

1 SHARON L. ANDERSON (SBN 94814)
County Counsel
2 THOMAS L. GEIGER (SBN 199729)
Supervising Deputy County Counsel
3 COUNTY OF CONTRA COSTA
651 Pine Street, 9th Floor
4 Martinez, California 94553
Telephone: (925) 335-1800
5 Facsimile: (925) 646-1078

6 Attorneys for
Contra Costa County Clerk - Registrar of Voters Stephen Weir
7

8 SUPERIOR COURT OF CALIFORNIA
9 COUNTY OF CONTRA COSTA

10
11 JOYCE ELLIS,
12 Plaintiff,
13 v.
14 STEPHEN L. WEIR, et al.,
15 Defendants.

Case No. C 10-03265

**OPPOSITION TO APPLICATION
FOR TEMPORARY RESTRAINING
ORDER**

Date: Nov. 5, 2010
Time: 2:00 p.m.
Dept.: 60

17
18 Plaintiff Joyce Ellis seeks a temporary restraining order that would prevent the
19 County Elections Office from continuing to process all vote by mail ballots. Plaintiff
20 contends that she, as an elections observer, is entitled under the Elections Code to stop the
21 current processing of vote by mail ballots in order to challenge whether a voter's signature
22 on a mail ballot return envelope is similar to the signature on that voter's registration card.
23 The Elections Code, however, does not allow this type of challenge by an elections
24 observer. Rather, observer challenges must occur *before* the processing of vote by mail
25 ballots begins, and only on specific grounds. The grounds for a pre-processing challenge
26 by an observer do not include a challenge on grounds that signatures are not similar. The
27 application should be denied so that the County Elections Official can continue processing
28 vote by mail ballots and complete the official canvass within the time required by law.

1 ARGUMENT

2 I. PLAINTIFF IS UNLIKELY TO PREVAIL ON THE MERITS BECAUSE
3 THE ELECTIONS CODE DOES NOT ALLOW AN ELECTIONS
4 OBSERVER TO CHALLENGE VOTE BY MAIL BALLOT ENVELOPE
5 SIGNATURES WHILE VOTE BY MAIL BALLOTS ARE BEING
6 PROCESSED.

7 Plaintiff's request for a temporary restraining order must be denied because Plaintiff
8 is unlikely to prevail on the merits.

9 A. Under Elections Code section 15105, Plaintiff May Not Challenge Signature
10 Verification of Vote by Mail Ballot Envelopes While Those Ballots Are Being
11 Processed.

12 Elections Code section 15105, which Plaintiff fails to even mention, establishes
13 specific limits on an elections observer's right to challenge.¹ This statute provides that any
14 challenge by an elections observer must occur before the processing of vote by mail ballots
15 begins:

16 *"Prior to processing and opening the identification envelopes of vote by*
17 *mail voters, the elections official shall make available a list of vote by mail*
18 *voters for public inspection, from which challenges may be presented.*
19 *Challenges may be made for the same reasons as those made against a voter*
20 *voting at a polling place.² In addition, a challenge may be entered on the*
21 *grounds that the ballot was not received within the time provided by this*

23 ¹ Elections observers may be any member of the county grand jury, and at least one member each
24 of the Republican county central committee, the Democratic county central committee, and of any other party
25 with a candidate on the ballot, and any other interested organization. (Elec. Code, § 15104(b).)

26 ² A challenge to a voter may only be made at a polling place for the following reasons: The voter
27 is not the person whose name is on the index; the voter is not a resident of a precinct; the voter is not a citizen
28 of the United States; the voter has already voted in the election; or the voter is presently on parole for
conviction of a felony. (Elec. Code, § 14240.) If a challenge occurs at a polling place, the challenge may
be defeated if the voter swears he or she is a resident of the precinct. (Elec. Code, § 14244.) Voter
challenges are limited because voter challenges potentially interfere with the constitutional right to vote.

1 code or that a person is imprisoned for a conviction of a felony. All
2 challenges shall be made prior to the opening of the identification envelope
3 of the challenged vote by mail voter.” (Emphasis added.)

4 Because challenges under Elections Code section 15105 occur without the voter
5 being present, a challenge to a vote by mail ballot faces an even higher burden of proof than
6 a challenge to a voter made at a polling place. “Because the voter is not present, the
7 challenger shall have the burden of establishing extraordinary proof of the validity of the
8 challenge at the time the challenge is made.” (Elec. Code, § 15106.) This high burden is
9 necessary in order to minimize interference with the voter’s constitutional right to vote and
10 to protect the vote from being “wrongfully denied, debased or diluted.” (*Hadley v. Junior*
11 *College Dist.* (1970) 397 U.S. 50, 52.)

12 Here, the processing of vote by mail ballots has not only begun, it is nearly
13 complete. Plaintiff wants to challenge signatures *during* processing, not *prior to*
14 processing. And she wants to challenge the processing of vote by mail ballots on grounds
15 that are not specified in Elections Code section 15105. Furthermore, nothing in Plaintiff’s
16 evidence indicates that she would be able to meet the high burden of proof that her
17 unspecified challenges would be valid.

18 Because Plaintiff’s request is not authorized under Elections Code section 15105,
19 her request for a temporary restraining order must be denied.

20 **B. Elections Code section 15104 Does Not Authorize Elections Observers To**
21 **Challenge Whether Signatures Are Similar**

22 Contrary to Plaintiff’s assertion, Elections Code section 15104 does not authorize
23 observers to challenge whether a particular signature on a mail ballot return envelope are
24 similar to the signature on that voter’s registration card. Elections Code section 15104
25 provides in relevant part:

26 “(d) ... [V]ote by mail voter observers shall be allowed sufficiently close
27 access to enable them to observe the vote by mail ballot return envelopes
28 and the signatures thereon and challenge whether those individuals handling

1 vote by mail ballots are *following established procedures*, including all of
2 the following: (1) Verifying signatures and addresses on the vote by mail
3 ballot return envelopes by comparing them to voter registration
4 information.” (Emphasis added.)

5 Under the plain language of the statute, observers may challenge whether elections
6 workers are following the correct procedures; that is, whether elections workers are actually
7 comparing signatures on envelopes to voter registration signatures. Nothing in the statute
8 authorizes observers to stop this process by means of a challenge on the ground that
9 signatures are not similar.

10 The Contra Costa County Registrar of Voters has adopted observer guidelines and
11 procedures, which establish general rules for observers. (See Lopez Decl., Exh. A.)
12 Observers may not interfere with the processing of mail ballot return envelopes, ballot
13 processing, or ballot counting. Observers may not enter inside the area where the
14 processing occurs. Instead, they are permitted access to a designated observation area that
15 is sufficiently close to enable them to observe and challenge whether individuals handling
16 absentee ballots are following established procedures. Observers are also required to sign
17 in and wear identification badges, and they may not carry on conversations with each other,
18 engage in loud talking or arguing or make disruptive comments or noises, including sighs
19 or gasps. They may not talk to or question members of the Elections Office staff while they
20 are working. (See Lopez Decl., Exh. A, Attch. 5, p. 1.)

21 The County’s guidelines also establish procedures for individuals who handle mail
22 ballots. These are the procedures that may be challenged. Mail ballot handlers compare
23 signatures “at the time a return batch is processed and the return status is entered into the
24 voters record. A return status code on the list of absentee voters indicates that the record
25 was processed.” An observer may challenge whether a signature *was compared and*
26 *processed*, but may not challenge the comparison itself. (See Lopez Decl., Exh. A, Attch.
27 5, p. 2.)

28 Observers may challenge other procedures. They may challenge, for example,

1 whether two elections workers work together on accurately duplicating damaged or
2 defective ballots, or whether vote by mail ballots are secured to prevent tampering. (See
3 Lopez Decl., Exh. A, Attch. 5, p. 2.)

4 Plaintiff's own evidence indicates that the Registrar of Voters has discretion in
5 dealing with elections observers. The California Secretary of State's memorandum to all
6 County Clerks/Registrars of Voters regarding elections observations rights and
7 responsibilities (Secretary of State Memorandum No. 10297, dated October 12, 2010,
8 attached as Exhibit B to Plaintiff's Request for Judicial Notice) states that:

9 "Elections observers should be aware that in general, the law provides
10 elections officials with some discretion in terms of how various observation
11 laws are applied. Furthermore, how a law is applied will vary from
12 jurisdiction to jurisdiction for reasons including, but not limited to:

- 13 ■ The size and configuration of the elections office.
- 14 ■ The staffing levels that the county elections official is able to afford.
- 15 ■ The number of observers who are requesting access to a particular
16 process.

17 Observers have the right to:

18 ...

- 19 ● *View* vote by mail and provisional ballot processing.

20 ...” (Emphasis added.)

21 Nothing in the Secretary of State's guidelines allow elections observers to challenge
22 the signatures themselves. According to the Secretary of State, elections observers may
23 view, but not challenge, vote by mail processing once processing begins.

24 Moreover, Plaintiff misunderstands the legislative history to Elections Code section
25 15104. (Plaintiff's Request for Judicial Notice, Exh. A.) The Assembly Elections and
26 Redistricting Committee's analysis of Assembly Bill 1573 states that the purpose of the bill
27 is for elections observers to be “allowed to observe the comparison of a signature on the
28 VBM ballot envelope with the signature on the voter's registration affidavit.” There is no

1 mention of any challenge by an elections observer to the comparison.³

2 **II. ISSUANCE OF A TEMPORARY RESTRAINING ORDER WOULD**
3 **IRREPARABLY HARM THE ELECTIONS OFFICIAL BECAUSE IT**
4 **WOULD INTERFERE WITH HIS MANDATORY DUTY TO COMPLETE**
5 **THE OFFICIAL ELECTION CANVASS.**

6 The processing of vote by mail ballots is part of the official canvass for the
7 November 2, 2010 election in Contra Costa County. (See Elec. Code, § 15301.) The
8 official canvass began Wednesday, November 3, 2010. For state or statewide elections, the
9 canvass results in a report of voting results to the Secretary of State. The canvass must be
10 continued daily, Saturdays, Sundays, and holidays excepted, for not less than six hours each
11 day until completed.

12 The official canvass includes many steps which must be completed in accordance
13 with Elections Code 15372. The Elections Official is required by law to certify the election
14 results to the governing body within 28 days of the election. (Elec. Code, § 15372.)

15 The official canvass steps are specified in Elections Code section 15302. These
16 steps include the following tasks:

17 (a) An inspection of all materials and supplies returned by poll workers.

18 (b) A reconciliation of the number of signatures on the roster with the number of
19 ballots recorded on the ballot statement.

20 (c) In the event of a discrepancy in the reconciliation required by subdivision (b),
21 the number of ballots received from each polling place shall be reconciled with the
22 number of ballots cast, as indicated on the ballot statement.

23
24
25 ³ Elections Code section 2194, cited in Plaintiff's brief, does not stand for the proposition that
26 elections observer challenges to vote by mail signature comparisons are authorized. Instead, this section
27 allows certain persons to see signatures. The word challenge is missing. Subsection (c)(1) of Elections Code
28 section 2194, in fact, refers to challenges pursuant to sections 15105 to 15108, inclusive. There is no
reference to Elections Code section 15104 as authorizing a challenge to signature comparisons. Presumably,
if the Legislature had wanted to allow elections observers to challenge signature comparisons during vote
by mail processing, it would have said so.

1 (d) A reconciliation of the number of ballots counted, spoiled, canceled, or
2 invalidated due to identifying marks, overvotes, or as otherwise provided by statute,
3 with the number of votes recorded, including vote by mail and provisional ballots,
4 by the vote counting system.

5 (e) Processing and counting any valid vote by mail and provisional ballots not
6 included in the semifinal official canvass.

7 (f) Counting any valid write-in votes.

8 (g) Reproducing any damaged ballots, if necessary.

9 (h) Reporting final results to the governing board and the Secretary of State, as
10 required.


11 As noted above, the official canvass must be completed within 28 days of the
12 election. (See Lopez Decl.) Any order allowing elections observers to interpose random
13 challenges, possibly for partisan reasons, would interfere with the elections official's duty
14 to complete the official canvass in a timely manner. (See Lopez Decl, ¶¶ 11-12.)

15 CONCLUSION

16 As the U.S. Supreme Court has stated, votes must not be "denied, debased or
17 diluted." (*Hadley, supra*, 397 U.S. at 52.) The Contra Costa County Clerk-Registrar of
18 Voters respectfully requests that Plaintiff's application for a temporary restraining order be
19 denied for the above reasons so that the elections process may continue and allow the
20 Registrar of Voters to complete the official canvass in the time required by law.

21 DATED: November 5, 2010

SHARON L. ANDERSON, County Counsel

22
23 By: 
24 Thomas L. Geiger
25 Supervising Deputy County Counsel
26 Attorneys for Defendants
27
28