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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN DIEGO
DEPARTMENT 60 BEFORE HON. YURI HOFMANN, JUDGE

_____)
BARBARA GAIL JACOBSEN,)
LILLIAN RITT & DOES1-50,)
) SC GIC870044
)
Contestants,)
)
vs.)
)
BRIAN BILBRAY, MIKEL HAAS,)
and DOES 1-50,)
)
)
Defendants.)
_____)

REPORTER'S TRANSCRIPT
August 25, 2006

A P P E A R A N C E S

For the Contestants	KENNETH SIMPKINS, PAUL LEHTO Attorneys at Law
For Defendant Bilbray	DAVID KING, Attorney at Law
For Defendant Haas	JAMES CHAPIN, Deputy County Counsel

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MICHAEL SHANE GALLIVAN
OFFICIAL REPORTER, CSR 5169
SAN DIEGO, CALIFORNIA

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3 STATE OF CALIFORNIA)

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5 COUNTY OF SAN DIEGO)

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8 I, Michael Shane Gallivan, CSR No. 5169, an official
9 reporter of the Superior Court of the State of California, in
10 and for the County of San Diego, do hereby certify that as such
11 reporter, I reported in shorthand the testimony adduced and the
12 proceedings had at the hearing of the above-entitled cause, and
13 that the foregoing transcript, consisting of pages
14 numbered 9-35, inclusive, is a full, true and correct record of
15 the testimony and evidence adduced and proceedings requested
16 transcribed while I was the reporter at the hearing of said
17 cause.

18

19 Dated this 28TH of AUGUST, 2006, at San Diego, California.

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Michael Shane Gallivan, CSR 5169

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Official Reporter

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1 San Diego, California, Friday, August 25, 2006, 2:45 p.m.

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3 THE COURT: This is in the matter of Barbara Gail
4 Jacobson, Lillian Ritt, contestants, versus Brian Bilbray,
5 Mikel Haas, et al. Will counsel please state your appearances.

6 MR. SIMPKINS: Good afternoon, your Honor. Kenneth
7 Simpkins appearing for contestants, who are present in the
8 courtroom.

9 MR. LEHTO: Paul Lehto also representing the
10 contestants. I will be doing the oral argument.

11 MR. CHAPIN: James Chapin on behalf of Mikel Haas,
12 the registrar of votes, who is present.

13 MR. KING: David King on behalf of Congressman Brian
14 Bilbray.

15 THE COURT: Okay. Let me see, Ms. Jacobson where are
16 you? Okay thank you.

17 Ms. Ritt.

18 MS. RITT: Thank you.

19 THE COURT: Good afternoon. And, Mr. Haas, where are
20 you? There you are. Okay.

21 We are here pursuant to an action that has been filed

22 in this court, it is an election contest. And there are
23 various remedies sought. The court today would like to address
24 the Jurisdictional issues that have been raised. And it would
25 be the court's intention to take the matter under submission,
26 render a ruling on that issue on Tuesday, and then if necessary
27 proceed with other related matters, namely Congressman Brian
28 Bilbray's special motion to strike, the SLAPP motion, and any

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1 discovery requests and other issues that may be properly before
2 the court.

3 So today I would like for counsel to address the
4 issue whether this court has authority to hear this matter,
5 particularly given the United States Constitution provision
6 which seems to state that the House of Representatives is the
7 body that has jurisdiction to address Congressman Bilbray's
8 election, Congressman Bilbray's returns and qualifications.

9 So, with that, are there any other preliminary
10 matters that you wanted to address before I hear argument on
11 that issue?

12 MR. LEHTO: No, your Honor.

13 THE COURT: Mr. LEHTO.

14 MR. LEHTO: Your Honor, I believe this is essentially
15 their motion. They should probably go first, attacking
16 jurisdiction.

17 MR. CHAPIN: I will be happy to.

18 In the context of article one, section five, the

19 California supreme court has weighed in on the very issue in
20 the McGee case, which I cited in my brief. The supreme court
21 held that in the context of California's parallel
22 constitutional provision, California courts have no authority
23 to adjudicate or judge California legislative elections. In
24 that case, the California supreme court says it is well
25 established that under the provisions of article one, section
26 five, courts have no jurisdiction to judge the returns and
27 election of United States senators, in that case. By analogy,
28 the jurisdiction to judge the qualifications and elections of

11

1 Assemblymen lies exclusively with the assembly. We hold,
2 therefore, that section 8600, which is the earlier statute
3 similar to 16,000 today, cannot validly apply to the office of
4 assemblyman. The court had no jurisdiction to entertain the
5 proceeding.

6 In the briefings by the contestants you will note
7 there's not a single many case in the history of the United
8 States in which the court judged a congressional election, it
9 doesn't happen that way. And, in fact, the only congressional
10 election we are aware of in the last decade that was contested,
11 Mr. Haas happened to be there because it was such a novelty
12 that several of the registrars around the state went to Orange
13 County, where a subcommittee of the House of Representatives
14 came to Orange County, conducted a hearing, took testimony and
15 made ultimately findings with respect to that congressional

16 election. That's the way it occurs, and that's the only way it
17 occurs.

18 There's a California elections code provision, 15551
19 which provides that the registrar, the elections official, is
20 obligated to hold the ballots for congressional election for
21 the House of Representatives or for Congress, in the case of
22 congressional election, in the case of state legislative
23 election for the state legislature not subject to an order of
24 the court for any other local election. All of those
25 provisions are tied together. This court has no jurisdiction
26 to entertain this proceeding under federal and state
27 constitutional law and state elections code.

28 Thank you, your Honor.

12

1 THE COURT: Thank you, Mr. Chapin.

2 Mr. King.

3 MR. KING: Thank you, your Honor.

4 Presidents Johnson, Nixon and Clinton can all firmly
5 attest that the constitution gives Congress certain judicial
6 powers. Article one, section 5 gives full judicial power over
7 federal legislative elections to the house at issue. Section 5
8 reads: "Each house shall be the judge of the elections
9 returns and qualifications of its own members," the judge.

10 We're not in the U.S. House. We are in the wrong

11 forum for a congressional elections contest. According to the
12 contestants' opposition brief that was filed yesterday, on Page
13 11, Line 8 to line 9, no relief is requested seeking to unseat
14 Bilbray and install Busby. This is correct, because this court
15 can't under article one, section five, clause one. This is a
16 telling admission from the contestants that this court has no
17 jurisdiction to hear an elections contest. This court can't
18 coin money, it can't declare war and it can't hear a
19 congressional elections contest.

20 A recount is under a different division of the
21 elections code. Section 15620 of the elections code would be
22 permissible under United States supreme court jurisprudence,
23 under the Roudebush decision. A recount is not the same thing
24 as an elections contest. Elections code section 15640 is the
25 exclusive means by which a court may order a recount for an
26 election. They haven't brought an action under division 15 or
27 pursued any administrative remedies under division 15. We are
28 in here under division 16, which is the section for elections

13

1 contests.

2 Elections contests are brought to change the results
3 of an election, this is evidenced in sections 16100E, 16101C
4 and D, 16201, 16202, -203, 16460. Numerous cases, The Friends
5 of Sierra Madre case, which was cited by the contestants
6 yesterday, declined to offer any relief under the elections
7 contests section of the elections code because the court found

8 that based on the facts that were alleged they could not
9 invalidate the election.

10 The action that is brought here before this court is
11 an election contest. An election contest can't be heard by
12 this court, and we can't have an action for an election contest
13 and miraculously change it into a division 15 recount request,
14 and you will see why in the 15640. California decisions follow
15 the distinction between recounts and contests set forth in the
16 Roudebush decisions. Roudebush is the seminal supreme court
17 case on the issue.

18 In the Roudebush case, the United States Senate
19 seated a member conditionally without prejudice to the outcome
20 of an appeal pending in the supreme court and without prejudice
21 to the outcome of any recount. And the supreme court stated,
22 quote:

23 "Which candidate is entitled to be seated in the
24 senate is to be sure a non-justiciable political question, a
25 question that would not have been the business of this court
26 even before the senate acted. The actual question before us,
27 however, is a different one, it is whether an Indiana recount
28 of the votes in the 1970 election is a valid exercise of the

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1 state's power under article 4, section 4 to describe the time,
2 places and manner of holding elections or is it a forbidden

3 infringement on the senate's power under article one, section
4 5. That question is not moot because the senate has postponed
5 making a final determination of who is entitled to the office
6 of senator pending the outcome of this lawsuit. Once this case
7 is resolved and the senate is assured that it has received the
8 final Indiana tally, the senate will be free to make an
9 unconditional and final judgment under article 1, section 5.
10 Until that judgment is made this controversy remains alive and
11 we are obliged to consider it a recount, not an election
12 contest."

13 In this case the House has made its unconditional and
14 final judgment of this election on June 13, 2006. The entire
15 House made its decision by unanimous consent to the admission
16 of Brian Bilbray to take his oath of office, consistent with
17 precedent tracing back to 1913, crossing across both party
18 lines with numerous instances within just the past couple of
19 years, including within 2004 twice by Representative Nancy
20 Pelosi. It's not a republican conspiracy that he was sworn in
21 so quickly, as the contestants have alleged, it's House
22 precedent, particularly when you have got a special election
23 and you have got people who aren't represented in Congress.

24 The Contestants have provided no basis for singling
25 out Brian Bilbray from among the 337 contestants and ten ballot
26 measures on the June 6 ballot in San Diego County. Among all
27 those elections, the only one election that's constitutionally
28 immune from a state elections contest was that of Brian

1 Bilbray. The only one election that is subject to the federal
2 contested elections act, which is the only means of contesting
3 such an election, was the election of Brian Bilbray. If there
4 was a genuine concern with the accuracy of the city, the
5 county's voting systems, why, why is the one election that we
6 can't hear an elections contest the one before this court.

7 The remedies provided within the elections contest
8 section allow the court to toss out votes, require a new
9 election and validate an election. This is exactly the type of
10 elections contest that the supreme court has held is vested
11 exclusively within the Congress.

12 Article 1, section 4 of the constitution provides
13 that the state has the power to regulate the times, manners --
14 excuse me -- "Times, places and manner of holding elections for
15 senators and representatives shall be prescribed by each state,
16 by the legislature thereof, but the Congress may at anytime, by
17 law, make or alter such regulations except as to the place of
18 choosing senators." Congress has acted pursuant to this
19 authority and enacted the Federal Contested Elections Act.
20 There is a remedy here.

21 If there were a genuine concern over the true victor
22 of this election, any one of the contestants could have filed
23 with the clerk of the House of Representatives and brought an
24 elections contest to the House Administration Committee. The
25 House Administration Committee has made its full and final
26 determination and let this court know where it stands on the
27 substance of this case. This court has no jurisdiction and
28 this matter should be dismissed.

1 Thank you, your Honor.

2 THE COURT: Thank you, Mr. King.

3 Mr. LEHTO.

4 MR. LEHTO: Thank you, your Honor. Paul LEHTO on
5 behalf of the contestants, Gail Jacobson and Lillian Ritt. And
6 with me here today also, as already introduced, is my
7 co-counsel, Kenneth Simpkins.

8 Benson versus Superior Court says that the purpose of
9 an election contest is a search for truth. It is not to be
10 received in the spirit of -- the consciousness or the spirit of
11 technical objections, it concerns maintaining the integrity of
12 the political system.

13 The argument today of the defendants is that this
14 court is powerless to maintain the integrity of the political
15 system of elections here in San Diego County. The reason the
16 court is alleged to be powerless to protect the voters of San
17 Diego County, and the 50th congressional district specifically,
18 is because Mr. Bilbray was sworn in on June 13, 2006, precisely
19 seven days after the election. The timeline is critical in
20 understanding the exact nature of the defendant's claims here
21 because the election was on June 6, the swearing in was on June
22 13.

23 On June 13, all of the ballots had not yet been
24 counted. Certainly the provisional ballots had not yet been
25 counted. The election was not certified until either June 29th

26 or 30th, depending on which date on the certification documents
27 you go with. So that 16 or 17 days prior to the election being
28 officially certified, Mr. Bilbray is sworn into Congress by

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1 members of his own party.

2 I wish we didn't have to identify which party was
3 which, because I think people would understand that this is
4 wrong, but once they know whose horse is in the race sometimes
5 things change sides. But to swear somebody in before the
6 election is official, when everybody knows from Bush versus
7 Gore, in 2000, that everything is keyed off of certification
8 dates, that when it becomes official that's when it's real, but
9 we have the Congressman sworn in on June 13, 16 or 17 days
10 prior to certification, and we have the attorney for the
11 registrar of voters, Haas, who is sworn to uphold voting rights
12 here in San Diego, saying there's no jurisdiction in this court
13 to uphold the integrity of the elections or even to take a look
14 at the evidence, that simply this court is powerless because it
15 lacks jurisdiction.

16 To put those two things together, Registrar Haas is
17 directly arguing that his own certification on June 29 or 30th
18 was void and without force or effect, because exclusive
19 jurisdiction regarding elections had transferred to the House
20 of Representatives. Therefore, under Haas' own arguments --
21 and I'm not making argument here, I'm just taking it one step
22 and applying that same principle to the certification --

23 Registrar of Voters Haas is directly claiming that his own
24 certification of the election is without force and effect.
25 Therefore, there was no election, at least no final election,
26 because everything legally is keyed off of the official
27 certification.

28 So this jurisdictional the argument, or what they

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1 style as a jurisdictional argument, goes way too far.
2 Essentially, what they are saying is in their specific intent,
3 which normally I would hesitate to speculate about because we
4 don't know what goes on inside people's heads, but we do
5 because they signed briefs saying this is what they think the
6 law says, the specific intent of Congress on June 13th was to
7 deprive this court of any jurisdiction to review this election,
8 to put this court in its place, which is to say powerlessness.

9 If they can do that, they can do anything. Why even
10 have an election? They could just swear in whoever they want
11 because the election need not be final. If it appears -- maybe
12 it's an appearance test. If they think -- if it appears
13 somebody won, probably let's swear them in and then that
14 deprives them of jurisdiction.

15 This is not really a jurisdictional argument, this
16 concerns an attack and a question of whether that action of a
17 premature swearing in is valid constitutionally. There is a
18 very big difference there in terms of the court's power. The
19 courts always have the power to determine the constitutionality

20 of actions by other branches of the government, that's called
21 judicial review. So by styling it as a jurisdictional
22 argument, it misleads as to the true nature of what's going on
23 here, which is an attempt to terminate the elections process
24 before it's over.

25 In order to make sense of these kinds of things, and
26 constitutional issues tend to get writ large with big ideas
27 because the constitution has big ideas, many state
28 constitutions say that a frequent recurrence to fundamental

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1 principles is necessary for the preservation of liberty and
2 free government.

3 So I just want to name a few fundamental principles
4 that I think are violated by the positions being taken by the
5 defendants here so that we can all orient ourselves to the
6 constitution, which we swore to uphold as a whole. We didn't
7 just swear to uphold article 1, section 5, we swore to uphold
8 the constitution as a whole.

9 And some of those fundamental principles include the
10 idea that the federal government is a government of limited
11 powers, unlike state governments, not unlimited powers, but of
12 limited powers. So the federal government, to have a valid
13 action, has to have a constitutional power delegated to it by
14 the states that can be identified.

15 Essentially, what the position of the defendants is
16 is that the House of Representatives has unlimited power to

17 swear in whoever they please. That seems to violate the
18 spirit, if not the letter under which this country was founded
19 as a whole.

20 Another fundamental principle is that all political
21 power is inherent in the people. That's in both, "We the
22 people," starting the Constitution, also in the Declaration of
23 Independence, that governments obtain their legitimate power
24 from the consent of the governed. Here we have the defendants
25 saying, "You know, we don't care to hear about whether there
26 was truly consent or not because we've sworn somebody in." I
27 think that violates the spirit of our constitution and the
28 letter.

20

1 How about article two, where it talks about elections
2 for the House of Representatives take place every two years and
3 shall be, quote, "by the people," unquote? The action of the
4 House of Representatives begs the question of whether the
5 election was "by the people," and certainly there are fact
6 issues here under a normal legal analysis that would justify
7 discovery and trial.

8 Certainly there is the function of the courts
9 generally, but most specifically in elections contests to be
10 truth seekers. That's being violated here because the right is
11 being broadly argued and asserted that the citizens, Ritt and
12 Jacobson, have no right to information other than whatever they
13 choose to give pursuant to a public records request or

14 something like that.

15 There can be nothing more important than the
16 integrity of our elections. The Mississippi supreme court,
17 cited in our trial brief, specifically held that the integrity
18 of our system of government is only as strong as the integrity
19 of our elections. Here again, the defendants don't want us to
20 look. How can we maintain the integrity of our elections if we
21 don't look? How can we maintain the integrity of our elections
22 if somebody who voted for the allegedly losing candidate isn't
23 allowed to challenge that claimed result? The winners can't
24 sue themselves, only the losers can conceivably file an
25 election contest. And yet we hear, inside or outside of court,
26 that this is about losers not being happy with an election
27 result, when in fact it's clear that the election contest is
28 designed to be a public interest vehicle to maintain the

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1 accuracy and the integrity of the election. And in the
2 adversarial process you have to have a party that's motivated
3 to seek the truth. Only the losers, or the so-called losers,
4 are going to be motivated to seek the truth. So here again,
5 there must be the element of adversariness in order to seek the
6 truth under our system of litigation in the judicial system.

7 So, your Honor, we -- I'll rely on my brief, but
8 there are various provisions of the Constitution that were
9 briefed that when taken as a whole cannot possibly lead to the
10 reasonable conclusion that the defendants are taking, which is

11 that they have essentially absolute power in the House of
12 Representatives to swear in who they please, when they please
13 and how they please. The founders of this country, whether it
14 was James Madison or Thomas Paine, or Thomas Jefferson or the
15 more conservative Mr. Adams, all felt that elections, even
16 though some of them had a few apprehensions about democracy,
17 they all felt elections were the fortress, the buttress against
18 the possibility of oppressive government.

19 So if this election system is the only way that the
20 people have to change the direction of their government or to
21 protect themselves from unauthorized action of the government,
22 that election system must be policed and policed seriously,
23 because without it, the people are powerless and the freedom
24 that everybody fought for would be readily lost due to people
25 who have better ideas and want to enforce those ideas because
26 they are better.

27 I think the House of Representatives here has a
28 better idea. They have a better idea that Mr. Bilbray, in

22

1 fact, won the election, and they want to enforce that.

2 At the very least, this constitutes a power play by
3 the House of Representatives. Given the timing of it, seven
4 days, it may constitute a record for signing in representatives
5 or swearing in representatives, which normally takes 35 or 40
6 days after the election, or even after certification. So the
7 attack here, or the real question is the validity of the

8 swearing in to actually deprive the court of jurisdiction.

9 And that is based on the broad claims that are being
10 made by the defendants, and not primarily my argument. The
11 only thing that's my argument here rather than defendants' is
12 that I'm saying, apply that same principle to the
13 certification. If this court is powerless, the certification
14 is powerless. And where does that leave us legally? Where
15 does that leave us constitutionally? If the principle doesn't
16 fit, the court should not follow it.

17 But, in fact, the leading case, elections case, with
18 regard to recounts is a 1972 U.S. supreme court of Roudebush
19 versus Hartke. And in that case, the U.S. Supreme Court
20 specifically held that article 1, section 5, does not prohibit
21 a recount of the ballots by Indiana, as the recount will not
22 prevent an individual senate evaluation of the ballots if they
23 so choose. That's a slight paraphrase at the very end, but
24 that's what the Roudebush versus Hartke case stands for.
25 Recounts are not at all prohibited.

26 Now, the recount in the Roudebush case was held to be
27 basically an administrative act. But what did the court say?
28 The court said the recount under Indiana law was basically

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1 non-judicial because it consists of appointing recount
2 commissioners and counting the votes that way.

3 So all of those issues, all of the issues of voter
4 intent that could come up, decisions to be made regarding

5 whether this voter voted this way or not, all of those things
6 would be handled by commissioners. And they basically said,
7 "That's non-judicial, so we are not going to have -- there's no
8 objection no, constitutional objection." In fact, even as read
9 by counsel for Mr. Bilbray, the Roudebush versus Hartke holding
10 was to carve out one thing that you just can't do, you can't
11 request that a seat can be changed in Congress because that
12 would be a non-justiciable political question.

13 As counsel correctly noted, we are not seeking an
14 order that requires a seat change in Congress. We are seeking
15 to find the truth and then letting the House of Representatives
16 provide their separate constitutional function. And whether
17 they want to abide by the truth or not, it's their choice.

18 But the fact that they have an independent power to
19 abide by the truth or not does not make the truth irrelevant,
20 it does not make policing the integrity of the election
21 irrelevant or -- and it does not deprive the court of
22 jurisdiction, because clearly the Indiana court went forward
23 and was allowed to go forward by the U.S. Supreme Court in
24 Roudebush versus Hartke.

25 So the law, properly understood, is nowhere near as
26 broad as what the defendants are trying to say that it is. And
27 the reason is is common sense. If the state, under article 1,
28 section 4, has authority to regulate the time, place and manner

1 of federal elections, which is what the constitution says, that

2 means the state can control the count of the votes, and they
3 did. There was no federal involvement on June 6. If the state
4 can control the count of the vote, they can control the recount
5 of the vote. That's ancillary to the count of the vote. It's
6 really doing the same task by a different method in order to
7 basically function as an audit mechanism. So, clearly, those
8 kinds of things exist.

9 The only thing the court and parties would be
10 prohibited from is treading upon the core, unique
11 constitutional prerogative of the House of Representatives,
12 which is the official moving or removing of a member of the
13 Congress. But it's -- it would have -- it has a critical
14 function for the court system to determine the truth and lay it
15 out there for the House of Representatives to exercise their
16 discretion. And then if the House decides not to respect the
17 truth of the court, the House pays a political price, but
18 that's letting the political process do its thing. They pay a
19 political price, but they don't pay a judicial price. But what
20 the defendants want to argue is, "We pay no political price
21 whatsoever, ever, because we are entitled to hide the
22 evidence."

23 We have pled in the petition that there is a pattern
24 and practice of hiding evidence regarding elections, both paper
25 evidence and electronic evidence, that rises -- and I believe
26 this was paragraphs 15 and 16 of the petition, and 17 -- to
27 constructive fraud or aiding and abetting fraud. It's at least
28 fraudulent that the Registrar of Voters Haas asserts, under

1 penalty of perjury, that these are the results of the election
2 and then instructs his lawyer to come in and say there's no
3 jurisdiction for anybody in San Diego to do anything. He
4 should disclose that early on, or in the certification document
5 saying, "I believe this may be void. I'm not sure I can
6 certify this. This may be a powerless act on my part." He
7 didn't do that.

8 At the very least, ROV Haas should be deemed to be
9 estopped from making this type of argument.

10 THE COURT: One question --

11 MR. LEHTO: Mm-hmm.

12 THE COURT: -- that was raised by Mr. King, that is:
13 If there is a concern about the integrity of the election
14 system, why was the Congressman's seat chosen to test that
15 election system instead of the literally hundreds of other
16 candidates who we would not have a problem with
17 jurisdictionally? It appears that it is only the Congressman's
18 seat that comes under the provision of the U.S. Constitution.
19 So it seems that the elections system could have very easily
20 been tested by using any of the hundreds of potentially other
21 contestants in this election.

22 MR. LEHTO: Your Honor, I think that there are some
23 arguments in this case that tend to go to the whole of the
24 election. For example, when the machines go out for a week to
25 two weeks, that does affect every race on the ballot. But
26 there are additional allegations that are very specific to the
27 congressional race.

1 MR. LEHTO: The swearing in issue. There was also
2 the issue that, in fact, that this was a close enough race that
3 the error that was made is going to matter. You can't steal an
4 election that was 80-20, nobody would believe it. It wouldn't
5 be credible if it was mistake or deliberate election fraud.
6 You would have to have a close election to begin with to even
7 have a chance of, of having a fraud that might be carried off.
8 So it needs to be a close election, which this election was.

9 There were polls just prior to elections showing.
10 Francine Busby 20 points ahead in the polls. And she loses the
11 election. That's an additional fact that is relevant to and
12 supportive of a fraud case in this particular race.

13 In this particular race, there are absentee ballot
14 precincts, although this is to some extent going to be to the
15 other races as well, showing turnout thousands of percent
16 higher than registered voters. Okay. That prevents anybody,
17 especially the public, from reconciling the number of votes
18 with the number of voters, which is done on a
19 precinct-by-precinct basis to make sure there's not ballot box
20 stuffing. If you take a whole bunch of absentee ballots into
21 every single precinct and put them into these mega precincts,
22 that kind of reconciliation no longer occurs. And that puts a
23 blindfold on being able to detect fraud from that standpoint.

24 There's evidence when things are structured in a way

25 so that a reasonable person can't tell and one of the normal
26 rules of election administration is being violated, that
27 there's some intent to hide something with regard to this
28 particular election.

27

1 And so I just want -- I could go on with more
2 examples, but I want to make sure that the court understands
3 that there are two classes of arguments, some of them go to the
4 whole of the election, but there are substantial arguments that
5 go specifically to this election.

6 THE COURT: Thank you.

7 MR. LEHTO: It's also the most important one on the
8 ballot, at least in the opinion of my client and many people in
9 the 50th congressional district. There might be a few people
10 that prefer an initiative, but it's the most important race on
11 the ballot.

12 So, your Honor, the reason that I spoke about these
13 principles is because otherwise it can lead to confusion and we
14 end up thinking of important constitutionally foundational
15 things, like checks and balances, could be redefined as
16 redundancy. You know, checks and balances why do we have them?
17 This is inefficient or redundant, we will just throw it out.
18 But if you realize what it is constitutionally by referring to
19 basic principles, you realize this is checks and balances.
20 This is an important part of our system. Then the court is, of
21 course, going to uphold that. That's what my clients, on

22 behalf of the public, are seeking to do, to pursue the
23 integrity of the system, to ask the court to be careful in its
24 analysis to uphold and preserve all parts of the Constitution
25 and purposes of our elections system and not just focus on one,
26 because, frankly, lawyers, I think judges probably take a
27 more -- broad-minded view, but lawyers oftentimes focus on the
28 very narrow issue and present that to the judge and hope for

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1 victory. I don't think we can do that in this case. There
2 needs to be a more global view, because there are at least
3 three to five different provisions of the constitution alone
4 that are relevant to this claim by the defendants concerning
5 either whether you style it as a jurisdictional issue or the
6 validity of the premature swearing in.

7 One of those constitutional provisions alluded to
8 already is the state authority to administer elections, that's
9 called the time, place and manner clause. What we have here is
10 a pattern and practice of administering elections. States do
11 the counts, states do the recounts. There is no federal
12 recount bill or law. It's expected that if there's a recount,
13 just as in *Roudebush versus Hartke*, that the state is going to
14 do it.

15 So in that context for the rules to change after the
16 fact, after the election, and say, "Oh, no, actually, even
17 though you thought the state had jurisdiction for recounts
18 prior to the election, now, because of the swearing in, that's

19 no longer true, it's no longer true that the state has recount
20 authority. And that's because we swore in Mr. Bilbray as a
21 member of the House of Representatives." The leading election
22 law case in this land, your Honor, is Bush versus Gore, in
23 2000.

24 In that case one of the concerns that was cited by
25 the U.S. Supreme Court is the idea of not making up rules after
26 the election. While here, you can call it a rule, you can call
27 it whatever you want, but after the election the rules changed.
28 The rules changed because of the fiat or the decision of the

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1 House of Representatives that would violate equal protection,
2 because San Diego's 50th district voters are not being treated
3 the same as any non-50th district voters. Everybody else has a
4 recount right, but not here. Why? Because the House of
5 Representatives, the government, acted through state action to
6 deny the voters of the 50th District their rights of equal
7 protection by swearing in Mr. Bilbray. No more recount, sorry.

8 And that is, that is precisely the kind of equal
9 protection violation that Bush versus Gore upheld, because in
10 that case they said, "You know, Vice-president Gore, we had a
11 problem with your partial recount request. You requested to
12 recount only four counties, not all of the counties in Florida.
13 That treats those counties as different than the rest of
14 Florida, and that creates equal protection violations."

15 So here the House of Representatives is saying

16 directly, "We are going to treat, with respect to recounts, the
17 voters of the 50th District differently than any other voters
18 in the land, because normally people don't get sworn in 7 days
19 after the election." That violates equal protection, too.

20 So the motion that is presented to the court is to
21 invite the court to violate equal protection, to invite the
22 court to ratify a seizure of power away from the state's
23 authority to administer elections and in favor of the federal
24 authority which has not traditionally at all been involved in
25 recounts. That alters the constitutional ballast. So having
26 altered unilaterally the constitutional balance by invading the
27 sovereignty of the state, the court is now asked to ratify
28 that, to uphold it, to give it the sanction of law, to make it

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1 all good.

2 Our courts, in their finest moments, have engaged in
3 judicial review and thoughtful judicial review about whether
4 the actions of government are indeed appropriate. That's when
5 the law and lawyers and judges rise to their highest level.

6 Finally, some arguments have been made that under the
7 McGee case, which there is specifically under California law an
8 exception made for assemblymembers who are not subject to the
9 election contest statute. So when the McGee case talks about
10 Assembly matters, they are talking about a statutory carve-out
11 that's not applicable in this particular case.

12 In any event, under the reserve powers of the people,
13 another basic principle, that the people reserve all powers not
14 delegated, and under the basic structure of our entire system
15 in which elections are the method by which power is transferred
16 from the people to the government, the government cannot
17 purport to do what the government did here in San Diego County,
18 which is ROV Haas, with the assistance of Diebold, counted the
19 votes in secret.

20 No human being, including Mr. Haas himself, has
21 performed a count. These machines process ballots, and the
22 counting occurs in electronic secrecy. With regard to the 2000
23 votes on touchscreens, it was in total secrecy, where the
24 voters never saw their ballots, it was completely on hard
25 drive, but it is still in secrecy, counted with regard to the
26 optical scans, because they are zipped through the machine so
27 fast, if the machine is misprogrammed -- there are many
28 different settings you can play with to give the machine the

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1 same level of discretion and choice that the human being would.
2 The idea of objective machines is an illusion. But we have
3 basically, we have secret vote counting that occurred in San
4 Diego County.

5 We have indicia and evidence that the results were
6 improper. We have indicia and evidence that the results were
7 tabulated improperly through these mega precincts. We have
8 ample opportunity, through the sleepovers, for any number of

9 strangers or volunteers who would only need access to a single
10 machine for one to two minutes to alter the entire election,
11 because each machine has a disk that is transferred like a
12 virus into the central tabulator.

13 So we have motive. Everybody is biased. Everybody
14 voted. Your Honor even said you are a 50th congressional
15 district voter. Everybody, everybody has bias, either
16 intentionally or directly. You have opportunity through the
17 sleepovers. You have suspicious results. You have mega
18 precincts. You have attempts made to hide the truth. You have
19 constitutional arguments made to say the court is powerless to
20 find out what the truth is. You have public records
21 requirements that are being stone-walled and defeated. You
22 have recounts that are being priced at up to eight times what
23 the price was in Orange County.

24 So the issue was the validity of the swearing in.
25 And that's why I mentioned those particular issues. The
26 validity of the swearing in comes in the context here of the
27 pleadings of fraud and the pleadings in our petition that we've
28 been in part, in significant part, prevented or blindfolded

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1 from even being able to tell whether or not fraud occurred.
2 And that that, in and of itself, is mal-conduct and grounds for
3 a new election. If it's not mal-conduct and grounds for a new
4 election, then what that means is that the registrar of voters
5 can simply certify any fanciful result or explain a result or

6 fraudulent result he or she wants to in any county in
7 California, and it's going to fly as long as there's enough
8 intent to withhold information or a constitutional argument or
9 something like that.

10 The checks and balances and judicial review is what
11 this case is all about, not covering our eyes, withholding
12 evidence and so forth.

13 So, your Honor, we would ask that you uphold the
14 truth-seeking function of the election contest, that you uphold
15 all of the provisions of the Constitution, that you take a
16 close look at the allowance for recounts under Roudebush versus
17 Hartke, and realize that the election contest has many layers,
18 and only one of those layers involves ordering that an
19 office-seeker change office. And that's the one that's been
20 stripped away. But that's only one slice of the pie.

21 The defendants would like the court to think that
22 having stripped away that one slice of the pie, the entire pie
23 of discovery is gone, or the entire pie of democracy is gone.
24 That's not the way the law functions here. That's not the way
25 our country and our democracy are supposed to function. And
26 the contestants really do believe that the public interest is
27 fundamentally implicated here, and the integrity of our
28 elections is fundamentally implicated. And that means the

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1 integrity of our entire country is implicated as well.

2 The final comment is to quote the Mississippi Supreme

3 Court in Waters versus Ganimi, where they made that comment
4 about integrity of elections equaling the integrity of the
5 government and concluded by saying that, "No amount of
6 convenience or inconvenience to election officials can possibly
7 rise to the level of the importance of maintaining our
8 republic." So the arguments that you've heard here from the
9 defendants should not be interpreted so as to deny the
10 integrity of our republic. And that's what we are asking the
11 court to keep fully in mind as you weigh these issues. Thank
12 you.

13 THE COURT: Thank you, Mr. LEHTO.

14 Final comments, Mr. Chapin?

15 MR. CHAPIN: Thank you, your Honor. I'm really
16 stirred by these allegations of fraud and mal-conduct and that
17 all the contestants want is to seek the truth.

18 There is a remedy available under the elections code
19 15620, where any voter can seek a recount without court
20 intervention for any reason, without making any allegations.
21 Ms. Jacobson requested a recount. Mr. Haas was poised to do
22 that recount, because he has nothing to hide, and she declined
23 to produce the first day's deposit to get that recount done.
24 Under the elections code, if you want to know the truth, any
25 voter can find it out as easily as that, but you've got to pay
26 for it.

27 If the registrar's count is wrong, the county absorbs
28 the cost. If the registrar is right, the taxpayers don't have

1 to absorb the recount cost for anybody that wants to go through
2 that process. Truth is available, they declined to pursue.

3 Mr. Haas doesn't care whether this court reviews the
4 ballots or it's the House of Representatives or the state
5 legislature. But it's my duty as a lawyer to come to the court
6 and tell you whether or not you should be the one doing it or
7 not. In this case it's absolutely clear that the only possible
8 challenge to this election is through the House of
9 Representatives and not through the courts. Every case in the
10 United States has said that, and the California Supreme Court
11 has confirmed that. Thank you.

12 THE COURT: Thank you, Mr. Chapin.

13 Final comments, Mr. King.

14 MR. KING: Yes, sir, your Honor. Just to correct a
15 matter here, the swearing of Congressman Bilbray distinguished
16 the facts from the Roudebush case. The other distinction is
17 this is an action for a contest versus an action for a recount.

18 And, again, the recount was initially requested here
19 and they walked away from doing a recount that would have been
20 permissible. And nobody was prepared to try to stop them
21 constitutionally and say, "You can't do a recount. You are
22 forbidden from doing a recount" that's permitted.

23 But, as I cited before, and in my initial moving
24 papers, there is extensive precedent tracing back historically
25 on an annual basis of people being sworn in before their
26 certifications are received from the state, especially in an
27 instance of a special election. I did not say that that
28 foreclosed any further action at that point, that is not true.

1 There was still a federal remedy which any candidate for the
2 50th congressional district could have pursued and no one chose
3 to pursue it, because there sincerely is not a genuine dispute
4 over who won this election. It was open and shut. And the
5 door was closed on July 29, when the period to file a federal
6 contested elections contest act -- or excuse me with the clerk
7 of the House, when that period expired the matter was closed
8 fully and there was no more remedy at that point. But this
9 allegation that there's some sort of, you know, nefarious
10 activity going on here with the swearing in, it has no merit.

11 I've got nothing further because this is directed to
12 the issue of jurisdiction.

13 THE COURT: All right.

14 MR. LEHTO: Your Honor --

15 THE COURT: Thank you.

16 MR. LEHTO: I had directed my comments to the
17 constitutional jurisdiction issue, I realize that, and recount
18 was left for Tuesday. You could argue that recount was a
19 jurisdictional issue. I was wondering if I could have one
20 minute to address the recount jurisdictional issue?

21 THE COURT: I prefer not, but I will give you that
22 opportunity anyway. We are going to, if necessary, address it
23 again on Tuesday.

24 MR. LEHTO: Well, your Honor --

25 THE COURT: Only take a minute.

26 MR. LEHTO: Your Honor, I point to 16601, which says
27 that -- and defendants had said that we had only proceeded
28 under 1600, and therefore it was fatal. Under 16601 it says at

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1 trial the ballots shall be opened and a recount taken. So
2 there's an independent 1600 basis for a recount, whereas they
3 had argued that, you know, because we weren't proceeding under
4 15640 that was fatal.

5 As far as the jurisdiction goes, we did file an
6 affidavit within five days. The statute says filing the
7 affidavit creates jurisdiction. That was done. The issue as
8 they are trying to say because they priced it so prohibitively,
9 and higher than ever before, or Orange County did, that that
10 created some sort of abandonment. But there's no law cited
11 that jurisdiction, once created, is somehow abandoned or abated
12 or destroyed or something like that. So jurisdiction exists,
13 and that five day affidavit was filed, your Honor.

14 THE COURT: Thank you. No more.

15 Lawyers always want to get the last word. Thank you
16 very much. I think we are done.

17 Counsel, thank you for your presentation with respect
18 to the jurisdictional issue. We will reconvene Tuesday at 1:30
19 in the afternoon with the court's ruling on this issue, and we
20 will determine how to proceed thereafter. Okay.

21 MR. SIMPKINS: Will there be a tentative ruling
22 posted?

23 THE COURT: I don't think so. There may be. If it
24 is, it will be posted the day before in the afternoon, after
25 3:00. All right, thank you.

26 MR. CHAPIN: Thank you, your Honor.

27 THE COURT: We stand adjourned.

28 (proceedings concluded)