

1 FREDRIC D. WOOCHEER (SBN 96689)
2 BEVERLY GROSSMAN PALMER (SBN 234004)
3 SALVADOR E. PÉREZ (SBN 309514)
4 STRUMWASSER & WOOCHEER LLP
5 1250 Sixth Street, Suite 205
6 Santa Monica, California 90401
7 Telephone: (310) 576-1233
8 Facsimile: (310) 319-0156
9 Email: bpalmer@strumwooch.com

10 *Attorneys for Contestant Mike Hutchinson*

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11 SUPERIOR COURT OF THE STATE OF CALIFORNIA
12 IN AND FOR THE COUNTY OF ALAMEDA

13 MIKE HUTCHINSON,

14 Contestant,

15 v.

16 NICK RESNICK,

17 Defendant.

18 ALAMEDA COUNTY REGISTRAR OF
19 VOTERS TIM DUPUIS, in his official capacity;
20 CITY OF OAKLAND CITY CLERK ASHA
21 REED, in her official capacity,

22 Real Parties in Interest.

Case No. 23CV025271

(Case Assigned to the Honorable Judge Brad
Seligman- Department 23)

**JOINT CASE MANAGEMENT
STATEMENT**

(Elec. Code, § 16400 et seq.)

Case Filed: January 6, 2023

Cross-Contest Filed: January 11, 2023

Trial Date: None

Case Management Conf: February 10, 2023,
10:30 AM

1 **INTRODUCTION**

2 Contestant and Cross-Defendant Mike Hutchinson, Defendant and Cross-Contestant Nick
3 Resnick, Real Party in Interest Alameda County Registrar of Voters, and Real Party in Interest City of
4 Oakland City Clerk Asha Reed respectfully submit this Joint Case Management Conference Statement
5 in preparation for the February 10, 2023 Case Management Conference.

6 **JOINT STATEMENT**

7 As the Court ordered at the January 20, 2023 Case Management Conference, the parties
8 convened to conduct an examination, subject to public observation, of the 235 ballots that the
9 County Registrar of Voters (“ROV”) had identified as “suspended ballots,” which the ROV
10 stated were not properly tabulated in the certified results for the November 2022 Oakland
11 School Board District No. 4 election because the tally system was improperly configured and
12 suspended votes in the first rank choice vote selection instead of advancing the vote as
13 required by the Oakland Charter.

14 The ROV first conducted an electronic review of ballot images to identify the batches
15 containing the 235 suspended ballots. Those batches (which are stored in boxes) were
16 retrieved and placed in a secure room in the ROV’s offices in Oakland.

17 On Wednesday, February 1, 2023, the date agreed upon by the parties and announced
18 to the public, personnel from the ROV’s office produced 155 batches of ballots, from which
19 the 235 ballot were retrieved. The ballots were retrieved, placed in plastic sleeves that were
20 labeled with each ballot’s batch information and a unique number from 1 to 235 for each
21 suspended ballot. The suspended ballots were then returned to be stored with the batches from
22 which they were originally retrieved. Representatives of all parties were present during the
23 retrieval of the ballots and were permitted to observe. The public was also permitted to
24 observe from behind plexiglass windows, and the process was livestreamed via a link from the
25 ROV’s website.

26 On February 6 and 7, 2023, the parties reconvened at the ROV’s offices. ROV
27 personnel produced each of the 235 suspended ballots from the batches in which they were
28 stored, removed them from their sleeve, and permitted the parties to observe them. Each ballot

1 was projected onto a screen visible to the parties and to public observers. Ballots were
2 examined one at a time, with personnel reciting the ballot’s number, source, and every
3 marking in each of the ranking positions 1 through 5. Two personnel then hand recorded the
4 called-out information on tally sheets (one sheet for each recorder). This allowed for a virtual
5 mirror image of the 235 suspended ballots to be created. The ballot was then returned to its
6 sleeve along with its respective hand tally sheets. Immediately thereafter, a second group of
7 ROV personnel took the ballots and hand summaries included in each batch and two personnel
8 reviewed the hand summary. Based on the hand summary, the ballot was allocated as a vote
9 for candidates Hutchinson, Manigo, or Resnick, or as an overvote. The public was permitted
10 to observe the entire process behind the plexiglass divider and had screens projecting both the
11 ballot images and the total counts of ballots reviewed and allocated. This process was also
12 livestreamed via a link from the ROV’s website.

13 The parties were permitted to challenge ballots for further examination. A challenged
14 ballot was not allocated to any candidate until after the challenges were reviewed. There were
15 eleven challenges raised by the parties—nine by Resnick and two by Hutchinson. Each of the
16 challenges was overruled by the ROV. In addition, at the conclusion of the review process, the
17 parties were allowed to again offer any additional challenges that they had to the 235
18 suspended ballots. No further challenges were made. As a result, none of the original eleven
19 challenges affected the final allocation of the ballots.

20 The review of ballots concluded shortly before 1 p.m. on February 7, 2023. At the
21 conclusion of the review, the tally was as follows:

Hutchinson	115
Manigo	37
Resnick	61
Overvote	22

27 These totals were the same as reported by the ROV to the Alameda County Board of
28 Supervisors at their special meeting on January 5, 2023.

1 In addition to examining the ballots, the parties conferred with the ROV's
2 representatives regarding the application of the advancing ballot methodology to choices
3 subsequent to the first choice. The ROV's office affirmed that it had used the advancing ballot
4 methodology for all selections in the ROV's tallies once the ROV became aware of the
5 methodological issue. This would mean, for example, that if one or more ranks were skipped
6 subsequent to a voter's first choice, the next selected candidate would be advanced to be the
7 voter's second choice.

8 **SEPARATE PARTY STATEMENTS**

9 **Contestant and Cross-Defendant Hutchinson**

10 Contestant Hutchinson, having reviewed the 235 suspended ballots, believes that the
11 factual issues presented by the election contest have been resolved. Each of the suspended
12 ballots has been individually examined by the parties, and the results of the examination
13 exactly match the ROV's previous publicly reported tallies. Accordingly, Contestant
14 Hutchinson becomes the second-place finisher in the first round of the election's ranked
15 choice voting allocation as a result of the application of section 1105(g) of the Charter of the
16 City of Oakland. No substantiated concerns have been raised regarding the second round of
17 the ranked choice vote allocation, so it is Contestant Hutchinson's contention that the Court
18 should set a briefing schedule for resolution of the legal issues raised in this litigation.

19 Contestant Hutchinson would also like to clarify and correct a number of misstatements
20 in Defendant Resnick's separate statement. In paragraph 2, Defendant Resnick claims "the
21 235 ballots that the Parties reviewed only contained a skipped ranking in the first column."
22 This is not accurate. Numerous ballots examined by the parties skipped more than the first
23 ranking position. A number of the ballots, for example, skipped the first four ranking
24 positions, registering a vote only at the fifth and final ranking position. By counsel's count
25 there were at 45 ballots that skipped more than the first rank that were examined by the
26 parties.

27 In paragraph 9, Defendant Resnick claims that the parties "also learned that the skipped
28 ranking system does not advance a voter's vote when a valid vote is preceded by an overvote.

1 This is despite the fact that an overvote is analogous to a write-in or blank ranking as ‘no
2 candidate is indicated’ for any of these choices.” This is not a legitimate issue that should
3 delay resolution of the contests. An overvote is not “analogous to a write-in or blank ranking.”
4 A blank ranking does not indicate a candidate. The same is true of a write-in ranking in this
5 race, as there were no qualified write-in candidates. The only candidates were Pecolia Manigo,
6 Defendant Resnick, and Contestant Hutchinson. An overvote, as defined in section 1105(h) of
7 Oakland’s Charter, on the other hand, is “a ranking with more than one *candidate* indicated.”
8 Moreover, the tally system cannot advance a vote when it is preceded by an overvote because
9 the Charter does not permit that. The aforementioned Charter provision clearly states: “Any
10 ballot that has been declared an undervote, overvote, or exhausted shall remain so and shall
11 not count towards any candidate in that round or in subsequent rounds.”

12 In paragraph 14, Defendant Resnick complains that the Registrar has not provided the
13 parties with a “summary report” and demands that he be provided specific information.
14 Defendant Resnick could have easily collected this information during the ballot review with
15 little effort and minimal diligence. Defendant Resnick had at least one attorney present during
16 the entirety of the process.

17 In short, Defendant Resnick’s objections are an effort to obfuscate the facts and
18 increase delay by interposing unnecessary demands. Contestant Hutchinson respectfully
19 requests that this election contest proceed expeditiously to judgment, as required by the
20 Elections Code.

21 **Defendant and Cross-Contestant Resnick**

22 Attached hereto as **Exhibit A**.

23 **Real Party in Interest Alameda County Registrar of Voters**

24 Since the last status conference held on January 20, 2023, the County ROV and staff
25 have been diligently preparing, organizing, and assembling the requisite trained teams to
26 conduct the review of the 235 suspended ballots that this Court ordered. That review was
27 completed on Tuesday, February 7, 2023 just prior to 1:00 p.m. During this time frame,
28 Resnick’s counsel has submitted several Public Records Act requests and as well, posed a

1 number of questions that it would like the County ROV to address. The County ROV will
2 move forward in responding to these pending PRA requests and providing responses to the
3 pending questions, as appropriate within the issues at play in this pending election contest. It
4 bears noting that the County ROV has responded to several of counsel’s questions and as well,
5 the County ROV previously produced to all parties the requested voter materials.

6 The County ROV objects to Resnick’s request that the Court order the ROV to
7 “provide the parties with copies of “each and every ballot”. The ROV understands this request
8 to relate to the 235 suspended ballots only. However, counsel provides no authority for
9 ordering such a production which would specifically breach the sanctity of the secret ballot.
10 Indeed, the Elections Code, the Code of Regulation, and established case law indicates that in
11 order to maintain the sanctity of the secret ballot, and the requisite anonymity of ballots,
12 copies of ballots should not be supplied to third parties, nor even to the Court. As well, the
13 legislature has set forth strict limitations for re-opening and viewing ballots to safeguard the
14 fundamental right to a secret ballot. The Elections Code declares that all voters “have the right
15 to cast a secret ballot free from intimidation.” (Elec. Code § 2300(a)(4).) This privilege is
16 codified in the Rules of Evidence. (Evid. Code § 1050 [privilege to protect secrecy of
17 vote].) Case law also establishes that ballots are not subject to disclosure under the California
18 Public Record Act (“CPRA”). (*Citizens Oversight Inc. v. Vu* (2019) 35 Cal.App.5th 612, 618-
19 620.) Specifically, the court in *Citizens Oversight* found that ballots are not subject to
20 disclosure under the CPRA because the Elections Code requires that the ballots be kept un-
21 opened and unaltered for a specified timeframe after which they are then destroyed. (*Id.* at 618
22 citing to Elec. Code §§ 17301(b) and 15370.) This is contrasted with other Elections Code
23 provisions that allow for the public inspection of tally sheets, voting rosters and other lists. (*Id.*
24 at 619 citing Elec. Code § 17303.)

25 Further, the Code of Regulations in addressing recounts provides that all persons
26 authorized to observe the recount pursuant to section 20816 “must be *permitted to observe and*
27 *inspect, without physical contact*, the integrity of all externally visible security seals used to
28 secure all ballot materials” (See Cal. Code. Regs. Title 2, § 20817(b); emphasis added.) And,

1 the Code of Regulations also provides that the use of camera and other recording devices by
2 the media, observers and interested parties is allowed “in a manner that will not interfere with
3 the recount, *compromise the anonymity of any ballot or record the signature of any*
4 *voter.*” (Cal. Code. Regs. Title 2, § 20821(a).)

5 There is no authority to allow for the production of ballots as requested by Resnick and
6 such a request is improper as it would destroy the sanctity of the secret ballot.

7 **Real Party in Interest Asha Reed, City Clerk for the City of Oakland**

8 Real Party in Interest Asha Reed, City Clerk for the City of Oakland, provides this
9 additional statement to urge the Court to resolve this matter expeditiously and take any steps it
10 believes necessary to enter judgment and require the Registrar of Voters to issue a revised
11 certificate of election consistent with the Registrar’s revised count that was reported to the
12 Board of Supervisors on January 5, 2023. *See generally* Elec. Code § 16700.

13 As the joint statement above makes clear, the manual review of the 235 ballots has
14 confirmed the Registrar’s revised count. The factual concerns raised in the contest and cross-
15 contest concerning the counting of ballots where no first-place selection was indicated have
16 therefore been fully resolved, and real party in interest Reed believes it is now appropriate for
17 the Court to resolve the case.

18 In addition to the factual claims, cross-contestant Nick Resnick initially raised three
19 legal arguments in his cross-contest: that there was inadequate voter education about the
20 advance rule, that the ballot design caused confusion, and that the advance rule set forth in the
21 City’s Charter is unconstitutional. If cross-contestant still intends to raise those arguments,
22 real party in interest Reed requests that the Court order expediated briefing on those claims.
23 Real party in interest Reed believes those arguments are meritless and can be resolved quickly
24 on the papers. First, the arguments should have been raised before the election and therefore
25 are barred from being raised in an election contest. *McKinney v. Superior Court*,
26 124 Cal. App. 4th 951 (2004); *see also Friends of Sierra Madre v. City of Sierra Madre*,
27 24 Cal. 4th 165 (2001). Second, the underlying claims are meritless, and courts have upheld
28 RCV systems like Oakland’s against constitutional challenges. *See, e.g., Dudum v. Arntz*,

1 640 F.3d 1098 (9th Cir. 2011).

2 DATED: February 8, 2023

Respectfully submitted,

3 STRUMWASSER & WOOCHEER LLP
4 Fredric D. Woocher
5 Beverly Grossman Palmer
6 Salvador E. Pérez

7 By: 
8 Beverly Grossman Palmer

Attorneys for Contestant Mike Hutchinson

9 DATED: February 8, 2023

10 SUTTON LAW FIRM, PC
11 James R. Sutton
12 Bradley W. Hertz
13 Eli B. Love

14 By: /s/ James R. Sutton
15 James R. Sutton

Attorneys for Defendant Nick Resnick

16 DATED: February 8, 2023

17 OLSON REMCHO
18 Karen Getman
19 Thomas A. Willis

20 By: /s/ Thomas A. Willis
21 Thomas A. Willis

*Attorneys for Real Parties in Interest and Cross-
22 Real Parties in Interest City of Oakland and City
23 Clerk Asha Reed*

24 DATED: February 8, 2023

25 MEYERS NAVE
26 Deborah J. Fox
27 Sky Woodruff
28 Jenny L. Riggs

By: /s/ Deborah J. Fox
Deborah J. Fox

*Attorneys for Real Party in Interest Alameda
County Registrar of Voters*

EXHIBIT A

1 supposed to advance votes when the voter leaves any ranking blank, the Registrar's office
2 was unable to confirm whether this process was followed for blank or write-in second
3 place rankings during the official canvass for the District 4 School Board race, or during
4 the re-tabulation conducted by the Registrar on December 23, 2022. In other words, the
5 Registrar's office could not affirmatively state whether voters in the District 4 School
6 Board race who selected a first place candidate, left the second place blank, and selected a
7 third place candidate had their third place candidate advanced into the second place
8 choice in the second round of tabulation.

9 8. The review of ballots conducted earlier this week therefore did not verify
10 the results of the re-tabulation conducted by the Registrar on December 23, 2022 because
11 the Parties were not able to review whether the skipped ranking methodology was
12 followed when voters left the second column blank or indicated a write-in candidate in the
13 second column. In other words, the review of ballots did not verify what occurred during
14 the second round of ranked choice voting.

15 9. The Parties also learned that the skipped ranking system does not advance a
16 voter's vote when a valid vote is preceded by an overvote. This is despite the fact that an
17 overvote is analogous to a write-in or blank ranking as "no candidate is indicated" for any
18 of these choices.

19 10. The Registrar's office has still not provided the Parties with the pages of the
20 voter information pamphlets relating to the three ballot measures which instituted ranking
21 choice voting in Oakland School Board elections, despite repeated requests for these
22 documents, repeated promises from the County that they would provide these documents,
23 as well as the fact that these voter information pamphlets are public records which should
24 be readily accessible. These voter information pamphlets contain the legislative history of
25 the ballot measures which instituted ranked choice voting for Oakland School Board
26 elections and are therefore essential to the legal review of how the Registrar re-tabulated
27 the ballots under the skipped ranking system.

28 11. The Registrar's office has still not provided the Parties with the instructions

1 for ranked choice voting provided to voters in the voter information pamphlets and on the
2 ballots, despite repeated requests for these documents, repeated promises from the County
3 that they would provide these documents, as well as the fact that these instructions are
4 public records which should be readily accessible. The instructions provided to voters
5 about ranked choice voting are essential for assessing the legality of how the Registrar re-
6 tabulated the votes in the skipped ranking system.

7 12. The Registrar's office has still not provided the Parties with its
8 communications with the County's voting system vendor about the skipped ranking
9 system, despite repeated requests for these documents, repeated promises from the County
10 that they would provide these documents, as well as the fact that these emails are public
11 records which are readily accessible. The email communications between the Registrar's
12 office and the voting system vendor are essential to assessing the legality of how the
13 Registrar re-tabulated the results and the skipped ranking system.

14 13. Defendant/Cross-Contestant Resnick respectfully requests that the Court
15 orders the Registrar to immediately produce the following documents:

16 A. The applicable pages of the voter information pamphlets for the three
17 ballot measures which instituted ranked choice voting in Oakland School Board elections;

18 B. The instructions provided to voters in the voter information
19 pamphlets and on the ballots relating to ranked choice voting; and

20 C. Email communications with the voting system vendor about the
21 skipped ranking system.

22 We also respectfully request that the Court set a deadline for this production.

23 14. It is not clear what work product the Registrar's office will create from the
24 review of the 235 ballots. Our understanding was that the Registrar's office would
25 produce a "summary report" of the ballots; i.e., how many first place rankings were
26 skipped because of a write-in candidate? How many voter choices were moved up one
27 ranking? Two rankings? Three rankings? How many of the ballots were originally
28 "remade" by the Registrar's office? The Registrar's office instead implied that it would

1 simply provide a tally of the 235 ballots.

2 15. Given the ambiguity in the summary of this week’s review of the 235 ballots
3 to be created by the Registrar’s office, and in order to give the Parties the opportunity to
4 more fully analyze the ballots, we respectfully request that the Court order the Registrar to
5 provide the Parties with copies of each and every ballot. The Registrar’s office has
6 numbered each ballot consecutively and by batches, and has placed each ballot in its own
7 plastic cover, so compiling the 235 ballots into a single PDF should be straightforward.
8 We also respectfully request that the Court set a deadline for this production.

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PROOF OF SERVICE

STATE OF CALIFORNIA
COUNTY OF ALAMEDA

Re: *Mike Hutchinson v. Nick Resnick, et al.*, Case No. 23CV025271

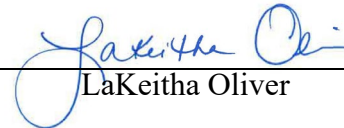
I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 1250 Sixth Street, Suite 205, Santa Monica, California 90401. My electronic mail address is loliver@strumwooch.com.

On **February 8, 2023**, I served the foregoing document(s) described as **JOINT CASE MANAGEMENT STATEMENT** on all appropriate parties in this action, as listed on the attached Service List, by the method stated:

If Electronic Filing Service (EFS) is indicated, I electronically filed the document(s) with the Clerk of the Court by causing the documents to be sent to One Legal, the Court's Electronic Filing Services Provider for electronic filing and service. Electronic service will be effected by One Legal's case-filing system at the electronic mail addresses indicated on the attached Service List.

If U.S. Mail service is indicated, by placing this date for collection for mailing true copies in sealed envelopes, first-class postage prepaid, addressed to each person as indicated, pursuant to Code of Civil Procedure section 1013a(3). I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Los Angeles, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing contained in the affidavit. I am a resident or employed in the count where the mailing occurred. The envelope or package was placed in the mail at Los Angeles, California.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct and that this is executed on **February 8, 2023**, at Los Angeles, California.



LaKeitha Oliver

SERVICE LIST

Mike Hutchinson v. Nick Resnick, et al., Case No. 23CV025271

Via EFS

Karen Getman
Thomas A. Willis
OLSON REMCHO LLP
1901 Harrison Street, Suite 1550
Oakland, California 94612
Tel: 510-346-6200 • Fax: 510-574-7061
Email: kgetman@olsonremcho.com

Barbara J. Parker
Ryan Richardson
Selia M. Warren
OFFICE OF THE CITY ATTORNEY
One Frank H. Ogawa Plaza, 6th Floor
Oakland, California 94612
Tel: 510-238-2961 • Fax: 510-238-6500
Email: rrichardson@oaklandcityattorney.org

*Attorneys for Real Party in Interest City of
Oakland; and City of Oakland City Clerk Asha
Reed, in her official capacity*

Via EFS

Bradley W. Hertz
THE SUTTON LAW FIRM, PC
22815 Ventura Boulevard, Suite 405
Woodland Hills, California 91364
Tel: 818-593-2949
Email: bhertz@campaignlawyers.com

James R. Sutton
Eli B. Love
THE SUTTON LAW FIRM, PC
150 Post Street, Suite 405
San Francisco, California 94108
Email: jsutton@campaignlawyers.com
elove@campaignlawyers.com

*Attorneys for Defendant and Cross-Contestant
Nick Resnick*

Via EFS

Deborah J. Fox
Sky Woodruff
Jenny L. Riggs
MEYERS NAVE
1999 Harrison Street, 9th Floor
Oakland, California 94612
Tel: 510-808-2000 • Fax: 510-444-1108
Email: dfox@meyersnave.com
swoodruff@meyersnave.com
jriggs@meyersnave.com

Donna R. Ziegler
Raymond Lara
OFFICE OF THE COUNTY COUNSEL
1221 Oak Street, Suite 450
Oakland, California 94612
Tel: 510-272-6700 • Fax:
Email: donna.ziegler@acgov.org

*Attorney for Real Party in Interest Alameda
County Registrar of Voters Tim Dupuis, in
his official capacity*