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August 23, 2006

The Honorable Yuri Hofmann
Superior Court of California, County of San Diego
330 West Broadway
San Diego, CA 92101

Dear Judge Hofmann,

It has come to the attention of the Committee on House Administration that the Court is presented with a case, *Jacobson v. Bilbray*, No. GIC870044, contesting the election of Mr. Brian Bilbray to the office of Representative of the 50th Congressional District. The Court should dismiss this action. State courts do not have jurisdiction to decide an action contesting the election of a member of the United States House of Representatives. That power is textually committed to the House of Representatives itself by the Constitution, a commitment that has been recognized by the Supreme Court. The House of Representatives determined that Mr. Bilbray is the Representative of the 50th Congressional District, and redress is unavailable under the Federal Contested Elections Act. Accordingly, this Court should deny plaintiffs' request to recount votes and issue an advisory opinion about the results of the June 6, 2006, special election for Representative of the 50th Congressional District.

The United States Constitution unambiguously states that "Each House shall be the Judge of the Elections, Returns, and Qualifications of its Members." United States Const. art. I, § 5, cl. 1. This clause is a textually-demonstrable commitment to each house of Congress to determine that its members meet the qualifications enumerated in the Constitution. *See Powell v. McCormack*, 395 U.S. 486, 548 (1969) (noting that article I, section 5 of the Constitution "is at most a 'textually demonstrable commitment' to Congress to judge only the qualifications expressly set forth in the Constitution"). One such qualification "expressly set forth in the Constitution" is that "[t]he House of Representatives shall be composed of Members chosen every second Year by the People of the several States." U.S. Const. art. I, § 2, cl. 1; *see also Roudebush v. Hartke*, 405 U.S. 15, 25 (1972) (stating that the analogous requirement that "[t]he Senate of the United States shall be composed of two Senators from each State, elected by the people thereof" is a constitutional qualification). As a result, the Constitution gives the House of Representatives "the authority 'to determine the facts and apply the appropriate rules of law, and, finally, to render a judgment which is beyond the authority of any other tribunal to review.'" *McIntyre v. Fallahay*, 766 F.2d 1078, 1081 (7th Cir. 1985) (quoting *Barry v. United States ex rel. Cunningham*, 279 U.S. 597, 613 (1929)).

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The House of Representatives has conclusively determined that Brian Bilbray is the people's duly elected representative from the 50th Congressional District. Under the Federal Contested Elections Act ("FCEA"), 2 U.S.C. §§ 381-396, a "candidate for election in the last preceding election claiming a right to such office" must, "within thirty days after the result of such election shall have been declared," provide to the contestee "written notice of his intention to contest such election." 2 U.S.C. § 382(a). Mr. Bilbray was admitted as a member of the House of Representatives on June 13, 2006, and was certified by the duly authorized official, the San Diego County Registrar of Voters, on June 29, 2006. As such, considering the statute governing computation of time contained in 2 U.S.C. § 394(a), such notice to Mr. Bilbray was due on July 31, 2006. No notice was provided, and no extension of time can be granted where notice is not provided within thirty days. *See* 2 U.S.C. § 394(c). As such, Mr. Bilbray's claim to the office of Representative of the 50th Congressional District cannot be assailed by Ms. Jacobson or any other person.

No relief this Court may grant could change the results of the June 6, 2006, election for Representative at issue in this case. When plaintiff asks this court to decree following a recount "[t]hat the candidate with the most votes be judged elected," plaintiff is asking the Court to issue an order that the House of Representatives is bound by the FCEA not to honor.

Further, this Court should refuse plaintiff's request to conduct a recount in order to provide an advisory opinion on the results of the June 6, 2006, election. In cases such as *Roudebush*, where a candidate contests an election through proper means, and there is a parallel state court proceeding pursuant to state law seeking to recount votes, Congress has postponed final determination of entitlement to the contested office. Here, however, none of Mr. Bilbray's opponents for Representative for the 50th Congressional District contested his election in the House of Representatives. Where no person with a claim to the office has sought to contest the election, the House of Representatives strongly believes that concerns of federalism dictate dismissal of any action to recount ballots. Our constitutional structure is not well served by having courts question the results of an election, the outcome of which all candidates have acceded.

Thank you very much for your consideration.

Sincerely,



Paul Vinovich
Counsel

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