered to the county clerk's office by a third party — a campaign worker — in violation
26 of then-section 1013's requirement that the absent voter must personally return or mail the
27 absentee ballot back to the clerk's office. The Supreme Court did not agree with the Fourth
28

1 District Court of Appeal's assessment in *Fair v. Hernandez* (1982) 138 Cal.App.3d 578 that
2 the bar to third-party delivery of absentee ballots was so fundamental to the preservation of
3 the integrity of elections that the ballots had to be invalidated, even when there had been no
4 fraud or tampering. Rather, the Court regarded section 1013's prohibition against third-party
5 delivery "as essentially directory in nature," and it cautioned that "[n]oncompliance with
6 directory provisions of the Elections Code will not nullify a vote unless the irregularity
7 prevented "the fair expression of the popular will.'" (42 Cal.3d at p. 412.)

8 In the present case, as mentioned above, it is impossible to characterize the "fill in the
9 oval" requirement as anything other than directory in nature. Indeed, the only thing that has
10 prevented "the fair expression of popular will" in this case is the Registrar's refusal to count
11 these ballots and add them to candidate Frye's vote total. There has been no fraud,
12 tampering or coercion in this case, nor has the secrecy of the ballot or the integrity of the
13 elections process been undermined by the voters' failure to fill in the little ovals. To
14 paraphrase the Supreme Court in *Wilks v. Mouton*, "[t]here was substantial compliance with
15 the essential provisions of [the write-in] provisions of the Elections Code. Under these
16 circumstances we will not deprive the individuals who cast the challenged ballots of the
17 exercise of their fundamental right to vote." (*Id.*, at p. 413.)

18 **IV. IF ELECTIONS CODE SECTION 15342 WERE INTERPRETED TO**
19 **PROHIBIT THE COUNTING OF THOUSANDS OF WRITE-IN VOTES**
20 **DURING A MANUAL RECOUNT JUST BECAUSE THE VOTERS**
21 **NEGLECTED TO FILL IN AN OVAL NEXT TO THE WRITE-IN**
22 **CANDIDATE'S NAME, IT WOULD DENY THOSE VOTERS THEIR**
23 **CONSTITUTIONAL RIGHTS TO VOTE AND TO THE EQUAL**
24 **PROTECTION OF THE LAWS**

25 As set forth above, Contestants believe that Elections Code section 15342 should be
26 interpreted so as to avoid any doubts about its constitutionality, and that the way to do that
27 is either to engraft upon the statutory language the implicit qualification that section 15342
28 applies only in the context of the machine tabulation of write-in votes during the canvass,
and not during a manual recount of ballots, or to rule that a violation of the technical
requirement to fill in the oval nevertheless does not warrant disqualification of the ballot.

1 If the Court were not willing to pursue either of those paths, however, and was instead
2 insistent that section 15342 must be construed to prohibit the counting of the 5,500
3 “unbubbled” write-in ballots in this case, then the statute would be unconstitutional, for it
4 would violate both the fundamental right to vote and the equal protection rights of the 5,500
5 voters disenfranchised by the statute.

6 The United States and California Supreme Courts have both acknowledged that the
7 right to vote is fundamental, and that it includes not only the right to cast a ballot, but to have
8 the vote counted, as well. (See, e.g., *Harper v. Virginia State Bd. of Elections* (1966) 383
9 U.S. 663; *Castro v. State of California* (1970) 2 Cal.3d 223.) It hardly bears repeating that
10 “implicit in the right to vote is the right to have that vote counted.” (*Partnoy v. Shelley* (S.D.
11 Cal. 2003) 277 F.Supp.2d 1064, 1073 (quoting *Davis v. Bandemer* (1986) 478 U.S. 109,
12 124).)

13 The Supreme Court has repeatedly emphasized that before this sacred right may be
14 restricted by the state, “the purpose of the restriction and the assertedly overriding interests
15 served by it must meet close constitutional scrutiny.” (*Dunn v. Blumstein* (1971) 405 U.S.
16 330, 226 (internal quotation and citation omitted).) As the Court explained in *Burdick v.*
17 *Takushi* (1993) 504 U.S. 428, 434:

18 “A court considering a challenge to a state election law must weigh ‘the
19 character and magnitude of the asserted injury to the rights protected by the
20 First and Fourteenth Amendments that the plaintiff seeks to vindicate’ against
21 ‘the precise interests put forward by the State as justifications for the burden
22 imposed by its rule,’ taking into consideration ‘the extent to which those
23 interests make it necessary to burden the plaintiff’s rights.’ Under this
24 standard, the rigorousness of our inquiry into the propriety of a state election
25 law depends upon the extent to which a challenged regulation burdens First
26 and Fourteenth Amendment rights. Thus, as we have recognized when those
27 rights are subjected to ‘severe’ restrictions, the regulation must be ‘narrowly
28 drawn to advance a state interest of compelling importance.’ But when a state
election law provision imposes only ‘reasonable, nondiscriminatory
restrictions’ upon the First and Fourteenth Amendment rights of voters, ‘the
State’s important regulatory interests are generally sufficient to justify’ the
restrictions.” (Internal citations omitted.)

26 In this case, there can be no question that the restriction at issue here is severe.
27 Indeed, it is the most severe restriction possible, for adopting the interpretation of state law
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1 advanced by Defendant Murphy will result in nothing less than the total disenfranchisement
2 of more than 5,500 voters in the City of San Diego. Moreover, any suggestion that the need
3 to fill in an oval is not a burdensome requirement is irrefutably belied by the fact that almost
4 3.5% of those voters who cast ballots in favor of candidate Frye neglected to fill in the oval.
5 It is therefore clear that although darkening an oval may not, in the abstract, strike some as
6 a burdensome requirement, in the context of voting — and specifically in light of the recent
7 changes in the City of San Diego’s voting systems, as well as the unusual complexity and
8 length of the November 2, 2004, ballot — the oval requirement is unduly burdensome.

9 It is equally clear that the state cannot advance any interest — let alone an interest of
10 “compelling importance” — sufficient to justify the imposition of this burden. The only
11 argument suggested by the statute’s legislative history — administrative convenience in
12 facilitating the machine counting of ballots during the canvas — cannot possibly save the
13 statute from unconstitutionality as applied in the context of a manual recount. As the
14 Supreme Court explained in *Carrington v. Rash* (1965) 380 U.S. 89, 96: “We deal here with
15 matter so close to the core of our constitutional system. The right to choose, that this Court
16 has been so zealous to protect, means, at the least, that States may not casually deprive a
17 class of individuals of the vote because of some remote administrative benefit to the State.”
18 (Internal citations and quotations omitted.)

19 An interpretation of section 15342 that precludes the counting of the 5,500
20 “unbubbled” write-in votes for Donna Frye would also directly contravene the equal
21 protection guarantees of the Fourteenth Amendment to the United States Constitution. As
22 the law was interpreted and applied by the Registrar of Voters in this case, the recount of the
23 ballots cast in this election has eerie parallels to the aborted recount in Florida following the
24 2000 Presidential election, and it is just as unconstitutional for the reasons explained by the
25 Supreme Court in *Bush v. Gore*, *supra*.

26 The High Court’s decision in *Bush v. Gore* is the seminal case addressing the use of
27 different standards for determining voter intent in the context of a manual recount. (*Bush*
28

1 v. *Gore, supra*, 531 U.S. at 103.) In that case, the Court considered whether the Florida
2 Supreme Court had properly ordered recount boards to proceed to determine voter intent by
3 examining the many punch card ballots cast in the 2000 presidential election in which a
4 “chad” was not completely perforated and therefore the machine tally had recorded an
5 undervote (i.e., no vote) in the presidential election.

6 Significantly, the Court began its analysis by recognizing that the fundamental right
7 to vote is premised on “the equal weight accorded to each vote and the equal dignity owed
8 to each voter.” (*Id.*, at pp. 104-05.) As the Court noted, once the state has granted the right
9 to vote, “the State may not, by later arbitrary and disparate treatment, value one person’s vote
10 over another.” (*Ibid.*) The Court further observed that while Florida law required the
11 counting of all votes in which the “intent of the voter” could be determined, Florida failed
12 to provide “specific standards to ensure . . . [the] equal application” of this principle. (*Id.*, at
13 p. 106.) As the Court explained: “The formation of uniform rules to determine intent . . . is
14 practicable and, we conclude, necessary.” (*Ibid.*)

15 Indeed, the Court observed that due to the absence of clear standards for determining
16 the intent of a voter who had failed to perforate the chad on his or her punch card, “the
17 standards for accepting or rejecting contested ballots might vary not only from county to
18 county but indeed within a single county from one recount team to another.” (*Ibid.*) The
19 Court also expressed concern regarding the differential treatment accorded undervotes
20 (which were ordered to be re-examined), as compared to overvotes (i.e., votes for more than
21 one candidate for President, which were not necessarily going to be re-examined):

22 “As a result, the citizen whose ballot was not read by a machine because he
23 failed to vote for a candidate in a way readable by a machine may still have his
24 vote counted in a manual recount; on the other hand, the citizen who marks
25 two candidates in a way discernible by the machine will not have the same
26 opportunity to have his vote count, even if a manual examination of the ballot
would reveal the requisite indicia of intent. Furthermore, the citizen who
marks two candidates, only one of which is discernible by the machine, will
have his vote counted even though it should have been read as an invalid
ballot.” (*Id.*, at p. 109.)

27 In the end, because the manual recount ordered by the Florida Supreme Court “did
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1 not contain the rudimentary requirements of equal treatment and fundamental fairness,” the
2 Court reversed the Florida Supreme Court’s order permitting the recount. (*Id.*, at p. 110.)

3 While the Supreme Court’s concern in *Bush v. Gore* was the absence of any standards
4 for discerning voter intent, the concern in the instant case is the constitutionality of a state
5 statute — Elections Code section 15342 — that may be read to require that a select group
6 of ballots *not* be counted despite the fact that the intent of the voter is clear. That is certainly
7 the reading that the Registrar has given the statute to date, refusing all entreaties to give
8 effect to the manifest intent of the voters who wrote in the name of Donna Frye but neglected
9 to fill in the bubble next to the write-in space, while simultaneously “enhancing” and
10 “correcting” other ballots containing marks that could not properly be read by the optical
11 scan machines in order to implement the voters’ intent and count those ballots. Thus, for
12 example, the Registrar will testify that she counted votes in which voters marked all of their
13 voting selections with a check mark or an “x” — notwithstanding the fact that the voting
14 instructions specifically warned that such marks were improper — but the Registrar refused
15 to count the more than 5,500 “unbubbled” votes in favor of candidate Frye in which voter
16 intent is equally unmistakable. This is precisely the sort of arbitrary decision disapproved
17 of by the Supreme Court in *Bush v. Gore*. Accordingly, to the extent that Defendant Murphy
18 suggests here that the Registrar’s decision to discount these “unbubbled” votes is compelled
19 by statute, the statute must be struck down as unconstitutional because it fails to provide “the
20 equal weight accorded to each vote and the equal dignity owed to each voter” (*id.*, at pp.
21 104-05) as mandated by the Constitution.

22 This case also parallels *Bush* with respect to the differential — and indeed
23 unconstitutional — treatment accorded undervotes when compared with overvotes. In *Bush*,
24 the Court expressed concern that the manual recount would permit the counting of
25 undervotes where the intent of the voter was clear, but not the counting of similarly
26 transparent overvotes. Here, in contrast, it is the voters who may have cast an overvote that
27 received preferential treatment. The evidence will show that the Registrar’s Office did
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1 everything within its power to ensure that voters did not cast overvotes, including training
2 poll workers about the problem and programming the machines at the precincts that scanned
3 the ballots to alert voters when they cast an overvote, thereby providing many voters with
4 the opportunity to correct their mistake. In addition, when voters accidentally recorded
5 overvotes that were not corrected at the precinct, ballots were “remade” to reflect the
6 apparent intent of the voter whenever such intent was readily discernable. For example, if
7 a voter had filled in the oval for Roberts as well as the oval for Murphy, but definitively
8 crossed out the Murphy oval and wrote the word “No” in the margin, the machine would
9 have recorded an overvote rather than a vote for either candidate, but the Registrar would
10 have “remade” this ballot by taping over the completed oval for Murphy, thereby allowing
11 the machine to record the vote for Roberts. The treatment accorded voters who may have
12 cast an undervote in a particular race such as the mayoral contest stands in sharp contrast.
13 Poll workers were not instructed to alert voters to the problem, machines were not programmed
14 to assist voters in avoiding undervotes in the mayoral election or any other specific race, and
15 the Registrar refused to remake such ballots no matter how clear the intent of the voter.

16 CONCLUSION

17 Everyone knows that Donna Frye received more votes in the November 2004 mayoral
18 election than Dick Murphy — substantially more votes. There is no legitimate reason why
19 the 5,500 votes with Donna Frye’s name written on them should not be counted, and plenty
20 of reasons why they *must* be counted. Only when those votes are finally counted will this
21 Court have fulfilled its obligation to “ascertain the will of the people and to make certain that
22 mistake or fraud has not frustrated the public volition.”

23 DATED: January 26, 2005

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