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

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

14 **Contestants,**

15 **vs.**

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

18 **Defendants.**

**CASE NO.:**

**I. ELECTION CONTEST**  
**II. VIOLATION OF DUE PROCESS**  
**and EQUAL PROTECTION OF THE**  
**LAW**

**(Elections Code, section 16400)**

19  
20 **I.**

21 **GENERALLY**

22 Contestants allege:

- 23 1. Contestants named above in the caption are, and at all times mentioned herein  
24 were, electors of the 50<sup>th</sup> Congressional District, San Diego County, State of California,  
25 and otherwise qualified to bring this action.
- 26 2. The verified statements of the Contestants are attached hereto and incorporated by  
27 reference herein.
- 28 3. Defendant Brian P. Bilbray is the declared winner of the election contested.

1 4. Defendant Bilbray was sworn into office on June 13, 2006, before the election was  
2 certified.

3 5. Defendant Mikel Haas is the registrar of voters for the County of San Diego and  
4 responsible for the conduct of the election contested.

5 6. Diebold Election Systems, Inc., (Diebold) is a corporation in the business of  
6 manufacturing electronic voting machines, and is the manufacturer of the voting  
7 machines at issue in this case.

8 7. Contestants are not presently aware of the true names, identities, or capacities of  
9 Defendants DOES 1 through 50, inclusive. Contestants therefore sues those defendants  
10 under their fictitious names. Contestants will amend this complaint on learning the true  
11 names, identities, or capacities of these defendants.

12 8. At all relevant times, each of the Doe Defendants have been, and are now, the  
13 agent or employee of the remaining defendants, and each was acting within the course  
14 and scope of such agency or employment.

15 9. The actions of defendants, as described in this complaint, occurred within San  
16 Diego County, California, and constitute "state action" as that term has been interpreted  
17 by relevant case law.

18 10. This contest relates to the special election conducted on June 6, 2006, and  
19 Defendant Bilbray's right to hold and fill the office of United States Congressman to the  
20 House of Representatives from the 50<sup>th</sup> Congressional District.

21 11. The date of the declaration of the result of the special election by the body  
22 canvassing the returns thereof, namely the San Diego County Registrar of Voters, was  
23 June 29, 2006.

24 12. Pursuant to California Election Code, section 16401, subdivision (d), this Contest  
25 is timely filed.

26 13. Jurisdiction is proper in San Diego County Superior Court pursuant to California  
27 Election Code, section 16500, and venue is proper in San Diego County.

28 14. On July 25, 2006, Contestants demanded in writing that the Registrar of Voters

1 and others preserve all relevant records, in response to reports that Defendants and others  
2 were considering the destruction of records, in violation of Procedures of use, Public  
3 Records laws, and 42 USC § 1974.

4 15. Mikel Haas and other San Diego County elections officials have conspired, and  
5 aided and abetted in the suppression, non-collection, and the destruction of relevant  
6 evidence and election materials concerning the June 6, 2006 election, under a variety of  
7 pretenses. The pretenses include, but are not limited to, (a) asserting claims of  
8 “confidential,” “proprietary,” and “trade secrecy” claims on behalf of Diebold to avoid  
9 producing electronic programs, electronic ballots and electronic audit logs and system  
10 files and other computerized records necessary to a proper and complete audit of the  
11 electronic voting systems (both optical scan and touchscreen) used in San Diego County,  
12 (b) failure to fulfill timely, or at all, public records requests filed on April 14, 2006, and  
13 June 30, 2006, for inspection and copying of election records, seeking, *inter alia*, audit  
14 logs, system logs, ballot definition files, security logs, seal logs, ballot envelopes,  
15 electronic ballots, paper ballots, provisional ballots, pollbooks/signature logs, etc.

16 16. Mikel Haas, as an official policy, directed that security procedures and chain of  
17 custody be abandoned on voting machines, by directing that essentially all voting  
18 machines, both optical scan and touchscreen, be released to the personal possession of  
19 pollworkers for overnight “sleepover” stays ranging from several days to over a week.  
20 During these sleepovers, the voting machines were unsecured, subject to access by  
21 innumerable neighbors, strangers and family members, and stored without records or  
22 proof of actual chain of custody, eliminating the ability of any person to detect whether  
23 or not fraud or improper access to the voting machines occurred.

24 17. Certain Defendants and Precinct Board officials permitted and authorized keys for  
25 touchscreen voting machines to be released to and retained by pollworkers between  
26 elections, with said keys remaining in “authorized” circulation to this date. This  
27 authorization is in violation of state and federal law, voting machine industry standards,  
28 and constitutes an intentional policy to undermine election security.

1 18. The actions of Defendant Haas, as Registrar of Voters, and Does 1-50, constitute  
2 such reckless indifference and intent to obscure the chain of custody, and frustrate  
3 reconciliation of ballots and other accountability for election mistakes, as to constitute  
4 aiding and abetting fraud or attempts at fraud and aiding and abetting, in violation of  
5 California Election Code, section 18500.

6 19. While Diebold prohibits the opening of the “boxes” of its voting machines by  
7 contract and/or on pain of “voiding the warranty,” evaluations of Diebold TS voting  
8 machines just in the last several weeks prior to the filing of this contest has revealed a  
9 heretofore unknown switch in the circuitry of the voting machine that allows the voting  
10 machine to boot from an external flash memory source rather than an internal flash  
11 memory source, allowing all certified software and other alleged safeguards to be totally  
12 circumvented and rendered ineffective. This renders nugatory all pre- and post-election  
13 testing, certification, and so forth, by constituting an “end around” all such alleged  
14 safeguards.

15 20. State law requires that election officials conduct a one per cent audit of the  
16 canvass. The one per cent audit in this case revealed discrepancies in the canvass as  
17 alleged herein.

18 21. Contestants incorporate by reference herein the verified statements of Contestant  
19 Jacobson and Contestant Ritt filed herewith and served with this pleading. Contestants  
20 will file the declarations of additional fact witnesses at the appropriate time.

21 22. Based on the verified statements filed herewith, this statement is filed pursuant to  
22 Elections Code, Section 16400, on the following grounds:

23 ////

24 ////

25 ////

26 ////

27 ////

1 **II.**

2 **MALCONDUCT (Calif. Elec Code § 16100)**

3 23. Contestants restate each of the allegations above and below as if set forth fully  
4 herein.

5 24. The precinct board members and/or election officials responsible for supervision  
6 of the election, including Mikel Haas, Registrar of Voters, and Does 1-50, were guilty of  
7 malconduct in that the officials knew, or should have known, that the voting machines  
8 they authorized for use in the election had serious security flaws and failed to address the  
9 security issues by, among other things, releasing the voting machines into the hands of  
10 persons not properly trained to protect the voting machines from tampering; by allowing  
11 the voting machines to remain in unsecured locations, such as pollworkers' car trunks  
12 and residential garages, for as long as seven days, or more, prior to the election; by  
13 failing to provide tamper-proof seals on ports in the machines that subject the machines  
14 to hacking of the software that counts the vote; by failing to maintain a chain of custody  
15 of the machines; by allowing keys to the machines to be possessed by persons not  
16 authorized to possess them; and by violating the conditions under which the voting  
17 machines were certified by the Secretary of State. The malconduct resulted in an election  
18 subject to fraud, without credibility, and which, therefore, cannot be relied on as an  
19 expression the will of the people. The malconduct affected each precinct in the District.  
20 The malconduct occurred throughout the election cycle.

21 25. Defendants, Mikel Haas, and Does 1-50, deliberately concealed and frustrated the  
22 ability of the public to determine whether or not fraud occurred such that, in addition to  
23 the affirmative evidence of fraud pleaded herein and in verified statements filed herein,  
24 there has been such a radical departure from the expected chain of custody and  
25 compliance with recordkeeping requirements that the ability of the public to detect fraud  
26 has been radically frustrated or eliminated.

27 26. The Mississippi Supreme court, even though specifically denying that fraud had  
28 occurred via elections officials, nevertheless ruled that because the opportunity to detect

1 whether fraud had occurred or not was removed (because of missing seals on ballot  
2 boxes) the remedy of a new elections was warranted. The Mississippi Supreme Court  
3 concluded their opinion by quoting itself from 1983, showing it's continuing relevance  
4 to this 2005 opinion:

5       Although there is a strong public policy in attempting to preserve the will of the  
6 electorate as reflected by the tabulation of all of the votes, we take this opportunity  
7 to remind throughout the state that they invite election contests, uncertainty and  
8 the opportunity for fraud by failing to pay close heed to the election statutes  
9 whether they be mandatory or directive. Any expense or burden such compliance  
10 creates is trivial when compared to the value of the goal of maintaining our  
11 Republic. Integrity of our government can be no greater than the integrity of  
12 elections which put our government officials in office. It is therefore the duty of  
13 every registrar to endeavor to comply with the election statutes regardless of the  
14 personal inconvenience it may create.

15 (*Waters v. Gnemi*, 907 So. 2d 307, 336 (Miss. Sup. Ct. 2005) (citing *Riley v. Clayton*,  
16 441 So. 2d 1322, 1328 (Miss. Sup. Ct. 1983).)

17 27. On information and belief, all errors alleged herein were sufficient to change the  
18 result of the race.

### 19 III.

#### 20 ILLEGAL VOTE (Calif. Elec Code § 16100)

21 28. Contestants restate each of the allegations above and below as if set forth fully  
22 herein.

23 29. A voter who casts a vote in an election in accordance with the laws of this state  
24 shall have that vote counted.

25 30. As the results of acts and omissions as alleged herein, Defendants Haas and Does  
26 1-50, failed to take all action necessary to make the votes effective in the election by  
27 failing to ensure proper voter registration, and by failing to comply with all prerequisites  
28 to voting, casting a ballot, and having the ballot counted properly and included in the  
appropriate totals of votes cast with respect to the candidates.

31. The actual conditions of the election, unknown to contestants until the day of the  
election or thereafter, violated the conditional certification of the Diebold Voting

1 machines by the Secretary of State, attached hereto as an Exhibit, such that the  
2 certification of the voting machines became void, resulting in the casting of illegal votes.  
3 All votes on Diebold voting systems, both optical scan and touchscreen were rendered  
4 illegal as a result of the violations of the conditional certification.

5  
6 **IV.**

7 **DENIAL OF VOTE (Calif. Elec Code § 16100)**

8 32. Contestants restate each of the allegations above and below as if set forth fully  
9 herein.

10 33. A sufficient number of eligible voters who attempted to vote in accordance with  
11 the laws of the state were denied their right to vote, and that had those voters been  
12 permitted to vote, Defendant would not have received as many votes as other candidates.

13 34. Polling places in San Diego County were scheduled to open at 7 a.m., on June 6,  
14 2006, but some did not open until as late as noon on election day denying hundreds of  
15 people the right to vote.

16 35. Over five hundred absentee voters ballots were mailed late and/or not received  
17 timely, denying those voters the right to vote.

18 36. In violation of California Election Code, section 18568, officials added to or  
19 mixed other ballots with the ballots of given precincts, with the intent to change the  
20 result of the election and obfuscate reconciliation attempts matching registered voters  
21 and ballots, particularly with regard to all absentee voter precincts.

22  
23 **V.**

24 **CANVASSING ERRORS (Calif. Elec Code § 16100)**

25 37. Contestants restate each of the allegations above and below as if set forth fully  
26 herein.

27 38. The precinct board members and/or election officials responsible for conducting  
28 the election and canvassing the returns made errors sufficient to change the result of the

1 election in which Defendant Bilbray has been declared elected. The errors included  
2 reported election results exceeding registered voters by several thousand percent in  
3 numerous precincts, as further set forth in the declarations and exhibits attached hereto.

4  
5 **VI.**

6 **PROGRAMMING ERRORS (Calif. Elec Code § 16100)**

7 39. Contestants restate each of the allegations above and below as if set forth fully  
8 herein.

9 40. Ballot definition involves the process by which signals initiated by a voter are  
10 tracked or correlated to data files on the optical scan or touchscreen computer. If any  
11 accidental or deliberate error in the ballot definition files occurs, votes intended for one  
12 candidate will be assigned to the wrong candidate.

13 41. Ballot definition errors are historically frequent with Diebold voting programs.

14 42. On information and belief, ballot definition errors resulted in the flipping of votes  
15 between candidates Bilbray and Busby, changing the result of the race.

16  
17 **VII.**

18 **VIOLATION OF DUE PROCESS and EQUAL PROTECTION**

19 43. Contestants restate each of the allegations above and below as if set forth fully  
20 herein.

21 44. Contestants have no plain, speedy or adequate remedy at law, and for that reason,  
22 seeks injunctive relief.

23 45. By acting as alleged herein, Defendants Haas and Doe Defendants, deprived  
24 Contestants of their right to be governed by persons duly elected without due process of  
25 law and the equal protection of the law, in violation of the Fourteenth Amendment to the  
26 United States Constitution.

27 46. By setting the cost of a recount of the votes at \$1.00 or more per vote recounted  
28 compared to other counties, such as \$0.14 per vote in nearby Orange County, Defendants



1 Haas and Doe Defendants effectively barred or punitively burdened Contestants from  
2 seeking a recount without due process of law and violating equal protection of the law,  
3 in violation of the Fourteenth Amendment to the United States Constitution. (See  
4 *Lindsey v. Normet*, 405 U.S. 56, 74 (1972).)

5 47. Contestants rights were violated relative to both electors of other counties who are  
6 assessed lower recount costs as well as relative to other requests for public records,  
7 which are assessed costs at lower fees and rates pursuant to the Public Records Act,  
8 when public policy and other considerations dictate that election records should be  
9 available at lower than typical cost, or at no cost, notwithstanding California Election  
10 Code, section 15630, et seq. Exemptions thereunder must be narrowly construed. (See  
11 California Government Code, sections 6250 - 6276.48.) In particular, access to public  
12 records for inspection purposes only must always be granted for free. (*Id.*) All responses  
13 must be prompt. (California Government Code, section 6257.) Precinct boards are  
14 “boards” within the meaning of covered agencies for purposes of the Public Records act.  
15 Moreover, on information and belief, access to these election records has been granted  
16 on more favorable terms to others. The Fourteenth Amendment of the U.S. Constitution,  
17 section 6254.5 of the Government Code, requires that Contestants be afforded equal  
18 protection of the law.

19 48. Contestant’s rights were also violated relative to the class of other public records  
20 requesters in that Defendant Mikel Haas, and Does 1-50, restricted or attempted to  
21 restrict the right of Contestants by limiting the scope of records produced. Defendant  
22 Haas arbitrarily limited the production of records to those that, in his judgment, are  
23 “relevant” when the law of public records and California public policy does not allow  
24 Haas to make an arbitrary determination about what records are “relevant” or what  
25 Contestants will be allow to know about their election of government representatives.

26 ///

27 ///

28 ///

1 **VIII.**

2 **CALIFORNIA CONSTITUTIONAL VIOLATION, Art. II, § 25**

3 49. Contestants restate each of the allegations above and below as if set forth fully  
4 herein.

5 50. California Constitution, Art. II, § 2.5, provides a right to have one’s vote counted.  
6 Section 2.5 states: “A voter who casts a vote in an election in accordance with the laws  
7 of this state shall have that vote counted.”

8 51. California Election Code further defines “Vote” by stating:

9 For purposes of Section 2.5 of Article II of the California Constitution, “vote”  
10 includes all action necessary to make a vote effective in any primary, special, or  
11 general election, including, but not limited to, voter registration, any other act  
12 prerequisite to voting, casting a ballot, and having the ballot counted properly and  
13 included in the appropriate totals of votes cast with respect to candidates for  
14 public office and ballot measures.

15 (California Election Code, section 15702.)

16 52. Ballots were not included in the appropriate totals of votes cast, in that absentee  
17 ballots were lumped into large precincts and separated from their proper registered  
18 precincts, making reconciliation of the ballots impossible. Said reconciliation is  
19 particularly important in that a public claim that 10,000 absentee ballots were forwarded  
20 in the final days of the election on behalf of the allegedly prevailing candidate Bilbray is,  
21 on information and belief, a pretextual claim for election fraud and irregularity including  
22 absentee precincts reported as having turnouts of 4,750% and higher, relative to  
23 registered voters reported for those same precincts.

24 **IX.**

25 **ILLEGAL AND UNCONSTITUTIONAL ELECTION**

26 53. Contestants restate each of the allegations above and below as if set forth fully  
27 herein.

28 34. The public has historically, traditionally and constitutionally had a role in the  
governance and supervision of elections which is beyond the power of government to

1 eliminate short of a constitutional amendment approved by the people. The people have  
2 a decisive role in all government ranging from determining liability in civil cases and  
3 guilt or innocence criminal trials to directing the policies of government to holding  
4 public officials accountable for their actions. In order to protect that role, public officials  
5 have the duty of public recordation of debate and votes in the legislative branch for the  
6 purpose of facilitating public review and control of those branches of government.

7 35. With regard to elections, the sum total of the changes effected by the use of  
8 electronic voting by San Diego county rise to the level of such fundamental change in  
9 the system of elections so as to necessitate a Constitutional amendment rather than a  
10 legislative change.

11 36. These fundamental changes include, but are not limited to, the count of the vote in  
12 secret, not only by public officials, but by corporations unaccountable to voters, thereby  
13 eliminating the public's right to observe and obtain information regarding the processing  
14 of the vote; the inability of election officials to actually prove and substantiate certified  
15 election results requiring the public and officials to simply take the machine totals based  
16 on faith alone; and the *sub silentio* elimination of other related rights regarding elections  
17 such to constitute a fundamental change and elimination of the public's role in elections.

18 37. The Constitutionally prescribed role for the public in elections cannot be  
19 undermined by legislative or ministerial acts any more than can the terms of the  
20 government representatives of the people be limited. As explained by the U.S. Supreme  
21 Court with regard to term limits:

22       Allowing these changes to the franchise related to elections for federal office  
23 would effect a fundamental change in the constitutional framework. Any such  
24 change must come not by legislation adopted either by Congress or by an  
25 individual State, but rather -- as have other important changes in the electoral  
26 process n50 -- through the amendment procedures set forth in Article V. The  
27 Framers decided that the qualifications for service in the Congress of the United  
28 States be fixed in the Constitution and be uniform throughout the Nation. [...] In  
the absence of a properly passed constitutional amendment, allowing individual  
States to craft their own qualifications for Congress would thus erode the structure  
envisioned by the Framers, a structure that was designed, in the words of the  
Preamble to our Constitution, to form a "more perfect Union." (n50, See, e. g.,  
Amdt. 17 (1913) (direct elections of Senators); Amdt. 19 (1920) (extending  
suffrage to women); Amdt. 22 (1951) (Presidential term limits); Amdt. 24 (1964)

1 (prohibition against poll taxes); Amdt. 26 (1971) (lowering age of voter eligibility  
2 to 18).)

3 (*U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (U.S. 1995).)

4 38. Because the election of June 6, 2006, (the first federal election after legislatively,  
5 but not constitutionally, mandated changes in elections pursuant to the Help America  
6 Vote Act) required a constitutional amendment to approve the changes in the public's  
7 role, it was an unconstitutional election, and therefore void and invalid.

8 **X.**

9 **HAND COUNT – RECOUNT APPLICATION**

10 39. Contestants restate each of the allegations above and below as if set forth fully  
11 herein.

12 40. Contestants have alleged sufficient errors and circumstances to be entitled to an  
13 ordered recount under the facts above, including the verified statements and declarations  
14 submitted herein.

15 WHEREFORE, Contestants pray for relief as set forth below:

- 16 1. That a hand-count of each and every vote be conducted;  
17 2. That all documents necessary to validating the canvass pursuant to applicable  
18 audit standards be produced;  
19 3. That the Court set the actual cost of a hand-count;  
20 4. That the candidate with the most votes be judged elected;  
21 5. For Contestant's costs of suit herein, including attorney's fees pursuant to Code of  
22 Civil Procedure, section 1021.5, and 42 U.S.C.A. § 1988, and other proper grounds;  
23 6. For such other and further relief as may be proper.

24 Dated: \_\_\_\_\_

25 Signed: \_\_\_\_\_

26 Kenneth L. Simpkins, Esq.  
27 Attorney for Contestants