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10 **SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO**

11 **BARBARA GAIL JACOBSON, LILLIAN
12 RITT, and DOES 1-50,**

13 **Contestants,**

14 **vs.**

15 **BRIAN P. BILBRAY, MIKEL HAAS, DOES
16 1-50**

17 **Defendants.**

CASE NO.: GIC870044

Judge: Hon. Yuri Hoffman

Dept.: 60

**CONTESTANTS' OPPOSITION TO
DEFENDANT HAAS' POINTS AND
AUTHORITIES IN RESPONSE TO
ELECTION CONTEST**

Complaint Filed: July 31, 2006

Hearing Date: August 25, 2006

Time: 1:30 p.m.

19 COME NOW CONTESTANTS in opposition to Defendant Haas' points and authorities in
20 response to election contest as follows:
21

22 **I.**

23 **THIS COURT HAS JURISDICTION OVER THIS ELECTION CONTEST**

24 This case involves the question of whether a electoral choice was made by the people of this
25 State in the 50th Congressional District, and if a choice was clearly made, what that choice was.

26 Defendants argue that the rushed swearing-in of Bilbray only seven days after the election and
27 weeks prior to certification somehow deprives this Court of "jurisdiction." Defendants are in effect
28

1 arguing for the remarkable proposition that unilateral self-serving actions by a majority party in the
2 House of Representatives to shuttle in a member of the same party can be effective, even if those actions
3 do violence to and amount to circumvention of other sections of the US Constitution as well as the
4 California constitution. The federal Constitution, after all, clearly commits the time place and manner of
5 elections to the States, including California. Thus, the question presented is whether a premature
6 swearing in of Brian Bilbray by the House of Representatives terminated the election processes of the
7 State of California, even though the US Constitution specifically provides that the State control the time
8 place and manner of federal elections.

9 Clearly, the swift swearing in did not end the election in the 50th Congressional District, and it
10 did not render everything, including the certification of results weeks later, nugatory and without
11 “jurisdiction.” If this swearing in had this effect, then in the course of dismissing this case the Court
12 would be bound to conclude that the certification of the results after the swearing in of Bilbray was
13 without force and effect, without jurisdiction, and in contravention of principles of federalism, as
14 Defendants argue. That conclusion, however, requires either an absurdity, or the conclusion that our
15 Congressional election was canceled by decision of the Speaker of the House, before all the votes were
16 fully counted, and well before certification.

17 The time place and manner of voting is committed to the State of California under the US
18 Constitution pursuant to Art. I, sec. 4. No court nor indeed any reader of the Constitution can ignore its
19 other sections that are relevant, but Defendants do so by focusing exclusively on Art. I sec. 5 when
20 several other sections are highly relevant. Because these other sections are largely ignored, the position
21 reached by Defendants is in conflict with or in tension with these other sections of the US Constitution
22 as well as with the California Constitution and its election contest statutes, which are accorded
23 constitutional dignity in the federal Constitution by its commitment to the several states of controlling
24 the Time, Place and Manner of federal elections, under Art. 1 sec. 4.

25 The various other provisions and rights that must be simultaneously considered by the Court
26 along with Art I, sec. 5 are as follows:

27 1. The Right to Vote is a Fundamental Constitutional Right, and Includes the Right to Have That
28 Vote Properly Counted. The Contestants in their trial brief quoted US v Classic: “The right of qualified

1 voters within a state to cast their ballots and have them counted at Congressional elections . . . is a right
2 secured by the Constitution” and “is secured against the action of individuals as well as of states.”
3 (*United States v. Classic*, 313 U.S. 299, 315, 85 L. Ed. 1368, 61 S. Ct. 1031 (1941).) Under US Supreme
4 Court authority such as *Wesberry v. Sanders*, the right to vote in order to be meaningful means the right
5 to have that vote properly counted.

6 2. The California Constitution makes the right to have the vote properly counted even more clear.
7 California Constitution Art. II, § 2.5 also provides a Right to have one's vote counted. It states: “A voter
8 who casts a vote in an election in accordance with the laws of this state shall have that vote counted.”
9 Calif. Elec. Code § 15702 further defines the scope of what “shall” be done under this constitutional
10 provisions by defining “vote” for the express purpose of this Constitutional section as follows: “For
11 purposes of Section 2.5 of Article II of the California Constitution , “vote” includes all action necessary
12 to make a vote effective in any primary, special, or general election, including, but not limited to, voter
13 registration, any other act prerequisite to voting, casting a ballot, and having the ballot counted properly
14 and included in the appropriate totals of votes cast with respect to candidates for public office and ballot
15 measures.” By including both prerequisite acts as well as post-voting acts and acts of appropriate
16 tabulation, it is clear that the full scope of counting is included herein, which naturally includes a second
17 counting, also known as a recount.

18 3. Under Article I, sec. 4 as held by *Roudebush v. Hartke* in 1972, a recount is an integral part of
19 the Indiana electoral process and is within the ambit of the broad powers delegated to the States by U.S.
20 Const. art. I, § 4. The fact that a recount right under CA law is decided pursuant to the face of the
21 pleadings makes it ministerial in nature, just like the Indiana law for recounts was. The differences
22 between this and regular civil actions is clear from the unique way in which election contests are
23 triggered compared to normal civil cases.

24 4. The US Constitution also requires that the members of the House be chosen “every second
25 year by the People of the several States.” Art. I, sec. 2, cl. 1. (emphasis added). This section makes a
26 demonstrable textual commitment to the States of the election by the People. Where the very notion of
27 who the People have voted for is in question, it can not be assumed that the issue has been transferred
28 “solely” to the House of Representatives, as argued by Defendants.

1 5. Not argued in *Roudebush v. Hartke* or the other cases, is the public interest and the
2 independent interests of the elector Contestants in vindicating the accuracy of elections, without which
3 similar practices or errors would simply be repeated again in November and other future elections.
4 Clearly, under CA law which is not challenged by defendants, an election contest is an action in the
5 public interest, not primarily for the private interest of particular candidates.

6 6. States have an especially strong sovereign right with regard to state elections, which is
7 extended to federal elections unless and until that is specifically taken away by action of Congress. Yet
8 federal statutes as recent as the Help America Vote Act in 2002 specifically relegate the definitions of
9 votes and the counting and recounting of those votes to the several States. In section (6), 42 USC 15481
10 of the Help America Vote Act, Congress recognized State Authority regarding vote counting standards,
11 stating "Uniform definition of what constitutes a vote. Each State shall adopt uniform and
12 nondiscriminatory standards that define what constitutes a vote and what will be counted as a vote for
13 each category of voting system used in the State." (42 USCS § 15481 (6).)

14 Putting all of these constitutional and federal statutory provisions together, the interpretation of
15 Defendants would (1) defeat the right to vote and to have that vote counted (2) uphold the proposition
16 that unilateral actions of a sister sovereign without a vote of the federal government would destroy the
17 power of a sister sovereign (the State) despite the special status of States that are the sole operators of
18 elections under our federal system. This simply makes no constitutional or federalism sense.

19 There are numerous other factual and legal defects in the arguments advanced by defendants:

20 1. Although Defendants argue that the court lacks jurisdiction, the US Supreme Court in *Lebron*
21 as cited in contestants trial brief clearly shows that the constitutional status and duties are clearly matters
22 for the courts, even if Congress announces otherwise, as it did in the *Lebron* case by passing a statute
23 claiming that Amtrak was not an instrumentality of the US Government. The court found otherwise,
24 ridiculed those who argued that they could define the scope of their own power, suggesting that such
25 arguments would necessarily mean that the FBI could decide whether its own warrants were proper or
26 not, and circumvent the Courts. Similarly here, this question is clearly for the court, and it is not
27 JURISDICTIONAL. Instead, the question is more properly framed as what the Constitution allows or
28 requires in this particular case, but not the power of this Court to decide.

1 Elections,” focuses on general elections. Article 2, entitled “Primary Elections,” and the two Articles
2 following which consider recounts, are focused on primary elections. This is best understood by
3 considering an outline of the statute as follows:

4 CHAPTER 5. FORM OF CONTEST STATEMENT

5 Article 1. General Elections 16400-16404
6 Article 2. Primary Elections 16420-16421
7 Article 3. Contests Other than Recount 16440-16444
8 Article 4. Contests Involving a Recount 16460-16467

9 CHAPTER 6. ELECTIONS OFFICIAL'S DUTIES

10 Article 1. Contest Procedures at General Elections 16500-16503
11 Article 2. Contest Procedures at Primary Elections: Contests Other than Recount ... 16520-16521
12 Article 3. Contest Procedures at Primary Elections: Involving a Recount 16540

13 The principles of statutory construction require that, in construing a statute to ascertain the intent
14 of the Legislature so as to effectuate the purpose of the law, a court must consider the statute read as a
15 whole, harmonizing the various elements by considering each clause and section in the context of the
16 overall statutory framework. (*DuBois v. Workers' Comp. Appeals Bd.* (1993) 5 Cal.4th 382, 398;
17 *Landrum v. Superior Court* (1981) 30 Cal.3d 1, 12.)

18 The Article 1 and Articles 2-4 set forth different legislative schemes. Article 1 is complete in and
19 of itself and is limited to general elections. Article 1 sets forth a requirement to name the defendant in
20 the affidavit and the time within which to file the affidavit. Article 2 is not complete the way Article 1 is.
21 For example, Article 2, regarding primary elections, has only two sections, one for naming the defendant
22 in an affidavit, and one for filing the affidavit with the court clerk, and no provision for service on the
23 defendant. In order to discover how to serve the affidavit referred to in Article 2, one must continue to
24 Article 3, section 16442, regarding primary election contests without a recount. Article 4, regarding
25 primary election contests with a recount, even refers to candidates at primary elections. (Elections Code,
26 section 16463.) Article 2 has no deadlines for filing the affidavits referred to by it, but Articles 3 and 4
27 do. Most importantly, Article 1 has a different time for filing then do Articles 2-4. The reason for a short
28 time line in primary elections is to provide elections officials with the names of candidates to place on

1 the general election ballot as soon as possible.

2 Chapter 6 makes the regulatory scheme clearer. Chapter 6 has three Articles. Article 1 is entitled
3 “Contest Procedures at General Elections,” Article 2, “Contest Procedures at Primary Elections:
4 Contests Other than Recount,” and Article 3, “Contest Procedures at Primary Elections: Involving a
5 Recount.” The legislative intent to set forth a separate scheme for general elections and primary elections
6 is clear.

7 The Elections Code provides that the statement of contest of a general election be filed 30 days
8 after the declaration of the result of the election by the Registrar of Voters. (Elections Code, section
9 16401.) Section 16401 identifies four separate time periods for filing and states, “*In all other cases, 30*
10 *days.*” (Election Code, section 16401, subdivision (d).) This contest is one of the final other cases.

11 The results of the election were declared on June 29, 2006. Thirty dates from that date was
12 Saturday, July 29, 2006. Elections Code, section 15, defers to the Government Code for computing the
13 last day for performance of an act. Government Code, section 6707, provides that when the last day for
14 filing any document with a state agency falls upon a Saturday, such act maybe performed upon the next
15 business day with the same effect as if it had been performed upon the day appointed.(See also, Code of
16 Civil Procedure, section 12a, subdivision (a).) Therefore, the deadline for filing the statement was
17 Monday, July 31, 2006, the same date on which the statement was filed.

18 Defendant Haas states in his rendition of the facts that Contestants failed to obtain a recount of
19 the general election from him in June as if obtaining a recount in a general election is a prerequisite for a
20 contest. Defendant cites no authority because no authority exists. Contestants have met all the
21 requirements for filing this general election contest. Nevertheless, an affidavit for recount was filed by
22 Contestant Jacobson within the five day deadline. (Ex. 1, Decl. of Barbara Gail Jacobson.)

23 Should the Court construe compliance with section 16462 as a condition for the contest of a
24 general election, Contestant Jacobson timely filed her affidavit. (Ex. 1, Decl. of Barbara Gail Jacobson.)
25 Superior court jurisdiction is obtained by filing the affidavit with the Registrar of Voters. (Elections
26 Code, section section 16462.) If the Court lost jurisdiction under this section, it was because of the
27 policies of Defendant Haas to refuse requests for records and setting outrageous monetary demands that
28 made it impossible for Contestant Jacobson to obtain a recount.

1
2 **III.**

3 **THE ALLEGATIONS IN THE PETITION FOR THE CONTEST ARE SUFFICIENT**

4 Defendant Haas states that no election should be set aside unless the results of the election would
5 be changed. Whether the election should be set aside, or some other remedy be ordered, a recount must
6 be conducted. The allegations are not meant, by themselves, to justify setting aside an election. The
7 allegations justify a recount.

8 Defendant Haas is incorrect when he states that no election can be set aside unless the results of
9 the election would be changed. If that were true, Haas could purport to certify an inscrutable election that
10 should not have been certified in the first place, and then argue that there is insufficient evidence upon
11 which to contest the election and prove anything to the contrary. In fact, this is one of the claims
12 contestants will prove in the alternative, namely that Haas has withheld and continues to withhold
13 evidence that would make it abundantly clear that the election should not have been certified because the
14 manual audit was deficient and showed errors, and intentional decisions by the registrar of voters
15 frustrate the ability of any person to investigate or determine the full nature of what happened on June 6,
16 2006.

17 The allegations cite with specificity facts that meet Defendant Haas' standard as set forth in *In re*
18 *Crier* (1926), 77 Cal.App. 605. The *Crier* stated that, "Although the provisions of the statute relating to
19 the statement of contest should be liberally construed, it remains true that the law contemplates that there
20 shall be at least some definite particularity in the charge of malconduct by election officers." (*Id.*, at
21 609.) In *Crier*, the court equated the statement filed in that case to saying, "The entire count by the
22 boards of election was wrong, . . ." (*Id.*, at 610.) The rule followed by *Crier* is that no statement of the
23 grounds of contest will be rejected for want of form, if the grounds of contest are alleged with such
24 certainty as will advise the defendant of the particular proceeding or cause for which such election is
25 contested, it does seem clear that the contestee in such cases is entitled to have stated the particulars in
26 which it is charged that malconduct was committed on the part of the officers conducting the election.
27 (*Id.*)

28 The allegations made in this contest are not general and are made with the specificity required by
the Elections Code. Defendant cannot handpick one or two allegations and claim that the contest should

1 be denied because of a claim of deficiency. One of the allegations raised by Defendant as deficient is
2 regarding the policy of allowing pollworkers to take hackable election machines home. If the allegation
3 is deficient, Defendant Haas remedied the deficiency by publicly admitting this fact. The allegation is
4 made by Contestants that this fact is a breach of security rendering the machines decertified. Using
5 decertified election machines to count the vote is The allegations taken in sum are sufficient to put the
6 credibility of this election into question.

7 The petition and verified statements of the contestants total some 25 pages of detailed pleading.
8 There has been no showing or explanation as to why this many pages is still insufficient pleading.
9 Moreover, because the specific claim in this case is that Haas has withheld the evidence contrary to law,
10 Haas should not be heard to claim that he should benefit from his own withholding of evidence under
11 normal principles of waiver and equitable estoppel.

12
13
14 Dated: August 24, 2006

Signed:



Kenneth L. Simpkins, Esq.
Attorney for Contestants