

BEFORE THE STATE RECOUNT COMMISSION

MARK OWEN, in his)
capacity as Chairperson)
of the Vanderburgh)
County Democratic)
Central Committee,)
)
Petitioner,)
)
v.)
)
WENDY (Mac) MCNAMARA,)
)
Respondent.)

VOLUME I

(Pages 1 - 233)

This recount hearing was reported by me, Faith Hurley, Court Reporter, Notary Public, County of Vanderburgh, State of Indiana, on the 12th day of December 2010, between the hours of 12:19 P.M. and 10:08 P.M., at the Hovey House, Mt. Vernon, Indiana.

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A P P E A R A N C E S

RECOUNT COMMISSION

CHAIRMAN - Todd Rokita
REPUBLICAN COMMISSIONER APPOINTEE - Gordon Durnil
DEMOCRATIC COMMISSIONER APPOINTEE - Bob Kuzman
REPUBLICAN COUNSEL - Brad King
DEMOCRATIC COUNSEL - Leslie Barnes
RECOUNT DIRECTOR - Bradley Skolnik

STATE BOARD OF ACCOUNTS MEMBERS

STATE EXAMINER - Bruce Hartman
Mike Rogina
Sara Bellamy
Lynne Spencer

COUNSEL FOR THE PARTIES

COUNSEL FOR PETITIONER - Adam Brown
COUNSEL FOR RESPONDENT - David Brooks

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1 MR. CHAIRMAN: The election in
2 House District 76 will be one of the matters
3 before the Commission today. And while the
4 Recount Commission is making these
5 proceedings available to all six million
6 Hoosiers via online video stream, the
7 Commission is pleased to be here again in the
8 county taking part in what is very essential,
9 albeit, as a recount it's going to go several
10 hours. Some might say -- some of our young
11 people might say it must get a little bit
12 boring, it is a very important part of the
13 civic engagement exercise that every Hoosier
14 needs to be involved with if this Republic is
15 to remain free. So thank you all for
16 attending and thank you all for watching.

17 I would like to note to the many
18 Hoosiers observing today's proceedings that
19 the building that we sit in today, the Hovey
20 House that I said was historic, is that
21 because it's named after a very important
22 Hoosier leader, Alvin P. Hovey, one of
23 Indiana's governors. Not only did Alvin
24 Hovey serve as Indiana's 21st governor, but
25 he was also a Union General during the Civil

1 War, an Indiana Supreme Court Justice and a
2 United States Congressman. Perhaps most
3 interesting to the proceedings here today is
4 the fact that while serving as governor from
5 1889 until 1891, Governor Hovey was
6 instrumental in implementing a bipartisan
7 effort to modernize Indiana's election
8 practices. And as I read about him, he
9 specifically sought to, as a reform and new
10 idea at the time, that we have pre-printed
11 ballots with the candidates' names on it when
12 voting. So he had that reform enacted into
13 law and several others, and so I think it's a
14 pleasant bit of irony that we're here today
15 for these recount and contest matters.

16 As I said in the earlier hearing, there
17 are two basic types of matters that come
18 before us. They either come in the form of
19 contests or they come in the form of
20 recounts. We have one of each today to work
21 with.

22 In contests we are basically deciding
23 whether or not a candidate is
24 constitutionally and statutorily qualified to
25 hold office or if there's an impossibility in

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the counting of the votes that requires a remedy of a special election.

In the context of the recount matters, we are doing just that; we are recounting votes and the three of us will rule on the disputed ballots that come before us.

Indiana's recount law is provided with a strict deadline by which the Recount Commission must complete its work. In the matter of House District 76, we must complete our work by December 20th and in the matter of the Secretary of State, we must complete our work by January 1st.

Note for the record that today's meeting of the Commission was properly provided under our public access and open records law and is pursuant to IC5-14-1.5-5, so we are legal.

I would now like to introduce the other members of the Recount Commission and the other participants that you'll see involved today.

First of all, to my left we have the Republican appointee to the Recount Commission, Mr. Gordon Durnil.

1 To my immediate right is the Democratic
2 appointed Commission member, Mr. Robert
3 Kuzman.

4 We've also appointed a recount director
5 who has done this for multiple years for the
6 Secretary of State's office now and he's done
7 a superb job in all cases and that's former
8 Securities Commissioner and now Recount
9 Director, Mr. Brad Skolnik. He's on my far
10 left.

11 We have Democratic counsel to the
12 Recount Commission, Ms. Leslie Barnes, who is
13 to Mr. Kuzman's right, and we have a
14 Republican counsel for the Recount
15 Commission, Mr. Brad King, right here to
16 Gordon's left.

17 We also have the State Board of
18 Accounts participating today. I first want
19 to thank and acknowledge State Examiner Bruce
20 Hartman who is here in the room today for
21 year after year his complete professionalism
22 in providing such a skilled team to work
23 with.

24 Under Mr. Hartman we have Mr. Mike
25 Rogina here, who is the first fellow on the

1 left, and he's going to introduce the rest of
2 -- of his team.

3 MR. CHAIRMAN: Mike.

4 MR. ROGINA: Thank you,
5 Mr. Chairman.

6 We assembled about 20 examiners to
7 assist in the recount. Not all of them are
8 here, but I'll introduce who is here.

9 Lynne Spencer, Sara Bellamy and Jeff
10 Arthur. We invited the rest to view the
11 operations of this hearing, and with that,
12 we're ready to go.

13 MR. CHAIRMAN: Thank you, Mike.

14 We're also joined by members of Indiana
15 State Police, who are also instrumental in
16 safeguarding the recount and receiving
17 election materials. I see them in the back
18 of the room. Thank you very much.

19 Before we get started, we -- I'll turn
20 the microphone over to Commissioner Kuzman
21 for a request regarding today's agenda.

22 MR. KUZMAN: Thank you,
23 Mr. Chairman.

24 In light of the weather that you
25 commented on and the timing of one motion

1 compared to the other issue, I was wondering
2 if we could reverse the order under -- or
3 make a motion to reverse the order under
4 section four of your posted agenda from 4B,
5 motion to dismiss petition for consent in the
6 Secretary of State's race Parker versus
7 White, if we could do that prior to the
8 recount in House District 76.

9 MR. CHAIRMAN: I appreciate that.
10 As Chair of the Recount Commission, I have
11 set the agenda. I'll note a couple of
12 things. First of all, the statutory
13 deadlines involved, that put this recount
14 deadline ahead of the contest deadline. I'll
15 also note the fact that in our experience,
16 these recounts tend to go on for hours and
17 they're unpredictable in terms of the length,
18 the amount of hours that it can take, so it's
19 my intention to prioritize the -- and we're
20 here in Posey County to do first and foremost
21 this recount, so it's my intention to keep
22 the priority as outlined in the agenda.

23 Moving on to -- or Commissioner Durnil,
24 did you have anything to add?

25 MR. DURNIL: No.

1 MR. CHAIRMAN: Moving on to House
2 District --

3 MR. KUZMAN: Well, I didn't get a
4 second. Is that -- I think that's
5 probably --

6 MR. CHAIRMAN: Did you make it in
7 the form of a motion?

8 MR. KUZMAN: I did.

9 MR. DURNIL: Second.

10 MR. CHAIRMAN: I'm hearing a
11 second. Thank you.

12 Moving on to House District 76, this is
13 in the matter of the recount for the election
14 of Indiana State Representative District 76.
15 Mark Owen, in his capacity as Chairperson on
16 the Vanderburgh County Democratic Central
17 Committee, Petitioner versus Wendy McNamara
18 as Respondent.

19 Counsel for the parties please state
20 your name for the record.

21 MR. BROOKS: I think, as --

22 MR. CHAIRMAN: You're not on?

23 MR. BROOKS: -- usual, anything
24 high tech that gets close to me is
25 malfunctioning. I touched it once; that's

1 probably why, but I don't know. I think --

2 MR. CHAIRMAN: No. We're not on
3 there.

4 MR. BROOKS: I don't know what I
5 did.

6 MR. CHAIRMAN: Let's see. Who is
7 our tech person?

8 MR. BROOKS: One dutifully
9 instructed me, but apparently I'm not doing
10 it right.

11 MR. CHAIRMAN: There's no switch
12 on that?

13 MR. BROOKS: Yeah. It's supposed
14 to be on the back. It was working at some
15 point, but I don't know why the -- I can talk
16 loud. That's not a problem. But I assume
17 that somebody wants this for some other
18 reason.

19 MR. CHAIRMAN: Yeah. My -- my
20 concern is that you won't get picked up on
21 the internet.

22 MR. BROOKS: Well, let me turn it
23 over to somebody who is most likely, by
24 virtue of his age, more technical than I am.

25 MR. CHAIRMAN: We'll stop for a

1 minute.

2 (Off the record - Technical
3 difficulties)

4 MR. CHAIRMAN: Names for the
5 record, please.

6 MR. BROOKS: David Brooks on
7 behalf of Wendy McNamara.

8 MR. CHAIRMAN: Thank you.

9 MR. BROWN: Adam Brown on behalf
10 of Mark Owen.

11 MR. CHAIRMAN: Thank you both.

12 On November 18th, 2010, a verified
13 petition for recount and contest for the
14 election of Indiana State Representative
15 District 76 was filed with the Indiana
16 Election Division by Petitioner Mark Owen.
17 On November 23rd, 2010, motion to dismiss the
18 contest action was filed with the Indiana
19 Election Division by Respondent Wendy
20 McNamara. Also on November 23rd, 2010, the
21 recount director issued an order which
22 granted the verified petition for recount and
23 ordered a manual recount of all votes cast at
24 the precincts located within Indiana State
25 Representative District 76. It was supposed

1 to begin at 8 a.m. on November 29th, 2010.

2 On November 24th, 2010, the recount
3 director issued an order to convene a meeting
4 of the Indiana Recount Commission for
5 December 5th, 2010, to conduct a hearing on a
6 motion to dismiss the contest action only.
7 And then on December 5th, 2010, the Recount
8 Commission conducted a hearing on a motion to
9 dismiss the contest action and the Recount
10 Commission granted the motion to dismiss in
11 that matter.

12 On December 7th, 2010, the recount
13 director issued an order to convene a meeting
14 of the Recount Commission for December 12th,
15 2010, at the Hovey House here in Mt. Vernon,
16 Indiana, to expeditiously complete the
17 recount of all votes ordered recounted. As
18 the recount director has ordered, this
19 Commission will do just that and complete
20 this recount. That means that we will
21 conduct our business without delays and in an
22 orderly fashion. I want to inform the
23 parties that we will complete the recount
24 today and, again, we will decide all issues
25 that we possibly can, but given my experience

1 of eight years in this -- in this chair and
2 previewing ballots that were put in dispute
3 and the reasons for the dispute, I'm
4 expecting four to five maybe slightly longer
5 in terms of hours to get this done. So I'm
6 asking Counsel to adhere to that expectation
7 noting that we'll -- we will take as long as
8 it takes, but we won't be tolerant of any
9 undue delays.

10 Before we proceed are there any matters
11 that either party wishes to address to the
12 Commission?

13 MR. BROWN: Mr. Chairman, I would
14 ask for a procedural ruling related to the
15 guidelines of the Commission.

16 During the inspection and audit of
17 ballots and -- and in our research of these
18 materials later on, we found what we believe
19 to be as many as 39 invalidly executed, under
20 Indiana statute, electronic ballots, but the
21 guidelines do not provide for any method of
22 disputing electronic ballots and we would
23 wish that before tallying a precinct, you
24 allow us to present evidence related to
25 invalidly executed electronic ballots prior

1 to tallying -- tallying what State of Board
2 of Accounts may have ruled as a precinct
3 without disputed ballots. We have those duly
4 marked and we're -- we -- we are cognisant of
5 the timeframe and we're willing to move
6 along. We would just request the ability to
7 -- to present that evidence as it appears in
8 a precinct before tallying that precinct.

9 MR. CHAIRMAN: The procedure we
10 use is, is that we will go in a very orderly
11 fashion, sometimes precinct by precinct, but
12 you will have every opportunity to make a
13 point of record the argument that you wish.
14 We usually first go through the recount for
15 the Petitioner's case in chief and then let
16 the Respondent quote their case in chief, so
17 I don't see -- see that you won't have such
18 an opportunity.

19 MR. BROWN: Okay.

20 MR. CHAIRMAN: Does Counsel agree
21 with that?

22 MR. KING: Yes, Mr. Chairman. I
23 will add that there are procedures set forth
24 in the guidelines, chapter five, concerning
25 the tallying of electronic votes, but I agree

1 with your statement.

2 MR. CHAIRMAN: Okay. Counsel?

3 MS. BARNES: Agree.

4 MR. CHAIRMAN: Okay. Let's start
5 this recount.

6 Has the State Board of Accounts
7 completed their final tally sheet?

8 MR. ROGINA: Yes.

9 MR. CHAIRMAN: Are there any
10 precincts -- are there any precincts in which
11 there are no disputed votes at all,
12 Mr. Skolnik?

13 MR. SKOLNIK: Mr. Chairman and
14 members of the Commission, you have placed
15 before you the recount tally sheets that have
16 been prepared by the State Board of Accounts,
17 and the answer to your question is, yes, that
18 tally sheet does reflect that there are
19 several precincts in which there are no
20 disputed ballots according to the tally
21 formed by the State Board of Accounts.

22 MR. CHAIRMAN: And could you read
23 the name of those precincts, including the
24 nonvoting precincts and the votes cast for
25 each candidate.

1 MR. SKOLNIK: Yes, Mr. Chairman.
2 The Commission shall -- the recount
3 shall be conducted first of all -- may begin
4 with any county agreed upon by the parties.
5 The tally sheet that has been prepared by the
6 State Board of Accounts begins with the
7 precincts in Posey County, followed by
8 Vanderburgh County and Gibson County. In
9 order to follow that tally sheet in probably
10 the most effective way, I would recommend, if
11 both parties would agree, that we begin with
12 Posey County.

13 MR. CHAIRMAN: Any objection from
14 the parties?

15 MR. BROOKS: No objection.

16 MR. BROWN: No objection.

17 MR. CHAIRMAN: Is yours working
18 now?

19 MR. BROWN: Yeah.

20 MR. CHAIRMAN: I don't think it
21 is. Tap on it.

22 (Off the record - Discussion
23 regarding microphones)

24 MR. CHAIRMAN: Okay. Proceed,
25 Mr. Skolnik.

1 MR. SKOLNIK: Thank you,
2 Mr. Chairman.

3 Mr. Chairman and members of the
4 Commission, if you turn your attention to
5 Posey County Bethel precinct, there are no
6 disputed votes in that precinct according to
7 the tally sheet prepared by the State Board
8 of Accounts. The State Board of Accounts
9 reflect the full valid ballots tallied
10 indicate 50 votes for Mr. Deig, 61 votes for
11 Ms. McNamara, and four no votes were tallied.

12 MR. DURNIL: I would move we
13 accept the State Board of Accounts tally as
14 final.

15 MR. CHAIRMAN: Second the motion.

16 Questions?

17 MR. KUZMAN: Question.

18 You touched on electronic. Is this one
19 of the -- are you going to -- procedure-wise
20 I want to make sure we get -- make sure they
21 get all your votes and count them.

22 MR. BROWN: In deference to the
23 Chairman's previous comments, I think there's
24 going to be time for me to try and --

25 MR. KUZMAN: Okay.

1 MR. BROWN: -- talk to the
2 Commission at that moment when Mr. Skolnik is
3 reading about what he believes is -- or what
4 has been tallied by the State Board of
5 Accounts as not being disputed, we'll bring
6 that up at the appropriate time, if that's --

7 MR. KUZMAN: I just didn't want
8 to lose your -- just give you a chance for
9 the record.

10 MR. BROWN: And in -- and in
11 Bethel we -- we don't believe we have any
12 electronic ballot disputes.

13 MR. CHAIRMAN: Okay. I do want
14 you to make a note, until we get some answers
15 from Counsel, the first time you do have an
16 argument to make, use that first
17 opportunity --

18 MR. BROWN: Right.

19 MR. CHAIRMAN: -- and we'll set
20 the course from there. Okay?

21 MR. BROWN: Sure.

22 MR. KUZMAN: And I'd also like --
23 if I may, sir, after each precinct like to
24 make a record that there is none or is
25 some --

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MR. BROWN: Okay.

MR. KUZMAN: -- so we're clear on electronic tallies.

MR. CHAIRMAN: Okay. So we have a motion. Any discussion? Hearing none.

All in favor?

Aye.

MR. DURNIL: Aye.

MR. CHAIRMAN: Okay. Unanimous.

MR. SKOLNIK: Mr. Chairman and members of the Commission, the next precinct in which the State Board of Accounts tally sheet reflects that there were no disputed votes is Black precinct 2 in Posey County.

MR. BROWN: Mr. Chairman --

MR. CHAIRMAN: Yes.

MR. BROWN: -- this is where we believe -- this is a precinct we believe we have a disputed electronic ballot.

MR. CHAIRMAN: Okay. Hold that thought.

Counsel, is this where he needs to make the argument?

MR. KING: Mr. Chairman, under the guidelines the first stage of the

1 proceeding is to identify the precincts which
2 have no disputes and to tally the votes
3 accordingly. It would then be the procedure
4 under the guidelines after that process is
5 completed to go back in alphanumeric order
6 and cover precincts such as Black 2 in which
7 a dispute has, in fact, been identified.

8 MR. CHAIRMAN: Okay. But we're
9 saying that there are no disputes and the
10 party is saying there is a dispute, if I have
11 this correct. So they should make that
12 objection and we'll hold that off then?

13 MR. KING: Yes, Mr. Chairman.
14 That would be my suggestion under the
15 guidelines, because it contemplates a routine
16 first step of clearing the record of
17 precincts that have no disputes.

18 MR. CHAIRMAN: Okay.

19 MR. BROWN: Can I ask Counsel --

20 MR. CHAIRMAN: Go ahead.

21 MR. BROWN: But -- but if -- if
22 that's true we will take a motion, though,
23 that there is no dispute, how does Counsel
24 then come back and say there's a dispute with
25 the tally sheet still? So do we need to move

1 that precinct procedurally to the disputed
2 issue?

3 MR. CHAIRMAN: Counsel?

4 MR. KING: Mr. Chairman and
5 members of the Commission, I think it's
6 sufficient if the Commission notes for the
7 record and those who are using the tally
8 sheets note on the tally sheet that there is,
9 in fact, a dispute in the precinct raised by
10 either of the parties and so it would not be
11 included in the list covered under the -- the
12 guidelines that Mr. Skolnik is going through.

13 MR. KUZMAN: Okay.

14 MR. CHAIRMAN: Counsel?

15 MR. BROOKS: Mr. Chairman, I
16 guess I'm a little confused as to what the
17 argument is. In -- in Black 2, for example,
18 there is one exhibit which is a single poll
19 book page, and my understanding would be
20 that, if there are any -- I'm not exactly
21 sure what the dispute is, but once the
22 precincts had been opened and we went through
23 it, Counsel would have had an opportunity to
24 make exhibits of the electronic tapes or
25 whatever the issue is. These -- these

1 precincts are closed, and I'm not -- I'm not
2 sure what is going to be allowed based on a
3 single exhibit which is a single poll sheet.
4 I understand the argument, but I know they
5 didn't make any exhibits, and if it's an
6 electronic voting issue comparing the tapes,
7 the tapes were in the poll book and -- or in
8 the precincts' election materials, they
9 should have made exhibits of those things
10 and, therefore, preserve some argument.

11 MR. CHAIRMAN: Well, we -- we
12 presume we are going to hear what the
13 argument is going to be. We're trying to
14 figure out if we have any precincts that no
15 one has any problems with and then we're
16 making those lists and then we can debate the
17 merits of -- of his dispute when we get to
18 that point.

19 Counsel, did you want to add something
20 to that?

21 MR. KING: No, nothing,
22 Mr. Chairman.

23 MR. CHAIRMAN: Counsel?

24 MS. BARNES: No, thank you.

25 MR. CHAIRMAN: All right. So

1 then it's the procedure if -- if as we're
2 going through looking for precincts where
3 there are no disputes, if -- if either party
4 has a dispute, do make that objection so we
5 can move it to a separate list.

6 So I'll note that, in fact, Posey
7 County Black 2 there was an objection and
8 that is a disputed precinct, so we can put
9 that precinct on a different part of the
10 list.

11 Mr. Recount Director.

12 MR. SKOLNIK: Thank you,
13 Mr. Chairman.

14 The next precinct in which the tally
15 sheet reflects that there are no disputed
16 votes is Posey County Black 3.

17 MR. BROWN: No objections.

18 MR. SKOLNIK: The votes tallied
19 by -- the votes totaled by the State Board of
20 Accounts in connection with Black 3 reflect
21 165 votes for Mr. Deig, 133 votes for
22 Ms. McNamara, ten no votes.

23 MR. DURNIL: We move it be -- be
24 moved to be the final vote.

25 MR. KUZMAN: Second.

1 MR. CHAIRMAN: Motion and a
2 second.

3 Any discussion?

4 Hearing none.

5 All in favor?

6 Aye.

7 MR. KUZMAN: Aye.

8 MR. CHAIRMAN: Unanimous aye.

9 Mr. Skolnik.

10 MR. SKOLNIK: Thank you,
11 Mr. Chairman.

12 The next precinct in which there are no
13 disputed votes contained on the tally sheet
14 prepared by the State Board of Accounts is
15 Posey County Black 5.

16 MR. BROWN: We believe we have
17 three electronic ballots to dispute,
18 Mr. Chairman.

19 MR. CHAIRMAN: I note one of the
20 parties disputes this precinct, so we will
21 not take a vote.

22 MR. SKOLNIK: Mr. Chairman, the
23 next precinct in which the State Board of
24 Accounts tally sheet reflects that there are
25 no disputed votes is Black -- Posey County

1 Black 6.

2 MR. BROWN: Mr. Chairman, we
3 believe we have electronic ballots to dispute
4 in that precinct.

5 MR. CHAIRMAN: Hearing an
6 objection, we will not vote on that precinct.

7 Mr. Skolnik.

8 MR. SKOLNIK: Mr. Chairman, the
9 next precinct which the State Board tally --
10 State Board of Accounts tally sheet reflects
11 that there are no disputed votes would be
12 Posey County Black 8.

13 MR. BROWN: Mr. Chairman, we also
14 believe we have electronic ballots in that
15 precinct to dispute.

16 MR. CHAIRMAN: To disputed
17 precincts.

18 Mr. Skolnik.

19 MR. SKOLNIK: Mr. Chairman and
20 members of the Commission, the next precinct
21 in Posey County in which the State Board of
22 Accounts the tally sheet reflects that there
23 are no disputed ballots is Black Number 12.

24 MR. BROWN: Actually --

25 MR. CHAIRMAN: Mr. Brown.

1 MR. BROWN: Actually, we have --
2 there's a -- there was an invalid provisional
3 ballot there. It's not the same issue,
4 Mr. Chairman, but we disputed the invalid
5 provisional ballot, and I don't -- so I think
6 we would like to leave that open for dispute
7 if possible.

8 MR. CHAIRMAN: Counsel, did you
9 have something?

10 MR. BROOKS: No. I just didn't
11 understand where we're at in the precincts
12 listed. I agree.

13 MR. CHAIRMAN: Mr. Brown has
14 disputed that.

15 MR. BROWN: That was Black 12.

16 MR. CHAIRMAN: Black 12 is
17 disputed.

18 MR. SKOLNIK: I apologize. I
19 have listed it as disputed.

20 Mr. Chairman and members of the
21 Commission, the next precinct on the State
22 Board of Accounts tally sheet in which
23 reflects that there are no disputed ballots
24 would be Posey County Center North.

25 MR. BROWN: Again, this is not

1 the electronic ballot issue, but a disputed
2 unopened absentee ballot.

3 MR. CHAIRMAN: Okay.

4 MR. SKOLNIK: Mr. Chairman, the
5 next precinct in Posey County in which the
6 State Board of Accounts tally sheet reflects
7 no disputed ballots would be Center South.

8 MR. BROWN: Mr. Chairman, we
9 believe we have electronic ballots to dispute
10 in that precinct.

11 MR. CHAIRMAN: Okay.

12 MR. SKOLNIK: Mr. Chairman, the
13 next precinct in Posey County in which the
14 State Board of Accounts tally sheet reflects
15 no disputed ballots would be Harmony Number
16 2.

17 MR. BROWN: No objections in that
18 precinct.

19 MR. CHAIRMAN: Mr. Skolnik.

20 MR. SKOLNIK: Mr. Chairman and
21 members of the Commission, the votes tallied
22 by the State Board of Accounts in Harmony
23 Number 2 precinct in Posey County reflect
24 that there were 135 votes for Mr. Deig, 127
25 votes for Ms. McNamara. One invalid ballot

1 was cast for Ms. McNamara and there were
2 three no votes.

3 MR. DURNIL: I move we accept the
4 State Board of Accounts as --

5 MR. KUZMAN: Second.

6 MR. DURNIL: -- final.

7 MR. CHAIRMAN: Motion and a
8 second.

9 Any discussion?

10 Hearing none.

11 All in favor of the motion?

12 MR. DURNIL: Aye.

13 MR. KUZMAN: Aye.

14 MR. CHAIRMAN: Ayes unanimous.

15 Mr. Skolnik.

16 MR. SKOLNIK: Mr. Chairman, the
17 next precinct in Posey County for which the
18 State Board of Accounts tally sheet reflects
19 that there are no disputed votes would be
20 Harmony Number 3.

21 MR. BROWN: No objections.

22 MR. CHAIRMAN: Hearing no
23 objection, Mr. Skolnik.

24 MR. SKOLNIK: Mr. Chairman, the
25 votes tallied by the State Board of Accounts

1 for Harmony Number 3 precinct reflect 79
2 votes for Mr. Deig, 74 for Ms. McNamara,
3 seven no votes.

4 MR. DURNIL: I move we accept the
5 tally.

6 MR. KUZMAN: Second.

7 MR. CHAIRMAN: Motion and a
8 second.

9 All in favor?

10 MR. KUZMAN: Aye.

11 MR. CHAIRMAN: Aye. Ayes
12 unanimously.

13 Mr. Skolnik.

14 MR. SKOLNIK: Mr. Chairman and
15 members of the Commission, the next precinct
16 in Posey County for which the State Board of
17 Accounts tally sheet reflects that there were
18 no disputed ballots is Lynn West.

19 MR. CHAIRMAN: Hearing no
20 objection, Mr. Skolnik.

21 MR. SKOLNIK: The votes tallied
22 in Lynn West by the State Board of Accounts
23 reflects 94 votes for Mr. Deig, 42 votes for
24 Ms. McNamara. One invalid ballot was cast
25 for Mr. Deig and two no votes were tallied by

1 the State Board of Accounts.

2 MR. DURNIL: I move we accept the
3 tally as final.

4 MR. KUZMAN: Second.

5 MR. CHAIRMAN: Hearing a motion
6 and a second.

7 All in favor?

8 MR. DURNIL: Aye.

9 MR. CHAIRMAN: Aye.

10 Ayes unanimously.

11 Mr. Skolnik.

12 MR. SKOLNIK: Mr. Chairman, the
13 next precinct in Posey County for which the
14 State Board of Accounts tally sheet reflects
15 that there are no disputed ballots is Robb
16 Number 3.

17 MR. CHAIRMAN: Hearing no
18 objection, Mr. Skolnik?

19 MR. SKOLNIK: The votes tallied
20 in Robb Number 3 by the State Board of
21 Accounts reflects 68 votes for Mr. Deig, 90
22 votes for Ms. McNamara. Two invalid ballots
23 were cast for Ms. McNamara and there were
24 seven no votes.

25 MR. DURNIL: I move we accept the

1 tally as final.

2 MR. KUZMAN: Second.

3 MR. CHAIRMAN: Hearing -- hearing
4 a motion and a second.

5 All in favor?

6 MR. DURNIL: Aye.

7 MR. KUZMAN: Aye.

8 MR. CHAIRMAN: Ayes unanimous.

9 Mr. Skolnik.

10 MR. SKOLNIK: Mr. Chairman, the
11 next precinct in Posey County for which the
12 State Board of Accounts tally sheet reflects
13 there are no disputed ballots is Robinson 1.

14 MR. CHAIRMAN: Hearing no
15 objection, Mr. Skolnik.

16 MR. SKOLNIK: The votes tallied
17 for Robinson 1 by the State Board of Accounts
18 reflects 143 votes for Mr. Deig, 198 votes
19 for Ms. McNamara. There were three invalid
20 ballots tallied that were cast for
21 Ms. McNamara and there are four no votes.

22 MR. DURNIL: I move we accept the
23 tally as final.

24 MR. KUZMAN: Second.

25 MR. CHAIRMAN: Motion and a

1 second.

2 All in favor?

3 MR. DURNIL: Aye.

4 MR. CHAIRMAN: Aye.

5 Ayes unanimous.

6 MR. SKOLNIK: Mr. Chairman, the
7 next precinct in Posey County for which the
8 State Board of Accounts tally sheet reflects
9 that there are no disputed ballots is
10 Robinson Number 2.

11 MR. CHAIRMAN: Hearing no
12 objection, Mr. Skolnik.

13 MR. SKOLNIK: The votes tallied
14 in -- for Robinson Number 2 precinct reflect
15 231 votes for Mr. Deig, 310 votes for
16 Ms. McNamara. There were five invalid
17 ballots cast for Mr. Deig and there were five
18 no votes.

19 MR. DURNIL: I move we accept the
20 tally as final.

21 MR. CHAIRMAN: Second?

22 MR. KUZMAN: Second.

23 MR. CHAIRMAN: Hearing a motion
24 and a second.

25 All in favor?

1 MR. DURNIL: Aye.

2 MR. KUZMAN: Aye.

3 MR. CHAIRMAN: Ayes unanimous.

4 Mr. Skolnik.

5 MR. SKOLNIK: Mr. Chairman, the
6 next precinct in Posey County for which there
7 are no disputed ballots is Robinson Number 3.

8 MR. CHAIRMAN: Hearing no
9 objection, Mr. Skolnik.

10 MR. SKOLNIK: The votes tallied
11 for Robinson Number 3 by the State Board of
12 Accounts reflect 231 votes for Mr. Deig, 346
13 for Ms. McNamara and there were 15 no votes.

14 MR. DURNIL: I move we accept the
15 tally as final.

16 MR. KUZMAN: Second.

17 MR. CHAIRMAN: Hearing a motion
18 and a second.

19 All in favor?

20 MR. DURNIL: Aye.

21 MR. CHAIRMAN: Aye.

22 Ayes unanimous.

23 MR. KUZMAN: Yes.

24 MR. CHAIRMAN: Mr. Skolnik.

25 MR. SKOLNIK: Thank you,

1 Mr. Chairman.

2 We now turn our attention to the votes
3 cast in Vanderburgh County.

4 MR. KUZMAN: Do we tally the --

5 MR. CHAIRMAN: Yeah. Let's go
6 through -- or do you want to tally the
7 County? The Commissioner is asking if we
8 need to stay in Posey County or we just keep
9 going?

10 MR. SKOLNIK: We proceed to
11 Vanderburgh County, I believe.

12 Mr. Chairman and members of the
13 Commission, the first precinct in Vanderburgh
14 County for which the State Board of Accounts
15 tally sheet reflects that there are no
16 disputed ballots would be Ward 6, Number 9.

17 MR. CHAIRMAN: Hearing no
18 objection, Mr. Skolnik.

19 MR. SKOLNIK: The votes tallied
20 by the State Board of Accounts for Ward 6,
21 Number 9 reflect 207 votes for Mr. Deig, 144
22 votes for Ms. McNamara and there were six no
23 votes.

24 MR. DURNIL: I move we accept the
25 tally as final.

1 MR. KUZMAN: Second.

2 MR. CHAIRMAN: Motion and a
3 second.

4 All in favor?

5 Aye.

6 MR. KUZMAN: Aye.

7 MR. CHAIRMAN: Unanimous Aye.

8 Mr. Skolnik.

9 MR. SKOLNIK: Mr. Chairman and
10 members of the Commission, the next precinct
11 in Vanderburgh County for which the State
12 Board of Accounts tally sheet reflects that
13 there are no disputed ballots would be Ward
14 6, Number 11.

15 MR. CHAIRMAN: Hearing no
16 objection, Mr. Skolnik.

17 MR. SKOLNIK: The votes tallied
18 by the State Board of Accounts for Ward 6,
19 Number 11 reflect 275 votes for Mr. Deig, 209
20 votes for Mr. -- for Ms. McNamara, 16 no
21 votes.

22 MR. DURNIL: I move we accept the
23 tally as final.

24 MR. KUZMAN: Second.

25 MR. CHAIRMAN: Motion and a

1 second.

2 All in favor?

3 MR. KUZMAN: Aye.

4 MR. CHAIRMAN: Aye.

5 Unanimous ayes.

6 Mr. Skolnik.

7 MR. SKOLNIK: Mr. Chairman, the
8 next precinct in Vanderburgh County for which
9 the State Board of Accounts tally sheet
10 reflects that there are no disputed ballots
11 would be Perry Number 1.

12 MR. BROWN: This is a precinct we
13 believe we have electronic ballots to
14 dispute.

15 MR. CHAIRMAN: Go ahead and shout
16 that out or --

17 MR. BROWN: I'm sorry. This is a
18 precinct we believe we have electronic
19 ballots to dispute.

20 MR. CHAIRMAN: Okay. We have an
21 objection. Put this in the disputed list.

22 Mr. Skolnik.

23 MR. SKOLNIK: Mr. Chairman, the
24 next precinct in Vanderburgh County for which
25 the State Board of Accounts tally sheet

1 reflects there are no disputed ballots would
2 be Perry Number 4.

3 MR. CHAIRMAN: Hearing no
4 objections, Mr. Skolnik.

5 MR. SKOLNIK: The votes tallied
6 by the State Board of Accounts for Perry
7 Number 4 reflect 197 votes for Mr. Deig, 229
8 votes for Ms. McNamara, six no votes.

9 MR. DURNIL: I move we accept the
10 tally as final.

11 MR. CHAIRMAN: And a second?

12 MR. KUZMAN: Second.

13 MR. CHAIRMAN: There's a motion
14 and a second.

15 All in favor?

16 MR. DURNIL: Aye.

17 MR. KUZMAN: Aye.

18 MR. CHAIRMAN: Motion is
19 unanimous.

20 Mr. Skolnik.

21 MR. SKOLNIK: Mr. Chairman, the
22 next precinct in Vanderburgh County for which
23 the State Board of Accounts tally sheet
24 reflects there no disputed ballots is Perry
25 Number 7.

1 MR. CHAIRMAN: Hearing no --

2 MR. BROWN: Actually, we do
3 believe we have a dispute in that. It's
4 actually of an absentee ballot, but it's --
5 it's not electronic, but we have a dispute.

6 MR. CHAIRMAN: Okay. Perry 7 is
7 disputed.

8 Mr. Skolnik.

9 MR. SKOLNIK: Mr. Chairman, the
10 next precinct for which there are no disputed
11 ballots listed on the tally sheet would be
12 Perry Number 8.

13 MR. BROWN: We believe we have
14 electronic ballots to dispute.

15 MR. CHAIRMAN: Perry 8 is
16 disputed.

17 Mr. Skolnik.

18 MR. SKOLNIK: Mr. Chairman, the
19 next precinct for which there -- in which
20 there are no disputed ballots listed on the
21 tally sheet in Vanderburgh County would be
22 Perry Number 10.

23 MR. BROWN: We believe we have a
24 provisional ballot in that precinct that was
25 not opened that's disputed.

1 MR. CHAIRMAN: Perry 10 is
2 disputed.

3 MR. SKOLNIK: Mr. Chairman, the
4 last precinct in Vanderburgh County for which
5 the State Board of Accounts tally sheet
6 reflects no disputed ballots would be Union
7 Number 1.

8 MR. CHAIRMAN: No objection.
9 Mr. Skolnik.

10 MR. SKOLNIK: The votes tallied
11 by the State Board of Accounts in Union
12 Number 1 in Vanderburgh County reflect 69
13 votes for Mr. Deig, 47 votes for
14 Ms. McNamara, two no votes.

15 MR. DURNIL: I move we accept the
16 tally as final.

17 MR. KUZMAN: Second.

18 MR. CHAIRMAN: Motion and a
19 second.

20 All in favor say, "Aye."

21 MR. DURNIL: Aye.

22 MR. KUZMAN: Aye.

23 MR. CHAIRMAN: Motion carries
24 unanimously.

25 Mr. Skolnik.

1 MR. SKOLNIK: Mr. Chairman and
2 members of the Commission, both precincts in
3 -- it's my understanding both precincts in
4 Gibson County have disputed ballots.

5 MR. CHAIRMAN: Okay. Thank you
6 very much.

7 Counsel or Mr. Director, what's next?

8 Okay. The Commission will now proceed
9 to count the ballots. Well, let's see.

10 I think we can take a vote on
11 the undisputed precincts now or do you want
12 to wait? Do you need another vote from us
13 for the final tally or the individual motions
14 we do suffice?

15 MR. KING: Mr. Chairman, the
16 individual motions are sufficient at this
17 point. There will be a vote on the tally at
18 the conclusion of the recount proceeding.

19 MR. CHAIRMAN: Okay. The
20 Commission then will now to proceed to count
21 the ballots in precincts with one or more
22 disputed ballots.

23 Has a -- has a determination been made
24 regarding the order in which we review the
25 counties -- same order -- the disputes?

1 MR. SKOLNIK: Mr. Chairman, as
2 you know, the guidelines provide that there
3 -- we proceed to take those per agreement of
4 the parties, and if no agreement can be
5 reached, then by order of this Commission. I
6 would recommend that we proceed in the same
7 order that we have -- that we have already
8 here today in which we begin with the ballots
9 cast in Posey County followed by Vanderburgh
10 and then Gibson unless there's any objection
11 from either members of the Commission or the
12 parties.

13 MR. CHAIRMAN: Hearing no
14 objection, we will proceed with Posey, then
15 Vanderburgh, then Gibson.

16 MR. SKOLNIK: Mr. Chairman, it's
17 my understanding now that we begin to look at
18 the ballots and -- and the -- the tally in
19 precincts other than the ones in which
20 there's been no dispute and that the
21 Commission begins by recognizing the director
22 to present State Board of Accounts regarding
23 the ballots cast within these precincts.

24 First of all, the director should state
25 the number of undisputed valid votes cast for

1 each candidate, followed by the undisputed
2 invalid votes cast for each candidate and
3 then the no votes in -- in each precinct.
4 And then I believe that the Commission would
5 order those to be counted for the designated
6 candidates.

7 Is that correct, Mr. Chairman?

8 MR. CHAIRMAN: Yeah, please.

9 Please proceed.

10 MR. SKOLNIK: Okay. Mr. Chairman
11 and members of the Commission, we will begin
12 with, in Posey County, Black Number 1. The
13 tally from the State Board of Accounts
14 reflects that there were 230 votes cast for
15 Mr. Deig, 219 votes, Ms. McNamara. There was
16 one disputed valid ballot cast for
17 Mr. Deig. There were nine no votes.

18 MR. CHAIRMAN: Hearing no
19 objection from the parties, members of the
20 Commission, motion? Discussion?

21 MR. BROWN: Actually, this --
22 this would be appropriate, Mr. Chairman -- I
23 was trying to find the appropriate time.
24 Since -- and I -- I disagree with Counsel on
25 -- on the issue of electronic ballots. There

1 is -- there's a provision to tally in the --
2 in the -- in the guidelines electronic
3 ballots. There is no provision to dispute
4 electronic ballots. We believe we have
5 direct evidence that two votes were cast in
6 this precinct that are -- were invalidly
7 executed, voters that were not registered in
8 this precinct. And I'm going to be real
9 careful, because these voters actually signed
10 the poll book, and I don't believe it's -- I
11 don't believe it's in the best interest of
12 this Commission -- I would defer to the
13 Chairman's opinion, but I'm going to attempt
14 not to use the voters' names where possible
15 because I don't believe in singling them out.
16 But we do believe we have evidence related to
17 those two electronic ballots and, therefore,
18 we would like to present that evidence and
19 then go forward before tallying what is a --
20 you know, what the State Board of Accounts
21 has tallied as undisputed, because since no
22 procedure was present to dispute electronic
23 ballots, we disputed the relevant materials.
24 And we don't believe that a tally tape from a
25 machine is the same as a ballot. We believe

1 that the statutes of the state as well as the
2 guidelines of the Commission are a bit -- a
3 bit behind the times in electronic voting and
4 that we have -- we should have the
5 opportunity to present this evidence and ask
6 the Commission for the appropriate remedy.

7 MR. CHAIRMAN: Okay. Right now
8 we're at that point of the recount where we
9 are trying to take motions on undisputed
10 valid votes, right, and undisputed invalid
11 votes, correct, or not?

12 MR. KING: Mr. Chairman --

13 MR. CHAIRMAN: Yes.

14 MR. KING: -- if I may.

15 The past practice of the Commission, at
16 least in 2006, was to, after the undisputed
17 precincts were dealt with, for the Commission
18 to consider each of the precincts in the
19 order specified by Mr. Skolnik. The
20 Petitioner has begun the presentation of his
21 case in chief --

22 MR. CHAIRMAN: Yeah.

23 MR. KING: -- with regard to
24 Black 1. It would be up to the Petitioner to
25 identify whether any of the ballot counts

1 listed on the spreadsheet are, in fact,
2 disputed.

3 What I understand Petitioner to be
4 doing is to say that there are additional
5 disputes beyond the votes tabulated on the
6 State Board of Accounts spreadsheet.

7 MR. CHAIRMAN: Okay. Thank you.

8 On my list for Black 1, it was -- I
9 noted -- and I could have noted this wrong --
10 that the -- the process that we just went
11 through a little bit earlier, I don't have
12 any mark next to it. When we talked about
13 Black 1 before, did you make an objection?

14 MR. BROWN: It was not a -- I did
15 not make an objection because it was not one
16 that was going to be tallied as undisputed.
17 There were -- yeah. Here -- here's the
18 possible confusion. There are disputed
19 ballots, paper ballots in this precinct as
20 well, so it was not on Mr. Skolnik's earlier
21 list, and I'm -- what we're trying to
22 preserve is, before this tally and vote by
23 the Commission where electronic ballots were
24 tallied -- the only thing on the State Board
25 of Accounts and -- and the only guidelines

1 they had to -- I'm not trying to fault the
2 State Board of Accounts. The only -- I
3 believe the only guidelines they had to
4 follow were to put disputed paper ballots on
5 their tally sheet. We're -- what we're
6 saying is, we have evidence of disputed
7 electronic ballots, and if -- we're afraid if
8 the vote of the Commission occurs now to
9 accept all undisputed ballots, we will be
10 prevented in each case, and that's why I
11 raised the objection now to try and get this
12 procedure rolling, Mr. Chairman, so we can
13 decide on this and --

14 MR. CHAIRMAN: I appreciate you
15 raising your objection, because we are trying
16 to whittle down what the issues are.

17 MR. BROWN: Thanks.

18 MR. CHAIRMAN: So I'm unaware
19 that our guidelines don't address electronic
20 ballots, but we'll get to your arguments, I
21 suppose, in a bit.

22 What's the advice of Counsel with
23 regard to if -- if -- if further objections
24 are made? It seems to me, I'd put them in
25 the disputed pile and let's go through --

1 through them at -- at the appropriate time,
2 but I'll take recommendations.

3 Commissioners?

4 MR. KUZMAN: If I -- if I may ask
5 -- maybe Counsel can help me here, both sides
6 -- alls we have left now is disputed
7 precincts, because this objection was raised
8 in all the other precincts that we didn't
9 have a motion. At some -- some point we have
10 to start dealing with each precinct. Am I --
11 am I -- am I right on that? So if we go
12 through this process and say that we agree
13 that Black 1 on this paper is correct, I
14 don't want to prohibit Counsel from raising
15 their issues, so I guess where are we to
16 start --

17 MR. CHAIRMAN: Whittling it down?

18 MR. KUZMAN: -- dealing with
19 that? Yeah, whittling it down. I mean, I
20 understand we all want to try to get this
21 done today, and --

22 MR. CHAIRMAN: Counsel.

23 MR. KUZMAN: Yeah.

24 MR. CHAIRMAN: Counsel.

25 MR. KING: Mr. Commissioner, we

1 -- we are at the stage where Petitioner is
2 presenting the Petitioner's case in chief.
3 It is the Petitioner's responsibility at this
4 point in the proceeding to bring up any
5 disputes the Petitioner has with regard to
6 precinct Black 1. If Respondent also has
7 disputes concerning Black 1, that's addressed
8 in the second phase of the proceeding in
9 Respondent's chief in case -- or case in
10 chief. So at this point, the burden is on
11 Petitioner to proceed forward with disputes
12 the Commission to consider and for Respondent
13 to make arguments to rebut the contention
14 made by Petitioner.

15 MR. BROOKS: I'm sorry. May I
16 ask -- we're going to go through all of the
17 precincts with Mr. Brown's objections and
18 then start back over again with ours,
19 disputes?

20 MR. CHAIRMAN: Correct.

21 MR. KING: Mr. Chairman, yes,
22 that is the procedure specified in the
23 guidelines.

24 MR. KUZMAN: Brad, you answered
25 my question and stated it much better than I

1 did. Thank you.

2 MR. CHAIRMAN: Mr. Brown.

3 MR. BROWN: Thank you. So,
4 Mr. Chairman, I would -- I would ask what you
5 would prefer on the most appropriate way to
6 share this evidence with -- I mean, I have
7 exhibit numbers and I can refer to lines if
8 you like trying not to identify voters or I
9 can use initials. I'm trying to establish
10 this procedure. We're going to have several
11 of these. I mean, we believe there's
12 somewhere in the 30s of these types of
13 objections, and I don't want to -- I want to
14 get this procedure straight if -- if at all
15 possible early on, sir.

16 MR. CHAIRMAN: Yeah. Well, let
17 me just give you some guidance.

18 You have to make your case and you have
19 to present evidence in the form or fashion
20 that allows you to present your case. I
21 appreciate you wanting to keep information
22 that doesn't need to be public private. Once
23 you say a voter's name and then get into the
24 ballots, well then, you've -- we've uncovered
25 and not allowed the secrecy of the ballots.

1 I appreciate you doing that where you can.

2 On the other hand, this is a public
3 proceeding and -- and you have to make a
4 case.

5 MR. BROWN: Okay.

6 MR. CHAIRMAN: Counsel.

7 MR. KING: Mr. Chairman, in -- in
8 past practice of the Commission, the State
9 Board of Accounts has been directed to
10 produce copies of exhibits that were
11 identified by Petitioner. I think State
12 Board of Accounts --

13 MR. CHAIRMAN: Have those?

14 MR. KING: -- has been prepared
15 -- is preparing those.

16 MR. CHAIRMAN: Oh, great. So
17 they -- State Board of Accounts, what they'll
18 do is, is if your exhibit numbers match up
19 and all that, they'll present to us copies.

20 MR. BROWN: Thank you,
21 Mr. Chairman.

22 In Black 1 then, the exhibit, the only
23 exhibit from the materials audited in Black 1
24 is Exhibit Number 4.

25 MR. CHAIRMAN: Just give us a

1 chance here.

2 MR. SKOLNIK: Mr. Chairman, the
3 State Board of Accounts will assist us in
4 making sure the exhibits are distributed
5 to you.

6 (Off the record - Distributing
7 exhibits)

8 MR. SKOLNIK: Members of the
9 Commission, you are being handed the exhibits
10 for Black -- for the precinct Black Number 1
11 and I believe it's Exhibit Number 4, which is
12 the one that is being discussed by counsel
13 for Petitioner.

14 MR. CHAIRMAN: Counsel.

15 MR. BROWN: Mr. Chairman and
16 members of the Commission, Exhibit Number 4
17 we have registration cards for Erin Siegel
18 and -- well, actually, we have a registration
19 card for Erin Siegel and then we have -- that
20 -- that is related to Exhibit 4. She is
21 registered in Black 8, according to the Posey
22 County Clerk, and due to the tally of the
23 State Board of Accounts, there was no
24 variance in the number of -- actually, they
25 had one less signature, so we believe this

1 voter was allowed to vote, should have been
2 required to vote provisionally under -- under
3 3-7-48-1 --

4 MR. CHAIRMAN: Which is?

5 MR. BROWN: -- because the voter
6 was not registered in the precinct. And that
7 would be our objection to tallying the votes.

8 And, you know, we -- we understand that
9 since this is a new argument on electronic
10 ballots, we want to present this evidence,
11 and we don't believe that the Commission --
12 we would urge the Commission to, because of
13 the number of these votes and the number of
14 the evidence on -- on votes tallied this way
15 and votes cast this way, if it's done on a
16 precinct-by-precinct level, it may not affect
17 the highest number of votes in House District
18 76, but in totality it will have a huge
19 effect, we believe, as we have tallied over
20 30 of these votes, and we believe that,
21 therefore, the remedy should -- maybe the
22 Commission -- I'd ask for whether they want
23 to choose to discuss possible remedies now or
24 after they've heard from other precincts or
25 what procedure they'd like to go with on --

1 on that issue.

2 MR. CHAIRMAN: We'll go with the
3 procedure we laid out, so I'm giving extra
4 time for you to make arguments since this is
5 the first one, but as we continue to go on,
6 we'll put time limits on each side to make
7 their arguments per ballot. So are you done
8 making your argument or do you want --

9 MR. BROWN: I'm done.

10 MR. CHAIRMAN: Okay. Please go
11 ahead. You're done?

12 MR. BROWN: I'm done. Does the
13 Commission wish to see the voter registration
14 card?

15 MR. CHAIRMAN: If you're talking
16 about it, we ought to see it.

17 So they don't have copies of that
18 either?

19 MR. SKOLNIK: Mr. Chairman, I
20 assume this should be marked as an exhibit if
21 it's being offered.

22 MR. CHAIRMAN: Yeah. Who is in
23 charge of that? Is that you, Brad?

24 MR. SKOLNIK: Yes, I can do that.
25 This will be reflected as Exhibit P,

1 for Petitioner, Pl.

2 MR. KUZMAN: Mr. Chairman.

3 MR. CHAIRMAN: Yes.

4 MR. KUZMAN: If we're going to
5 mark these, I would assume mark them and give
6 them to the court reporter to make a
7 permanent record or do we have access to a
8 copy machine if we need to?

9 MR. CHAIRMAN: Well, in terms of
10 copies --

11 MR. KUZMAN: I'm just trying to
12 -- I'm just trying to --

13 MR. SKOLNIK: As a general rule,
14 the exhibits, the originals would go to the
15 court reporter.

16 MR. KUZMAN: Right.

17 MR. CHAIRMAN: And that's what
18 we'll do here.

19 MR. SKOLNIK: Do we have a copy
20 machine?

21 MR. HARTMAN: We have the
22 original exhibits as shown on our exhibit
23 sheet on the tally sheet. This is something
24 that we can get.

25 MR. CHAIRMAN: Yeah. Well, if

1 they're presenting something that's not going
2 to the State Board of Accounts, we'll --
3 we'll make the exhibit number. We'll give it
4 -- it will end up with the court reporter in
5 a pile right there (indicating), and if
6 Counsel hasn't made copies for all of us in
7 terms of the original, we're just going to
8 have share.

9 MR. BROWN: Okay.

10 MR. CHAIRMAN: Okay.

11 Could we hear from the other side on
12 their response to this, please. Do you want
13 to see the exhibit? Do you know --

14 MR. BROOKS: No. I've -- I've
15 seen it.

16 Well, it's my understanding that there
17 is a single dispute that's left in Black 1.

18 And you don't have anything else, Adam?

19 MR. BROWN: I don't -- I don't
20 think so --

21 MR. BROOKS: Okay.

22 MR. BROWN: -- in Black -- no,
23 not in Black 1.

24 MR. BROOKS: Well, I guess I'm a
25 little perplexed as to what Mr. Brown thinks

1 ought to be done about this grievous error
2 that apparently -- first of all, I don't know
3 that we know that anybody on this last sheet
4 actually voted or not. Frequently -- the
5 more general approach is that these people
6 are people who didn't vote or voted
7 provisionally, so I don't know that there's
8 any proof that this lady, Erin, assuming --
9 I'm not very good with Irish. Does Erin with
10 an E have to be a -- but this particular
11 voter, we don't know that she voted -- or he
12 or she, and, furthermore, if she was entitled
13 to vote in Black 8, which is also a precinct
14 in House District 76, I'm not sure what the
15 harm is. But at the end of the day, this
16 Commission's job is to count ballots, and if
17 there's no ballot associated with this
18 particular alleged irregularity to count, I
19 don't know what this Commission can do;
20 furthermore, in the event that this
21 particular voter was allowed to vote and was
22 not registered in the correct -- or voted in
23 the wrong precinct, that falls under some
24 sort of election official error under
25 312-112, which does not -- means that you

1 can't not count a vote because of that kind
2 of error. So -- so we don't know for sure
3 whether this voter voted at all.

4 Secondly, if there was an error, it was
5 because of an error on the part of an
6 election official.

7 And third and most important, there's
8 no remedy -- there's one person that voted.
9 I don't understand what Mr. Brown thinks
10 ought to be done. This Commission can do one
11 of two things; count the ballots or throw the
12 whole precinct out, and there's been no
13 allegation of fraud, tampering or misconduct,
14 so that's not an option; plus, it's only one
15 vote. So if we want to make a note, that's
16 fine, but -- but I don't know what the remedy
17 is, because once this precinct is -- we're
18 going to go through these precincts per the
19 Commission's rules, and you're going to have
20 a count. And let's assume this was an
21 irregularity, but there's nothing that can be
22 done because there's no ballot associated
23 with it, then -- then the vote that was
24 counted by the State Board of Accounts is
25 going to stand and we'll move on to the next

1 precinct. I don't understand what the --
2 what we're supposed to do with this. What's
3 the point?

4 MR. CHAIRMAN: Okay. Thank you.
5 Since this is the first one, I'm going to ask
6 the Petitioner to continue his argument in
7 response.

8 Is there anything more to add?

9 MR. BROWN: Thank you,
10 Mr. Chairman.

11 Well, I don't believe counting or
12 throwing the entire precinct out is the only
13 remedy. I also don't believe that there was
14 no harm. We have a voter who was clearly not
15 registered in the precinct, and that is not
16 the mistake. The mistake was to let the
17 voter vote, I guess, but that's not -- that's
18 not a remedy -- that's not to say the vote
19 should have counted. If a -- if a
20 provisional voter shows up at the wrong -- if
21 they would have cast this vote correctly by
22 statute as a provisional vote, it would not
23 have been deemed valid in any way, and it was
24 invalidly executed under the statutes of the
25 law and that's the mistake of the voter in

1 going to the wrong polling location. It
2 happens numerous times on Election Day, so
3 voters that don't go to the right polling
4 location on Election Day, same as this voter
5 did, are going to show up and be told to go
6 to a different location, and if they don't
7 make it, they don't vote. And the only
8 evidence we have are the tallies of the votes
9 from Election Day and the tallies of the
10 State Board of Accounts on the number of
11 signatures in the poll book. There's no
12 evidence this person didn't vote, and, in
13 fact, we have numerous instances where
14 everything matches up and we know these
15 people voted in many precincts because there
16 is no variance in signatures on the poll book
17 versus Election Day tallies, and I would -- I
18 would say on the remedy issue -- and this is
19 really where we're going to, you know, make
20 or break these objections going forward
21 today, is -- is my view, and I don't believe
22 that -- if you look at 312-1118,
23 certification of recount results, in that
24 statute in subsection -- 312-1118C, if there
25 is -- if the Recount Commission or its

1 designee determines that there was a mistake
2 made on the printing of ballot, mistake made
3 in the programming of electronic machine, an
4 electronic voting machine malfunctioned or,
5 four, a deliberate act or series of actions
6 occurred that make it impossible to determine
7 which candidate received the highest number
8 of votes, the Commission shall order a
9 special election be conducted under 310-8.
10 And I -- I know that this is -- I don't see
11 -- this is a duty of the Commission if they
12 find this to order that special election.
13 And there are several instances in several
14 precincts where this has occurred and in
15 totality, it's a -- it's a high number of
16 votes. I mean, like I said, we tallied as
17 many as 35 to 40 of these votes districtwide,
18 which is a significant number in a nine-vote
19 election. And we believe that there is a
20 remedy -- it's a special election -- if they
21 determine that this happened in enough
22 precincts and in enough number that they
23 cannot determine who won the race, and that's
24 what we would request, that either this
25 precinct be set aside and in the totality of

1 the circumstances, the Commission make its
2 decision or that they -- you know, at the end
3 if there's not enough votes they feel to
4 determine the race, they can choose to not
5 act on this precinct at that time.

6 MR. DURNIL: Are you alleging
7 those actions were deliberate?

8 MR. BROWN: The voter
9 deliberately voted and they showed up and
10 signed four different lines, provided ID.
11 Yeah, I'm --

12 MR. DURNIL: Under a conspiracy,
13 did they --

14 MR. BROWN: I don't -- I don't
15 believe that's needed by the statute, but
16 there was a deliberate act.

17 MR. CHAIRMAN: Other questions
18 from Commission members to Counsel?

19 MR. KUZMAN: Let me see if I can
20 follow your -- you have a voter, because it's
21 electronically, you can't have a ballot
22 attached, so, therefore, you don't know the
23 idea of how that voter cast, so the remedy
24 then you're referring to is a special
25 election in that precinct because you can't

1 tally the count because it's electronically
2 and there would be no ballot.

3 MR. BROWN: Correct.

4 MR. KUZMAN: I just wanted to
5 make sure.

6 MR. CHAIRMAN: Other questions
7 from Commission members? Questions from
8 Commission members? Questions from
9 Commission members to Counsel?

10 Here's one: You cite the statute that
11 deals with problems with machines, but you're
12 not alleging there's a problem with a
13 machine; you're saying the problem is with
14 supposedly this voter who voted outside her
15 precinct.

16 MR. BROWN: I read the -- I read
17 the entire statute, Mr. Chairman, and there
18 are provisions of that statute that relate to
19 problems with the machine. The last
20 provision deals with a deliberate act or a
21 series of actions occurred that make it
22 impossible to determine which candidate
23 received the highest number of votes. That's
24 the provision, C4, that we're actually --

25 MR. CHAIRMAN: Okay.

1 MR. KUZMAN: -- counting on.

2 MR. CHAIRMAN: Thank you. And
3 what about the -- the citation that opposing
4 counsel makes to innocent election errors?
5 How do we know that's not one of those, this
6 whole thing you're bringing up, that an
7 errant poll worker allowed a voter to be
8 signed in; the voter innocently thought that
9 they were in the wrong (sic) precinct and got
10 through the process? Isn't that an innocent
11 election error?

12 MR. BROWN: But -- but that
13 statute -- there's no -- if -- if the voter
14 -- so --

15 MR. CHAIRMAN: What statute is
16 that again? Page numbers are helpful.

17 MR. BROOKS: 410.

18 MR. CHAIRMAN: Thank you.

19 MR. BROWN: Which -- I'm sorry.
20 Which -- which one are you --

21 MR. CHAIRMAN: Page 410.

22 MR. BROOKS: That's the statute
23 you're reading from, right?

24 MR. BROWN: Oh, the statute I was
25 reading from. I thought you were asking

1 about --

2 MR. CHAIRMAN: Yeah.

3 MR. BROWN: -- his statute.

4 312-112, the --

5 MR. CHAIRMAN: Thank you.

6 MR. BROWN: -- state statute.

7 MR. CHAIRMAN: Yeah. 312-112,

8 please.

9 MR. BROWN: That is in 371 -- on
10 371. And I would -- I would read the first
11 sentence of that to say: Accept as provided
12 -- a ballot that has been marked and cast by
13 a voter in compliance with this title.

14 We don't believe it was done in
15 compliance with this title. They cast that
16 ballot in the wrong precinct. They're not
17 eligible to vote in that precinct. There was
18 no ballot cast in compliance with this title,
19 and we -- we don't believe that that -- that
20 statute even applies to this case.

21 MR. CHAIRMAN: How do you know --
22 thank you. How do you know that the voter
23 voted?

24 MR. BROWN: By the tally of
25 Election Day votes and the tally of

1 signatures in the poll book compared to the
2 tally on the electronic voting machine.

3 MR. CHAIRMAN: Meaning that --

4 MR. DURNIL: Do you know which
5 office that they voted for?

6 MR. BROWN: I have no idea which
7 office they voted for.

8 I'm sorry, Mr. Chairman, what --

9 MR. CHAIRMAN: Yeah, but the
10 tally matches up, you're saying?

11 MR. BROWN: Yes. Well, actually,
12 they had -- they had a variance -- they
13 actually had one extra signature -- no -- one
14 less signature from their count, so more
15 voters voted than what's in the poll book,
16 but we believe all the ones that signed
17 including these four did vote.

18 MR. CHAIRMAN: And 13 -- the
19 address that's on the voter registration, is
20 that, in fact, in Black 8 or Black 1?

21 MR. BROWN: The -- on the -- on
22 the voter registration, is it 1311
23 Mockingbird Lane? Is that the -- I neglected
24 to bring extra copies of our materials, but
25 if that's the -- that's the same address she

1 -- she signed in at, we don't believe that
2 address is in -- in that district. No, we
3 didn't -- we didn't go and physically drive
4 to the home, but...

5 MR. CHAIRMAN: So you don't know
6 if -- you don't know if it's, in fact, in
7 Black 8 or Black 1?

8 MR. BROWN: That's a -- that's a
9 record from the clerk's office. We would
10 assume they are -- they are aware of people's
11 addresses and know where they are registered
12 and which --

13 MR. CHAIRMAN: You don't think
14 the clerk's office makes any mistakes?

15 MR. BROWN: I believe they do,
16 sir, but...

17 MR. CHAIRMAN: So you haven't
18 checked. What if that's wrong and -- and --
19 and 1311 is actually in Black 1? Then there
20 would be no issue, right, or would there
21 still be?

22 MR. BROWN: If, in fact, it is in
23 the precinct listed --

24 MR. CHAIRMAN: Then there's no
25 issue.

1 MR. BROWN: -- then there would
2 not be.

3 MR. CHAIRMAN: Are you -- do you
4 have any evidence to present right now that
5 shows aside from the voter registration
6 definitely where that address is?

7 MR. BROWN: Where on a map? I
8 could -- I could pull up Google maps and I
9 could use the ---

10 MR. CHAIRMAN: That would tell me
11 what precinct it's in?

12 MR. BROWN: I could -- I could --
13 we -- we could produce that evidence today if
14 you'd like. I mean, we did not verify on the
15 clerk's website. I mean, I understand your
16 point, Mr. Chairman. I fail to see that
17 there was over 35 voters in this county that
18 were registered in the wrong precinct, had
19 the wrong voter registration card in the
20 wrong precinct, and so --

21 MR. CHAIRMAN: Well, I'm not
22 talking about voter registration cards. You
23 -- you can't demonstrate where this address
24 actually is so that we can have that as part
25 of the -- the record and -- and part of the

1 evidence, yet you're asking for a special
2 election of at least one precinct, and as
3 you've described, maybe many more, so that to
4 me is kind of drastic.

5 MR. BROWN: If that voter -- I
6 understand it's drastic, sir, and if that
7 voter was -- if that voter is not valid -- if
8 they -- if their -- if their address is, in
9 fact, in the precinct in which they voted,
10 they're still not -- they would still have
11 trouble with their registration because
12 they're not registered in the clerk's office
13 at that address.

14 MR. CHAIRMAN: Yeah. And there
15 might be some error, but you're not going to
16 -- that doesn't call for disenfranchisement.

17 MR. BROWN: We're not asking
18 anyone be disenfranchised; we're asking for
19 those voters to have a voice in that
20 precinct. All the voters that -- and we --
21 we ask that invalid -- invalidly executed
22 electronic ballots not be allowed to dilute
23 the votes of the other voters who validly
24 cast ballots in that precinct and we think
25 that would be very, very much out of line

1 with what the election code and our
2 constitution --

3 MR. CHAIRMAN: Okay.

4 MR. BROWN: -- requires as far as
5 registration.

6 MR. CHAIRMAN: Any other
7 questions from Commissioners?

8 MR. KUZMAN: I'd like to ask the
9 Recount Director a question.

10 Do we have in our guidelines a way to
11 take judicial notice or a form of judicial
12 notice of this to be put in -- in the
13 records?

14 MR. SKOLNIK: Judicial notice of
15 -- what is it that you're holding?

16 MR. BROWN: A valid -- a valid,
17 potential valid registration filled out by
18 the clerk of -- is this Posey -- let me take
19 my glasses off -- Posey County.

20 MR. SKOLNIK: I am unaware, and I
21 would also defer to Counsel. I'm unaware of
22 any provision that allows for a judicial
23 notice.

24 MR. KUZMAN: I mean, it's a --

25 MR. SKOLNIK: If the parties have

1 no objection or something, something can be
2 admitted into evidence.

3 MR. CHAIRMAN: I don't think
4 there's any objection to this as a piece of
5 evidence. I don't think anyone disputes that
6 it's -- that -- its validity. So it's there.
7 It's in -- I don't think any one of us
8 objected to its admission, so it's there.

9 MR. BROWN: Mr. Chairman, we
10 have --

11 MR. CHAIRMAN: Other questions
12 from --

13 MR. BROWN: Mr. Chairman, we --

14 MR. CHAIRMAN: -- Commissioners?
15 Other questions from Commissioners? Hearing
16 none.

17 Both Counsel wanted to speak, so I'm
18 going to let one more round go briefly and
19 then we're going to take a motion. Okay?

20 MR. BROOKS: Two quick points,
21 Mr. Chairman and Commission members: If
22 every time there's a single voting mistake in
23 a precinct we have a special election, we
24 will never have any elected officials. As
25 you know, Mr. Chairman, from all the

1 elections, there's no such thing as a perfect
2 election. There are always minor errors, and
3 that is exactly why we have 312-112. But
4 more importantly, as I'm understanding it,
5 Mr. Brown is asking this Commission to
6 consider a special election. That is a
7 contest remedy. And you may recall that
8 Mr. Brown's contest was dismissed, and I
9 think if you look at the statute that he's
10 reading from, unlike local recounts and
11 contests where they have separate chapters,
12 the -- the contest and the recount for the
13 Recount Commission are all in the same
14 chapter, so in that particular case, you have
15 the -- the recount issues in A, A1, 2 and 3,
16 and then it starts talking about a contest
17 and lists the contest criteria, and they
18 don't have a contest action before this
19 Commission.

20 MR. CHAIRMAN: Thank you.

21 Mr. Brown.

22 MR. BROWN: Thank you,

23 Mr. Chairman.

24 I was alerted the Posey County Clerk is
25 actually in the room today and we think she

1 can^ check verify that the address in
2 question is actually in precinct Black 8, not
3 precinct Black 1, if you'd like that for the
4 -- for the Commission's consideration.

5 MR. BROOKS: Mr. Chairman, if it
6 -- if it makes it easier, for purposes of
7 discussion, we're not arguing that it's not
8 in -- in Black 8. I don't think that's the
9 main point. I mean, you've got to remember,
10 this entire county is in House District 76,
11 so in the event that this lady cast a vote,
12 she would have voted for House District 76
13 whether it was in Black 1, Black 8 or any
14 other precinct. So it all comes out in the
15 wash. The lady voted. If she should have
16 voted in another precinct, it's probably not
17 a good thing, but it certainly has no impact
18 on this race, which is what we're here to
19 talk about.

20 MR. CHAIRMAN: Okay. Thank you.

21 Motions from the Commission.

22 MR. DURNIL: They want her vote
23 then?

24 MR. CHAIRMAN: Yeah.

25 MR. DURNIL: It's a question of

1 -- we're kind of -- but presuming this --
2 this voter walked in and showed her voter ID,
3 had her address on her driver's license,
4 whatever, and was allowed to vote makes it a
5 clerical error. And you can't determine good
6 votes from bad votes or however you want to
7 describe them the courts have held over the
8 years, so I would move to deny the -- the
9 motion or any consideration of this issue.

10 MR. CHAIRMAN: All right. I'll
11 second the motion.

12 Further discussion?

13 MR. KUZMAN: I think -- if I may.
14 Mr. Brooks, I think, hit it somewhat close.
15 You're right. 312-112 talks about
16 incidentals, but I think when you talk --
17 what I think Mr. Brown is talking about is
18 the totality of the circumstances argument.
19 And if you look at just one, yes, but when
20 you look at the big picture of things, this
21 could have an effect on an election. And
22 you're right; no election is perfect, but
23 when you start looking at the big picture of
24 an election and you continue to see potential
25 mistakes in elections, then I -- this

1 Commission should be concerned about an -- an
2 election and -- rather than one here or one
3 there. I think if I counted -- and correct
4 me if I'm wrong -- one, two -- six to eight,
5 maybe ten of these incidents have occurred.
6 I think that throws it out of that potential
7 -- six or eight precincts that are being
8 alleged. I see your -- I saw your marks and
9 I'll use the word "alleged", because there's
10 been no evidence other than this precinct put
11 in front of the Commission. So I'm -- I'm a
12 little concerned that we take this motion
13 until we hear the totality of the
14 circumstances argument and -- and see if it's
15 just incidental.

16 MR. CHAIRMAN: Thank you,
17 Commissioners.

18 A couple of quick questions for the
19 Petitioner.

20 Both parties have representatives at
21 the precinct level at the polling place,
22 right?

23 MR. BROWN: Yes.

24 MR. CHAIRMAN: And -- and both
25 parties, including Mr. Deig's, are allowed to

1 make challenges.

2 MR. BROWN: Correct.

3 MR. CHAIRMAN: And both parties
4 and the candidates are allowed to have poll
5 watchers, correct?

6 MR. BROWN: Correct.

7 MR. CHAIRMAN: Did anything come
8 up or any challenges made throughout the
9 process that this voter lived in the wrong or
10 was voting in the wrong precinct?

11 MR. BROWN: We don't have any
12 documentation in the materials we audited
13 that shows there was a challenge.

14 MR. CHAIRMAN: I appreciate the
15 -- the totality of the circumstances argument
16 and I don't think anyone here is unconcerned
17 about this, but mistakes do happen. There
18 hasn't been a fair -- a perfect election in
19 the history of civilization, but it does have
20 to be fair and accurate. And as mistakes
21 happen, they happen innocently; they happen
22 randomly; they don't just happen to women;
23 they just don't happen to African Americans
24 or -- or anything else like that. I am not
25 seeing you present any of those circumstances

1 here, so I'm going to vote in -- in favor of
2 Gordon Durnil's motion and move on with the
3 recount and not change the tally based on
4 your argument at this time.

5 Commissioners?

6 MR. DURNIL: We have to --

7 MR. CHAIRMAN: Oh. We've got to

8 take --

9 MR. DURNIL: -- tally the vote.

10 MR. CHAIRMAN: All in favor of
11 the motion signify by saying, "Aye."

12 MR. DURNIL: Aye.

13 MR. CHAIRMAN: Aye.

14 All opposed?

15 MR. KUZMAN: Aye.

16 MR. CHAIRMAN: Two to one. The
17 motion carries.

18 And I believe we're on Black 1.

19 Counsel?

20 MR. KING: Mr. Chairman and
21 members of the Commission, I think the -- the
22 next step would be for the -- the recount
23 director to read the tally, but we --

24 THE REPORTER: I'm sorry. I'm --
25 I'm not hearing.

1 MR. CHAIRMAN: Okay.

2 Can we quiet down, please.

3 THE REPORTER: I'm sorry. Go
4 ahead.

5 MR. KING: Mr. Chairman and
6 members of the Commission, I think the next
7 step would be for Counsel to read the tally
8 in Black 1, but for clarification, there is
9 one disputed ballot indicated for Mr. Deig
10 and we're assuming that's Respondent's
11 disputed ballot.

12 MR. BROOKS: We have two
13 challenged exhibits or two exhibits that we
14 sponsored. Are you wanting me to -- we're
15 going to withdraw those at some point, so if
16 we're going to come back around, I'll do it
17 then; or if you want to do it now, we'll
18 withdraw everything that's disputed by us in
19 that precinct. I don't want to get you out
20 of your procedure.

21 MR. CHAIRMAN: So we can get a
22 final tally at that -- at this point then?

23 Yeah. Let's do that then.

24 MR. KING: Barring objection from
25 any of the parties.

1 MR. CHAIRMAN: Okay. We're ready
2 to -- to do a final tally on Posey County
3 Black 1 unless there's an objection from a
4 party.

5 MR. BROWN: Just so I understand,
6 Mr. Chairman, Mr. Brooks is withdrawing his
7 -- his objections in this precinct as well
8 and we're just going to final tally the
9 precinct?

10 MR. CHAIRMAN: That is correct.

11 MR. BROWN: Okay. Great. Thank
12 you. No objection.

13 MR. SKOLNIK: Mr. Chairman, the
14 tally for Black Number 1 would reflect 230
15 votes for Mr. Deig, 219 votes for
16 Ms. McNamara, nine no votes.

17 MR. DURNIL: I move we accept the
18 tally as final.

19 MR. SKOLNIK: It's my
20 understanding -- I apologize to interrupt.
21 It's my understanding that the disputed valid
22 ballot has been withdrawn?

23 (Off the record - Discussion
24 between Mr. King and Mr. Skolnik)

25 MR. CHAIRMAN: Counsel?

1 MR. KING: Mr. Chairman and
2 members of the Commission, the tally sheet as
3 distributed by State Board of Accounts
4 currently shows 230 votes cast for Mr. Deig,
5 219 votes cast by -- cast for Ms. McNamara,
6 with one disputed valid ballot cast for
7 Mr. Deig. That's why I asked earlier if that
8 was the ballot disputed by Respondent.

9 MR. CHAIRMAN: I'd have to pull
10 it out and see what the exhibit number is.

11 MR. BROOKS: I mean, at the end
12 of the day, there were enough -- if you get
13 rid of the disputes of the ballots, the final
14 vote total will be exactly what the vote
15 total from the State Board of Accounts of
16 valid ballots was, so the -- by withdrawing
17 everything, it would be 230 Deig, 219
18 McNamara.

19 MR. KING: Mr. Chairman.

20 MR. CHAIRMAN: Counsel.

21 MR. KING: Thank you. That's why
22 as we go through this process, it's important
23 that we verify the math as we've done in
24 previous recounts.

25 MR. CHAIRMAN: I want to thank

1 Counsel. We can't have enough eyes on us.

2 MR. SKOLNIK: So, therefore, it's
3 my understanding that the ballots tallied in
4 Black Number 1 would reflect 230 votes for
5 Mr. Deig, 219 votes for Ms. McNamara, nine no
6 votes.

7 MR. DURNIL: I move we accept
8 that tally as final.

9 MR. CHAIRMAN: A second?

10 Any discussion?

11 Hearing none.

12 All in favor signify by saying, "Aye."

13 MR. DURNIL: Aye.

14 MR. CHAIRMAN: Aye.

15 All opposed?

16 MR. KUZMAN: Aye.

17 MR. CHAIRMAN: Motion carries two
18 to one. Thank you.

19 Mr. Skolnik.

20 MR. SKOLNIK: Mr. Chairman, the
21 next precinct in alphanumeric order would be
22 Black Number 2. This is one of the
23 precincts, I believe, in which Mr. Brown
24 indicated that there were some disputed
25 ballots even though the State Board of

1 Accounts tally sheet did not reflect -- not
2 reflect those.

3 MR. CHAIRMAN: Mr. Brown.

4 MR. BROWN: Not to waste anyone's
5 time, because this issue is not dissimilar
6 from the issue just -- just decided on, we
7 would withdraw our dispute on Black 2. We --

8 MR. CHAIRMAN: When you say --
9 I'm interested in understanding at least
10 before you withdraw that.

11 When you say it's not dissimilar, I
12 mean, is it the same exact fact pattern?

13 MR. BROWN: It's not exactly the
14 same. I can go through it quickly.

15 We -- there was a -- there was a voter
16 listed in the poll book in this precinct and
17 she was registered in --

18 MR. CHAIRMAN: Let's -- let's go
19 through it, because I just want to --

20 MR. BROWN: Okay.

21 MR. CHAIRMAN: -- understand --

22 MR. BROWN: Right.

23 MR. CHAIRMAN: -- exactly what
24 you're saying --

25 MR. BROWN: Yeah. It just --

1 MR. CHAIRMAN: -- so the Board
2 can get us the exhibits first.

3 MR. BROWN: Yeah. I'm sorry.
4 The exhibit that we're referring to is
5 Exhibit Number 1.

6 MR. KUZMAN: Adam, can you wait
7 until everybody gets the exhibits.

8 MR. BROWN: Right. I'll wait.

9 MR. SKOLNIK: You're referring to
10 Black Number 2, Exhibit --

11 MR. BROWN: Black --

12 MR. SKOLNIK: -- Number 1?

13 MR. BROWN: Black 2, Exhibit 1,
14 sir.

15 MR. SKOLNIK: Thank you. The
16 State Board of Accounts will get those for
17 the Commissioners.

18 MR. CHAIRMAN: Black 2 -- Black
19 2, Exhibit 1?

20 MR. BROWN: Yes, sir.

21 MR. CHAIRMAN: Okay. We're
22 ready.

23 MR. BROWN: In Black 2, Exhibit 1
24 you'll see Betty Schneider -- Schneider
25 listed in the second row, and her -- there's

1 a notation in the third column in her row
2 that says ABS, and so she -- that ABS
3 notation says she voted absentee either early
4 vote or by mail -- we believe it was early
5 vote -- in this precinct. And her -- but she
6 appears on the Absentee Activity Report from
7 the clerk's office in -- in Black -- in
8 precinct Black 1, so we believe she early
9 voted. She walked in and early voted at the
10 clerk's office and voted in the wrong
11 precinct. She's registered in Black 2. We
12 verified that. I don't -- and -- and she
13 voted early at the clerk's office and voted
14 in the wrong precinct according to the
15 activity report on Black 1; and, therefore,
16 even though it's a little bit different
17 process, my arguments, Mr. Chairman, would be
18 the same on this voter in that there was a
19 mistake. The -- that there -- I guess I
20 should hold on for one second, because we are
21 going to present evidence of electronic early
22 votes that were invalidly executed. This is
23 one. This was one where the voter was
24 registered and the voter did everything they
25 could, and after the finding of the

1 Commission, it seems they were ruling that a
2 mistake like this is not one that warrants a
3 special election. If the Commission wishes
4 to consider, there is a procedure for
5 actually identifying this voter's ballot
6 because it was an early walk-
7 in vote, and so if it would change the
8 Commission's outcome of the ruling that this
9 vote should not count, this vote can actually
10 be pulled back out even though it is an
11 electronic ballot.

12 The reason that that is linked up, the
13 ballot and the -- and the voter, is because
14 by statute, if an early voter dies before
15 Election Day, they are to -- their ballot is
16 to be -- their electronic ballot is to be
17 taken out of the count.

18 And so, Mr. Chairman, I guess if the
19 Commission is willing to consider the
20 arguments are the same except we -- the
21 remedy would be actually invalidating this
22 vote by the procedure that the clerk would
23 use -- and I can have the clerk explain it,
24 but the computer person, the -- the
25 electronic voting machine person is in Texas.

1 I talked to her on the phone. She confirmed
2 and the Posey County Clerk confirmed that
3 this is a -- this is how they deal with a
4 voter that dies. And so there is a different
5 remedy in this case, and so I guess we would
6 ask for the Commission's consideration of --
7 of the issue in granting a different remedy.

8 MR. CHAIRMAN: Okay. I'll hear
9 from opposing counsel.

10 MR. BROOKS: Well, with respect
11 to the special election, I just -- just to
12 make -- are we asking for a special election
13 in this precinct also?

14 MR. BROWN: We are not asking for
15 the remedy of a special election.

16 MR. BROOKS: Okay.

17 MR. BROWN: We are asking --

18 MR. BROOKS: So you're asking
19 that we go into the computer somehow and
20 extract this lady's vote, a lady who voted in
21 House District 76 and was entitled to vote in
22 House District 76, but we're going to go in
23 and invalidate her ballot? Am I
24 understanding that's what we're asking?

25 MR. BROWN: Mr. Chairman, the

1 understanding is that, yes, this voter voted
2 in the wrong precinct and her vote was -- she
3 was registered in a different precinct; it
4 was invalidly executed and we would ask that
5 this vote be -- be determined invalid and
6 pulled out of the tally.

7 MR. CHAIRMAN: Okay.

8 Counsel continue with your argument.

9 MR. BROOKS: Yeah. I mean,
10 that's all I have to say, really. I mean,
11 this is a lady who is entitled to vote in
12 House District 76 and did so, and Counsel for
13 the Democrats are now asking that a vote that
14 she was entitled to cast in House District 76
15 be somehow extracted from the computer and
16 disallowed. I just think that's -- to say
17 perhaps -- I'm trying to look for a good word
18 -- perhaps undemocratic. She was entitled to
19 vote there and did.

20 MR. CHAIRMAN: Okay. Thank you.

21 Questions from Commissioners?

22 Just so I have the fact pattern right
23 then, this -- you're saying that this person
24 voted early at the courthouse, which is one
25 place to go vote --

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MR. BROWN: Right.

MR. CHAIRMAN: -- at the courthouse when you vote early and that somehow got -- that vote got recorded in the wrong precinct on the tally sheets and -- and on the -- the poll list. You're not saying in any way that she then went to the precinct and voted again or anything like that, are you?

MR. BROWN: No. We're not alleging any --

MR. CHAIRMAN: -- or -- or that she went somewhere on Election Day and voted in the wrong place?

MR. BROWN: Right.

MR. CHAIRMAN: She went to the clerk's office under Indiana law 30 days before an election or -- or closer to the election and voted absentee in person, and then you are bringing Exhibit 1 here from that precinct as evidence because that person is listed here on this poll list and it's at a different precinct than she actually lives in as the reason to invalidate her vote.

MR. BROWN: That is our argument,

1 yes.

2 MR. CHAIRMAN: Okay.

3 Questions?

4 MR. KUZMAN: May I ask?

5 Can you explain that for him.

6 MS. BARNES: Sure. Thank you.

7 Mr. Chairman, members of the
8 Commission, not only did this voter vote in
9 the wrong precinct; she was given a ballot or
10 -- or that's what Counsel is alleging. She
11 was given a ballot for the wrong precinct,
12 and in 2006 in -- in the recount between Jon
13 Elrod and Ed Mayhern, voters were given the
14 wrong ballot style for the precinct that they
15 lived in and this Commission invalidated
16 those ballots. They refused to count those
17 ballots. And if similar argument that
18 Counsel is making in this case is to be
19 consistent, when a voter is given an
20 incorrect ballot and if -- if the clerk is
21 allowed to identify the ballot, you could see
22 the ballot style if she was, indeed, given a
23 ballot for Black 1 or Black 2. The voter is
24 to be given the ballot for the precinct that
25 they reside in.

1 MR. CHAIRMAN: And since -- thank
2 you, Counsel. And are you saying that a
3 different ballot style would have changed the
4 result in this particular race? I mean, was
5 -- was -- was 76 on one and not the other or
6 vice versa?

7 MS. BARNES: No. Mr. Brooks is
8 right that the entire county is within House
9 District 76, but this voter -- it -- it
10 appears from all the evidence that you have
11 in front of you this voter was given an
12 incorrect ballot style and was allowed to
13 vote in a precinct where she did not reside.

14 MR. CHAIRMAN: Okay. Thank you.

15 Questions from Commissioners? I'll get
16 a response from our Counsel as well after
17 that.

18 Go ahead, please, Brad.

19 MR. KING: Just briefly,
20 Mr. Chairman, to add that certainly in the
21 Elrod v Mayhern situation, House District 97
22 did not consist of all of Marion County.

23 MR. CHAIRMAN: Okay. That's what
24 I was wondering. Thank you very much.

25 Mr. Durnil?

1 MR. DURNIL: Is it time for
2 questions or time for a motion?

3 MR. CHAIRMAN: Either/or,
4 questions or a motion.

5 MR. DURNIL: For the same reason
6 as the last -- oh, do you have another
7 question?

8 MR. CHAIRMAN: Do you have
9 another question?

10 MR. KUZMAN: I do have one for
11 Mr. King.

12 MR. CHAIRMAN: Okay.

13 MR. KUZMAN: Was the questions
14 for the ballots in 2006 because they were
15 wrong ballots, if you remember, if they were
16 wrong ballots because they may have been
17 given somebody else's state rep district or
18 they were wrong ballots because of precincts?
19 Do you -- do you recall?

20 MR. KING: Mr. Chairman and
21 Commissioner, the dispute that I recall
22 involving 3-11.7-6-2 concerned a request for
23 transfer where a person was returning to
24 their former precinct. There may be
25 additional ones, but that's the dispute that

1 I recall.

2 MR. DURNIL: That admitted they
3 had a wrong -- they had a wrong precinct in
4 a --

5 MR. KUZMAN: In a state district?

6 MR. DURNIL: -- state district.

7 MR. KUZMAN: Okay.

8 MR. DURNIL: That's what I
9 remember, but I'm not sure.

10 MR. KUZMAN: Okay. That's fine.

11 MR. DURNIL: But on the same
12 basis I made the last motion, the voter did
13 everything she was supposed to do. There was
14 a clerical error and her vote should count,
15 so I would move that we deny the motion.

16 MR. CHAIRMAN: I second the
17 motion.

18 Discussion?

19 Hearing none.

20 All in favor of the motion?

21 MR. DURNIL: Aye.

22 MR. CHAIRMAN: Aye.

23 All opposed to the motion?

24 MR. KUZMAN: Aye.

25 MR. CHAIRMAN: Motion carries two

1 to one.

2 Mr. Skolnik.

3 MR. SKOLNIK: Mr. Chairman, if
4 there are no other objections within this
5 precinct, Black Number 2, the vote tally for
6 Black Number 2 reflects 83 votes for
7 Mr. Deig, 91 votes for Ms. McNamara, one no
8 vote.

9 MR. DURNIL: And I move we accept
10 that tally as final.

11 MR. CHAIRMAN: Second.

12 Discussion?

13 Hearing none.

14 All in favor say, "Aye."

15 MR. DURNIL: Aye.

16 MR. CHAIRMAN: Aye.

17 Opposed?

18 MR. KUZMAN: No.

19 MR. CHAIRMAN: Motion carries two
20 to one.

21 Mr. Skolnik.

22 MR. SKOLNIK: Mr. Chairman, the
23 next precinct in which there are disputed
24 ballots would be Black Number 4.

25 MR. CHAIRMAN: Mr. Brown.

1 MR. BROWN: We have no issues
2 remaining in Black 4. We withdraw whatever
3 disputes we had.

4 MR. CHAIRMAN: I'll note that
5 Petitioner withdraws disputes for Posey
6 County Black 4.

7 Mr. Skolnik.

8 MR. SKOLNIK: Mr. Chairman, in
9 Black Number 4, it showed that there were two
10 votes cast for Mr. Deig that I assume --
11 disputed ballots cast for Mr. Deig. I assume
12 that those were challenged or disputed by --
13 by the Respondent. Unless all challenges and
14 disputes are withdrawn by Counsel, I --

15 MR. BROOKS: Just one second. I
16 think we will. If Mr. Brown has withdrawn
17 all of his challenges, we withdraw ours as
18 well.

19 MR. CHAIRMAN: I noted that
20 Petitioner -- Petitioner -- I note that
21 Petitioner and Respondent both withdraw their
22 disputes.

23 Mr. Skolnik.

24 MR. SKOLNIK: Mr. Chairman, the
25 tally in Black Number 4 after the withdrawal

1 of all disputes or challenges reflects 69
2 votes for Mr. Deig, 76 votes for Ms.
3 McNamara, one no vote.

4 MR. DURNIL: I would move that we
5 accept the tally as final.

6 MR. KUZMAN: Second.

7 MR. CHAIRMAN: Motion?

8 Discussion?

9 Hearing none.

10 All in favor say, "Aye."

11 MR. KUZMAN: Aye.

12 MR. CHAIRMAN: Any opposed?

13 Hearing none.

14 The motion carries unanimously.

15 MR. SKOLNIK: Mr. Chairman, we
16 turn our attention now to Black Number 5.
17 This is one of the precincts in which there
18 were no disputed ballots listed on the State
19 Board of Accounts tally sheet, but I believe
20 Mr. Brown had indicated there may --

21 MR. CHAIRMAN: Mr. Brown.

22 MR. SKOLNIK: -- been a challenge
23 in some -- some votes.

24 MR. BROWN: Thank you,
25 Mr. Chairman and members of the Commission.

1 The exhibit in Black 5 that we'd like
2 to draw your attention to is Exhibit 1.

3 MR. CHAIRMAN: Okay.

4 MR. BROWN: Black 5, Exhibit 1.

5 MR. CHAIRMAN: We'll stop there.

6 Okay.

7 MR. BROWN: After researching on
8 the activity report, I would draw your
9 attention to the voter, walk-in voter, Allen
10 D. Rutherford. We are in precinct Black 5.
11 He's on the activity report for Black 5.
12 He's registered in Black 7 after we
13 researched that, and I can share the
14 registration card with the Commission. But
15 our issue actually is that we were not able
16 to locate any validly executed absentee
17 application, and in 311 -- I'm sorry -- in
18 3-11-4-2 --

19 MR. CHAIRMAN: Do you want us to
20 look at this (indicating)?

21 MR. BROWN: If -- if every -- if
22 -- I just wanted you to, you know, to confirm
23 that it was in Black 7. I'm sorry I didn't
24 bring enough copies for everyone.

25 MR. SKOLNIK: If a paper is

1 presented or an exhibit, it should be marked
2 just so we can --

3 MR. BROWN: All right. Sorry.

4 MR. SKOLNIK: -- preserve the
5 record.

6 This will be marked as Exhibit P2.

7 MR. BROOKS: Just as a matter of
8 procedure, Mr. Chairman, before any document
9 gets handed up there, if there's no copies,
10 if we could just take a quick look at it,
11 please.

12 MR. CHAIRMAN: Okay. Thank you.

13 MR. BROWN: Right here
14 (indicating). I apologize.

15 Mr. Chairman, 3-11-4-2 deals with a
16 voter who wants to vote by absentee ballot
17 must apply to the County Election Board for
18 an official ballot and they must sign the
19 absentee ballot application except as
20 provided in B, and that subsection B deals
21 with voters with disability or those voting
22 with a power of attorney. We don't have
23 evidence that either of those cases were --
24 were the case for Mr. Rutherford.

25 Also in the early voting statute, which

1 is on page 307, 3-11-10-26.2, which allows
2 early voting, this is where the clerk may use
3 an electronic voting system, but we don't see
4 anything in there that allows someone to vote
5 without a proper application, and, again, we
6 would ask that this voter's -- this voter was
7 not -- did not apply or sign the affidavit to
8 attest that they were who they said they
9 were. We have no evidence they presented an
10 identification. We have no way of knowing if
11 this voter was, in fact, Allen Rutherford,
12 and so we would ask that this ballot, through
13 the same procedure described previously,
14 because it's a walk-in absentee early vote,
15 this ballot be invalidated under Indiana
16 code. Thank you.

17 MR. CHAIRMAN: Thank you.

18 Counsel.

19 MR. BROOKS: Well, again, I guess
20 Mr. Brown's asking that we somehow
21 disenfranchise a guy who was entitled to vote
22 in House District 76 and did vote in House
23 District 76. And the procedure for early
24 voting is, you walk in; you've got to pass a
25 Republican and a Democrat, and so this

1 missing application or missing piece of paper
2 at best is an error on the part of an
3 election official, but -- but the implication
4 is that he somehow got past the Republican
5 and got past the Democrat in addition to not
6 filling out the piece of paper, so we -- we
7 suggest that this is increasing the standards
8 for disenfranchisement. I'm not sure it will
9 get worse, but we totally disagree with the
10 approach to disenfranchise a person who is
11 entitled to vote.

12 MR. CHAIRMAN: Thank you.

13 Questions from Commissioners.

14 Mr. Brown, so I understand you, you're
15 saying that there's no absentee ballot
16 application on file in the clerk's office for
17 this person?

18 MR. BROWN: We were -- no. In
19 the materials we audited, we did not see an
20 absentee ballot application for
21 Mr. Rutherford in any of those materials. We
22 did not -- we looked up his registration; we
23 did not seek for duplicate copies in the
24 clerk's office. I apologize, but...

25 MR. CHAIRMAN: So you didn't ask

1 the clerk's office where it was or anything
2 like that?

3 MR. BROWN: We did not. On the
4 -- on the day we were auditing, no, we did
5 not ask them to look and see if it had been
6 misplaced or --

7 MR. CHAIRMAN: Okay.

8 MR. BROOKS: Mr. Chairman, for --
9 can I make one other comment, please?

10 MR. CHAIRMAN: Okay. Counsel.

11 MR. BROOKS: You know, we went
12 through all these materials and, obviously,
13 the materials are impounded. The proper way,
14 as I would understand it, to show that there
15 was no application for Mr. Rutherford would
16 be to make an exhibit of all of the early
17 voting applications and represent that those
18 were all of them and say it's not in here. I
19 mean, we're just sitting here -- he didn't
20 make anything an exhibit, so now we're
21 supposed to understand that there was no
22 application when they're all locked up. He
23 should have made all of the applications an
24 exhibit to show that Mr. Rutherford wasn't in
25 there so that we'll know that, in fact,

1 Mr. Rutherford wasn't in there. I have no
2 idea and I wouldn't imagine that the
3 Commission could have any idea without seeing
4 those, and without making them an exhibit, we
5 shouldn't even be considering this argument.

6 MR. CHAIRMAN: Thank you.

7 Commissioner.

8 MR. KUZMAN: Would the -- would
9 the State Board of Accounts have the
10 applications for this precinct?

11 MR. CHAIRMAN: Mr. Rogina?

12 MR. ROGINA: I believe they're in
13 file cabinets.

14 MR. CHAIRMAN: Where?

15 MR. ROGINA: We'd have to look in
16 the precinct bag.

17 MR. KUZMAN: If they weren't in
18 the precinct bag --

19 MS. BELLAMY: That would be the
20 only way we would have them, is if they're in
21 the precinct bag.

22 MR. CHAIRMAN: Other questions
23 from Commission members?

24 MR. KUZMAN: I want to ask a
25 question to opposing counsel.

1 MR. CHAIRMAN: Yeah. Go ahead.

2 MR. KUZMAN: Wasn't this the only
3 exhibit he would have access to? He wouldn't
4 have access to anything else, would he?

5 MR. BROOKS: Oh, absolutely. We
6 went through these precincts every little
7 piece of material in those bags, so if he
8 wanted to copy them, he could have made them
9 an exhibit and didn't.

10 MR. KUZMAN: Well, we have access
11 to them now because the State Board of
12 Accounts has them, right?

13 MR. BROOKS: Well, that's up to
14 the Commission on what the Commission wants
15 to do. My experience is that once these
16 precincts are closed -- I mean, that's the
17 whole idea of going through and marking
18 exhibits. You don't get two shots at it.

19 MS. BELLAMY: We do have the
20 applications.

21 MR. CHAIRMAN: Is there a
22 request?

23 MR. KUZMAN: I would -- I would
24 like to make a request then that if the
25 application is here it be produced by the

1 State Board of Accounts.

2 MR. CHAIRMAN: Hearing no
3 objection?

4 MR. BROOKS: I object if that's
5 your question. I mean, that's the whole --

6 MR. CHAIRMAN: I meant for
7 Commission members.

8 MR. BROOKS: Oh, I'm sorry.
9 Excuse me.

10 MR. CHAIRMAN: We'll note your
11 objection.

12 MR. BROOKS: It's like I tell my
13 kids, "Duly noted."

14 MR. CHAIRMAN: The Commission is
15 going to enter this as an exhibit.

16 I do see an original absentee ballot
17 application reportedly signed by the voter.

18 MR. SKOLNIK: Mr. Chairman, this
19 will be marked as Exhibit C1 since it's being
20 entered by the Commission.

21 MR. CHAIRMAN: Mr. Brown, do you
22 want to add anything to your argument or
23 subtract anything?

24 MR. BROWN: We withdraw upon
25 finding the application. Our watchers didn't

1 see it. I see on a notation from the State
2 Board of Accounts it was found late, so we
3 must have -- I apologize for the mistake. It
4 was not any intention to waste the
5 Commission's time with an argument that --
6 and I -- I firmly believe that is his
7 application, so...

8 MR. CHAIRMAN: I appreciate that
9 comment, Mr. Brown. And for the -- well,
10 since we're in discussion, what I will state
11 for the record, I suspect there's going to be
12 a motion made on your argument to not accept
13 your argument. I would vote for that, but
14 not because we produced this. My intention
15 for asking this line of questioning was to
16 preserve the -- or maintain the integrity of
17 the Posey County Clerk's office and make sure
18 that there was a record. Even if this didn't
19 exist, I would agree with Respondent
20 counsel's contention that that would have
21 been an error at that point and we shouldn't
22 disenfranchise the voter for it, and as such
23 -- well, the Chair should make a motion, so
24 I'll take a motion on this argument.

25 MR. DURNIL: Didn't he withdraw

1 it?

2 MR. CHAIRMAN: Did you? Oh, you
3 withdrew it?

4 MR. KUZMAN: Yeah, he withdrew.

5 MR. BROWN: I withdraw it.

6 MR. CHAIRMAN: Excuse me. Pardon
7 me. Okay. You withdrew it. Thank you.

8 Mr. Skolnik.

9 MR. SKOLNIK: Mr. Chairman, it's
10 my understanding there are no other
11 challenged or disputed ballots in precinct
12 Black 5. The tally in that precinct,
13 therefore, reflects 71 votes for Mr. Deig, 69
14 votes for Ms. McNamara.

15 MR. DURNIL: I move we accept
16 that tally as final.

17 MR. KUZMAN: Second.

18 MR. CHAIRMAN: All in favor?

19 Aye.

20 MR. DURNIL: Aye.

21 MR. KUZMAN: Aye.

22 MR. CHAIRMAN: Motion carries
23 unanimously.

24 MS. BELLAMY: Mr. Chairman, could
25 we have that back to put back in or do you --

1 MR. CHAIRMAN: Well, we have the
2 court reporter who needs a copy, so --

3 MS. BELLAMY: We can get copies.

4 MR. CHAIRMAN: -- I think the
5 original should stay with you, so if you
6 could find a copy for the court reporter for
7 C1, that would be good.

8 MS. BELLAMY: We can get copies.

9 MR. CHAIRMAN: On the other hand,
10 P2 will go to the court reporter.

11 Thank you.

12 Mr. Skolnik.

13 MR. SKOLNIK: Mr. Chairman, the
14 next precinct in Posey County is Black Number
15 6. This is another precinct in which there
16 were no disputed ballots listed on the tally
17 sheet compiled by the State Board of
18 Accounts, but that Mr. Brown indicated he had
19 a challenge or dispute.

20 MR. CHAIRMAN: Let me stop. I
21 think the State Board of Accounts has
22 something to add.

23 MR. ROGINA: Yes, Mr. Chairman.
24 There were six no votes in Black --

25 MR. CHAIRMAN: Go ahead and say

1 it loud because you don't have a mic.

2 MR. ROGINA: There were six no
3 votes in Black 5.

4 MR. SKOLNIK: My kids would say,
5 "My bad". I need to re-tally. It's a legal
6 art form in our house.

7 MR. KUZMAN: I second that.

8 MR. SKOLNIK: Let me -- let me
9 read again the tally as I have it in Black
10 Number 5 and then possibly entertain a motion
11 or a motion to modify.

12 Thank you, Mike, for bringing that to
13 our attention.

14 The tally in Black Number 5 reflects 71
15 votes for Mr. Deig, 69 for Ms. McNamara, and
16 there were six no votes tallied by the State
17 Board of Accounts.

18 MR. DURNIL: I would move to
19 modify the motion to --

20 THE CHAIRMAN: Second.

21 MR. DURNIL: -- accept that as
22 final.

23 THE CHAIRMAN: Hearing no
24 discussion.

25 All in favor?

1 MR. KUZMAN: Aye.

2 MR. CHAIRMAN: Aye.

3 Motion carries unanimously.

4 Mr. Skolnik.

5 MR. SKOLNIK: Mr. Chairman, we
6 now turn our attention to precinct Black 6,
7 and this is another one of the precincts in
8 which Mr. -- when we -- there are no disputed
9 ballots tallied on the State Board of
10 Accounts spreadsheet but that Mr. Brown
11 indicated that there was a dispute.

12 MR. CHAIRMAN: Mr. Brown.

13 MR. BROWN: Thank you,
14 Mr. Chairman.

15 Black 6, Exhibits 11 and 12 are what I
16 will reference.

17 MR. CHAIRMAN: Great. --We'll get
18 those together. Thank you.

19 MR. KUZMAN: What exhibits again?
20 I'm sorry.

21 MR. BROWN: Sorry?

22 MR. KUZMAN: What exhibits again?

23 MR. BROWN: Exhibits 11 and 12.

24 MR. CHAIRMAN: There's some
25 writing on the back of these too.

1 We have some confusion, Mr. Brown, in
2 the numbering system up here, so why don't
3 you approach and let us know what you're
4 looking at so we can match up.

5 (Off the record - Mr. Brown
6 approaches the bench)

7 MR. CHAIRMAN: Okay. Thank you,
8 Mr. Brown. Go ahead.

9 MR. BROWN: Thank you,
10 Mr. Chairman.

11 These are two voters that early voted
12 but did not sign the application as required
13 by previously cited 3-11-4-2; furthermore, we
14 have -- you know, it's clearly the
15 legislature's intent through the voter ID
16 statute to do all we can to verify voters are
17 who they say they are, and to allow these
18 votes would be in direct conflict, it would
19 seem, with that legislative intent, and we
20 would ask these two early votes be
21 invalidated through the procedure described
22 previously because of the lack of signature,
23 invalid application and, therefore, an
24 invalid execution of this vote. And that is
25 our -- that's our argument. Thank you.

1 MR. CHAIRMAN: Thank you,
2 Mr. Brown.

3 Mr. Brooks.

4 MR. BROOKS: On this particular
5 State Board of Accounts summary sheet, I
6 cannot tell -- they didn't break out -- some
7 of them did and some of them didn't -- how
8 many early votes there were versus paper, but
9 the assumption is that there are a lot of
10 early ballots that were cast electronically.
11 You've got two mistakes. There's no --
12 there's not even an allegation this time that
13 these people weren't entitled to vote or that
14 they were in the wrong precinct. This is no
15 different than in his last argument where
16 somebody apparently either lost the paperwork
17 or it didn't happen. This is an error on the
18 part of an election official. If they had
19 this absentee ballot application form filled
20 out and let them go -- go by and vote without
21 signing, certainly that's an error, and it's
22 unfortunate, but those votes are now mixed
23 in. I also guess I -- there are obviously a
24 lot of different kind of voting machines, and
25 I'm not sure that -- we've had no real

1 testimony from anybody who knows these
2 machines that somehow the computer guy can go
3 in and find Clarence Crook's vote on an
4 electronic machine and somehow extract that
5 and not count it. I mean, all we're hearing
6 is Mr. Brown say that. I don't -- I
7 certainly don't believe that's true on most
8 of the electronic machines that -- that I've
9 been involved with. I'm not saying it can't
10 happen, but there's no testimony that somehow
11 we can identify some voter and that it can --
12 that vote can actually be counted. I was
13 actually thinking that that was contrary to
14 law, but I could be wrong on that, that those
15 votes are supposed to be anonymous once they
16 get in the machine.

17 MR. CHAIRMAN: Thank you,

18 Mr. Brooks.

19 Questions from Commission members.

20 I'll let -- let you respond. Go ahead,

21 Mr. Brown.

22 MR. BROWN: Thank you,

23 Mr. Chairman.

24 If this voter had showed up to early
25 vote and did not present an ID, they would

1 either have to cast a provisional vote or
2 attempt to go and vote at the polls without
3 an ID.

4 If you can look at the form here, it's
5 clearly not marked by any human. Those
6 markings -- well, somebody's got a lot
7 straighter handwriting than I do. Those
8 markings definitely seem to be computer
9 generated. I don't have verification of
10 that, but it definitely looks that way.
11 Everything on this form looks preprinted. We
12 have no way of knowing these two voters are
13 who -- you know, these two voters actually
14 showed up and voted that day.

15 And in response to the system, the
16 Posey County Clerk is here. She will
17 testify. And we went through this...
18 Mr. Brooks was present. We went through it
19 with the computer technician during the audit
20 process. We went through it with both clerks
21 in Vanderburgh and Posey where these machines
22 appear. This can be done. We've talked
23 about it on more than one occasion. And so
24 I'm happy to bring for the Commission the
25 Posey County Clerk to verify that these votes

1 can be identified. And the anonymity was an
2 issue that we clearly -- you know, as you --
3 as you said, Mr. Chairman, it just happens
4 this is a public meeting and we -- we
5 identified these voters by name. We're not
6 going to in any way want to identify how they
7 voted; we simply ask that the -- that the
8 numbers that match up these voters, not by
9 name, but by serial number between the voter
10 and the ballot be used to invalidate the
11 ballot. We have no idea how these two voters
12 voted and, frankly, we're not asking to find
13 out; we're just asking that, because we
14 cannot verify that these two voters actually
15 showed up to vote that these two people
16 actually were the ones that cast that vote
17 that day --

18 MR. CHAIRMAN: Okay.

19 MR. BROWN: -- that they be
20 invalidated.

21 MR. CHAIRMAN: Thank you.

22 Commission, questions?

23 Mr. Kuzman.

24 MR. KUZMAN: If you show up to
25 early vote, you have to present an ID; is

1 that correct? Is that correct?

2 MR. BROWN: Yes.

3 MR. KUZMAN: Okay. So we have no
4 idea if this person -- what you're trying to
5 say is that whoever -- whether these two
6 people, whoever named person, it could be
7 anybody that voted without signing under the
8 penalties of perjury.

9 MR. BROWN: Correct.

10 MR. CHAIRMAN: And just for our
11 nomenclature, I'd like us to get in the habit
12 of not calling it early voting --

13 MR. KUZMAN: Okay.

14 MR. CHAIRMAN: -- because we
15 don't have that here in Indiana. We have
16 absentee voting in person. And that leads me
17 to my question and -- and perhaps comment.

18 Absentee voting in the state of Indiana
19 is a special dispensation in that you have to
20 have a special set of statutorily prescribed
21 -- one of a set of statutorily prescribed
22 reasons for voting absentee and, otherwise,
23 it's my understanding that you have to
24 closely abide by the procedure, if not
25 exactly follow it, in order to avail yourself

1 of that special dispensation.

2 I find it on its face very
3 disconcerting, I will say, that there's no
4 signatures here when there's been a request
5 on this form to swear or affirm under the
6 penalties of perjury that these people are
7 who they say they are. And maybe we can
8 resolve that here and explain this and --
9 through testimony or something else, but I'm
10 also going to want to hear from our counsel
11 as to whether or not I'm right on that, on
12 that point, but I can say before any motions
13 are presented that I do not like what I see
14 here.

15 Response from both sides, starting with
16 Mr. Brooks.

17 MR. BROOKS: I certainly agree,
18 Mr. Chairman, that it's somewhat
19 disconcerting and we are not pleased about
20 it, just like some of the other allegations
21 that Mr. Brown has made. I mean, one, we
22 didn't have a form at all. It would appear
23 that this person, for whatever reason, was on
24 -- is -- is clearly a registered voter, went
25 through -- the dates of the signing -- or the

1 date signed numbers match the clerk's
2 certification, so at some point -- and these
3 are voted in the clerk's office, so unless we
4 think that the clerk somehow generated these
5 on her own, the assumption is that they did
6 go through some process in order to get --
7 get there. They're certainly registered.
8 It's unfortunate, but I don't -- you know,
9 I'm not very comfortable with this let's call
10 the guy in Texas, computer guy, and see if he
11 can, in fact, extract some vote for some
12 particular voter, and I just -- I just think
13 it's another error. They went through the
14 clerk's office, clearly, and the clerk's
15 people didn't have them sign and, you know,
16 how -- how -- how old are those people? Do
17 we have the poll book?

18 MR. CHAIRMAN: Quickly from --

19 MR. BROOKS: So, anyway, that's
20 such an argument.

21 MR. CHAIRMAN: Quickly, Mr. Brown,
22 anything in response just to what he said
23 last? If not, I'm going to go to my counsel.

24 I'd like to hear from Counsel on this,
25 this whole matter, starting with Brad.

1 MR. KING: Mr. Chairman and
2 members of the Commission, the Chair is
3 correct in stating that absentee ballot
4 applications are required to be signed, that
5 under 3-11-4-2 they are signed under the
6 penalties of perjury if an application for an
7 absentee ballot is received by a County
8 Election Board. The legislature enacted a
9 law in 2005 -- It's Indiana code
10 3-11-4-18.5 -- which specifies that upon
11 receipt of an absentee ballot application, a
12 member of the County Election Board, which
13 would be a member of either of the two major
14 parties, or a member of the Absentee Voter
15 Board, those employees in the clerk's office
16 who process it, may challenge the application
17 on one of several grounds. The one that
18 would be applicable under these facts would
19 appear to be A3, has not been executed in
20 accordance with Indiana law. If, in fact,
21 the affidavit is filed, the County Election
22 Board conducts a hearing to rule on the
23 matter and then acts to refer to the
24 appropriate prosecuting attorney any
25 violation of election law that they find.

1 In my opinion, this -- this procedure
2 could have been employed in this case, but
3 was not. The absentee ballot application
4 was, therefore, accepted and the absentee
5 ballot apparently issued. There's no
6 procedure other than that spelled out for --
7 for dealing with the challenge to the
8 application itself.

9 MR. CHAIRMAN: Thank you.

10 Counsel, if -- if you have anything to
11 add.

12 MS. BARNES: Thank you,
13 Mr. Chairman.

14 While Mr. King is right that
15 3-11-4-18.5 permits a member of the County
16 Election Board or Absentee Board to challenge
17 applications, that statute applies to
18 applications that are mailed in. The --
19 these applications that you have before you,
20 while they can be used by voters who want to
21 vote by mail, the voters, by checking box B
22 as in boy on the form have indicated that
23 they were voting in the -- in the clerk's
24 office.

25 In 2008 in November, the Marion County

1 Republican party brought a lawsuit to permit
2 individuals -- for applications to be able to
3 be challenged. On Election Day the ballots
4 would have been treated provisionally. The
5 Indiana Supreme Court agreed those ballots --
6 if the challenges were proven to be valid,
7 then those ballots would not be counted.
8 That is why we have a procedure that ballots
9 that are counted on an electronic voting
10 system can be identified and pulled. The
11 procedure that -- that's been talked about by
12 Counselor Brown where if a voter dies, that's
13 not the only procedure in which a ballot can
14 be withdrawn. If -- if the County Election
15 Board or in this case the Recount Commission
16 determines that a ballot was invalidly cast,
17 that's the proper procedure to identify the
18 ballot and withdraw it from the vote total.

19 MR. CHAIRMAN: Okay. Thank you.

20 Do we know in -- or are we going to
21 have to call a witness to discover the
22 procedure used to withdraw the ballots if
23 that's how we end up voting? Is there a way
24 that we know this already as a matter of law
25 or fact?

1 Counsel? Brad?

2 MR. KING: No, Mr. Chairman. I
3 think you would have to receive evidence
4 regarding that before the Commission rules.

5 MR. BROOKS: Mr. Chairman.

6 MR. CHAIRMAN: Yeah.

7 MR. BROOKS: These are computer
8 generated. Obviously the -- the voters
9 didn't fill any of it out, it would appear.
10 It's all typed and appears to be the same.

11 MR. CHAIRMAN: So you agree
12 with opposing counsel on that point?

13 MR. BROOKS: It would appear to
14 me that there's not --

15 MR. CHAIRMAN: Okay.

16 MR. BROOKS: -- a lot --

17 MR. CHAIRMAN: I'd like the
18 record to show that you guys agreed on
19 something today. I appreciate that.

20 MR. BROOKS: Oh, we'll -- we'll
21 agree on lots of stuff, not -- not perhaps
22 during this proceeding.

23 But I would ask that if we're going to
24 actually consider disenfranchising these
25 people that we look through the applications

1 for absentee ballot to see that if, in fact,
2 there are not ones that -- by these same
3 voters that are signed so that this isn't
4 simply a computer-generated duplicate.

5 MR. CHAIRMAN: Yeah. And I was
6 going to take testimony on that, too, from
7 the clerk and see if she can explain the
8 situation, but if you want to take a couple
9 of minutes to go through the evidence,
10 documentary evidence, I'm happy to do that.

11 MR. BROOKS: And I'm confused
12 about -- actually, I'm now -- now confused
13 about the procedure. All -- all of these are
14 pre-typed with the exception of -- so I don't
15 know. Are they pre-generated by the clerk's
16 office and then somebody gets to fill them
17 in? I mean, it's a little odd that all of
18 these are apparently computer generated ahead
19 of time. How would you know whether
20 somebody's going to come in --

21 MR. CHAIRMAN: So the question
22 is, were they actually used or not.

23 You want to take five minutes to review
24 documents? Do you want to --

25 MR. BROOKS: Sure.

1 MR. CHAIRMAN: Go ahead and speak
2 in the microphone.

3 MR. BROWN: I'm sorry. I'll note
4 on the report the names for the Commission
5 members.

6 MR. SKOLNIK: Mr. Chairman,
7 Counsel for Petitioner has just handed --
8 handed me proposed Exhibit P3.

9 MR. CHAIRMAN: Thank you.
10 Counsel.

11 MR. BROWN: Yes. You'll see
12 within -- I starred in pen within the first
13 few pages. If you look -- it's alphabetical
14 by last name -- you could see those voters
15 are listed on the activity report as voting.
16 And there's a walk-in -- a notation that they
17 voted walk-in in the column. I think it's
18 the fourth column.

19 MR. CHAIRMAN: Is that it?

20 MR. BROWN: That's it.

21 MR. CHAIRMAN: Okay.

22 Counsel.

23 MR. BROOKS: Yes. Let me -- I
24 mean, we can call the clerk, but here's what
25 I understand the procedure to be. If I want

1 to in-person absentee vote -- thank you -- I
2 -- I go into the clerk's office; they ask for
3 my photo ID; I sign the log. If you look on
4 the exhibits, in the upper-right hand corner,
5 each -- that is a code for this person.

6 MR. CHAIRMAN: No. Ours is cut
7 off, actually.

8 (Off the record - Correcting
9 exhibit)

10 MR. CHAIRMAN: Okay. Counsel.

11 MR. BROOKS: So in any event, I
12 show my ID; I sign the log. And this
13 handwritten number in the upper right-hand
14 corner is the log, which I think somebody is
15 trying to get for us. Then -- then a clerk's
16 employee is sitting at a computer; she looks
17 them up in voter registration, and that's why
18 all these forms are -- they look like they're
19 prefilled out because they are filled out at
20 the computer at the time.

21 So you've already got a voter that
22 showed ID; they've signed this log, and --
23 and if there's no signature, it seems a whole
24 lot more likely to me that for some reason
25 they just weren't handed back. Why would