

1 JOHN EICHHORST (No. 139598)
MICHAEL L. GALLO (No. 220552)
2 JASON S. TAKENOUCI (No. 234835)
D'LONRA C. ELLIS (No. 239623)
3 HOWARD RICE NEMEROVSKI CANADY
FALK & RABKIN
4 A Professional Corporation
Three Embarcadero Center, 7th Floor
5 San Francisco, California 94111-4024
Telephone: 415/434-1600
6 Facsimile: 415/217-5910

7 LOWELL FINLEY (No. 104414)
Law Offices Of Lowell Finley
8 1604 Solano Avenue
Berkeley, California 94707
9 Telephone: 510/290-8823
Facsimile: 415/723-7141

10 Attorneys for Plaintiffs/Petitioners
11

12 SUPERIOR COURT OF THE STATE OF CALIFORNIA
13 COUNTY OF SAN FRANCISCO

14
15 JOSEPH HOLDER, PETER CANTISANI,
DOLORES HUERTA, JUDY
16 BERTELSEN, CHARLES L. KRUGMAN,
DAVID HAGUE GOGGIN, ALYCE E.
17 FRET LAND, HELEN ACOSTA, MARY
C. KENNEDY, CHARLES FOX, MARTY
18 KRASNEY, MITCH CLOGG, BEN P.
VAN METER, NANCY TILCOCK,
19 CHARLES O. LOWERY, JR., LILLIAN
RITT, HAROLD C. CASE, SUSAN J.
20 CASE, KENNETH MARTIN
STEVENSON, LARRY MARKS, HARRY
21 JOHN RAPF. MERRILEE DAVIES,
BERNICE M. KANDARIAN, VICTORIA
22 POST, and VERONICA ELSEA,
individuals,

23 Plaintiffs/Petitioners,
24

25 v.

26 BRUCE MCPHERSON, as California
Secretary of State; ELAINE GINNOLD, as
Elections Official of Alameda County;
27 VICTOR E. SALAZAR, as Elections
Official of Fresno County; CAROLYN
28 WILSON CRNICH, as Elections Official of

ENDORSED
FILED
San Francisco County Superior Court

MAR 21 2006

GORDON PARK-II, Clerk
BY: DEBORAH STEPPE
Deputy Clerk

No. CPF 06-506171

VERIFIED PETITION FOR WRIT OF
MANDATE (ELEC. CODE 13314(a);
CODE CIV. PROC. §§1085, 1094.5),
DECLARATORY AND INJUNCTIVE
RELIEF

IMMEDIATE ACTION REQUESTED,
ELECTION LAW MATTER CALENDAR
PREFERENCE PURSUANT TO ELEC.
CODE §13314(a)(3)

1 Humboldt County, ANN BARNETT, as
Elections Official of Kern County;
2 THERESA NAGEL, as Elections Official
of Lassen County; CONNY
3 MCCORMACK, as Elections Official of
Los Angeles County; MICHAEL SMITH,
4 as Elections Official of Marin County;
MARSHA WHARFF, as Elections Official
5 of Mendocino County; MAXINE
MADISON, as Elections Official of Modoc
6 County; JIM MCCAULEY, as Elections
Official of Placer County; KATHLEEN
7 WILLIAMS, as Elections Official of
Plumas County; MIKEL HASS, as
8 Elections Official of San Diego County;
DEBBIE HENCH, as Elections Official of
9 San Joaquin County; JULIE RODEWALD,
as Elections Official of San Luis Obispo
10 County; JOSEPH E. HOLLAND, as
Elections Official of Santa Barbara County;
11 COLLEEN BAKER, as Elections Official
of Siskiyou County; DERO FORSLUND,
12 as Elections Official of Trinity County;
JERRY T. MESSINGER, as Elections
13 Official of Tulare County; and DOES 1
through 50.

14 Defendants/Respondents.
15

HOWARD
RICE
HEMEROVSKI
CANADY
TALK
& RABKIN
Professional Corporation

1	INTRODUCTION	1
2	THE PARTIES	5
3	JURISDICTION AND VENUE	10
4	COMMON ALLEGATIONS	11
5	I. THE EVOLUTION OF LEGAL REQUIREMENTS RELATING	
6	TO USE OF ELECTRONIC VOTING MACHINES IN	
	CALIFORNIA ELECTIONS.	11
7	A. Federal Requirements.	11
8	B. California Laws Protecting The Integrity Of California	
	Elections.	12
9		
10	II. THE DUBIOUS HISTORY OF DIEBOLD VOTING SYSTEMS	
	IN CALIFORNIA AND ELSEWHERE.	13
11	A. California’s Disastrous Experiment With Diebold Voting	
12	Systems In The March 2004 Primary Results In	
	Decertification Of The AV-TSx.	13
13	B. Numerous Studies of Diebold Products By Other States Show	
14	Widespread Security Flaws And Problems.	15
15	C. Computer Expert Harry Hursti’s “Exploits” Demonstrate	
	Vulnerabilities In The Diebold Voting System And Expose	
	Diebold Misrepresentations.	17
16		
17	III. DIEBOLD’S RENEWED EFFORTS TO ACHIEVE	
	CERTIFICATION OF ITS VOTING SYSTEM.	18
18	A. Security Concerns Are Raised At The Public Hearing On	
	Diebold Certification.	19
19		
20	B. After Another Successful “Hack” By Hursti, The California	
	Secretary Of State Finds That Additional Testing Of The	
21	Diebold Voting System Is Needed As A Prerequisite To	
	Certification.	19
22	C. The Secretary Of State Requests Review Of The Diebold	
23	Voting System’s Memory Cards By Members Of His Voting	
	Systems Technology Assessment Advisory Board And Their	
24	Analysis Confirms The Existence Of Known Security Flaws	
	And Discovers Others.	21
25	1. The VSTAAB Security Analysis.	21
26	2. The VSTAAB’s Recommended “Mitigation” Measures.	22
27	3. The VSTAAB Report Acknowledges Its Limited Scope	
28	And The Existence Of Other Security Issues.	23

HOWARD
RICE
NEMEROVSKI
CANADY
FALK
& RABKIN
A Professional Corporation

1	D. The Diebold AV-TSx’s Paper Audit Trail System Has Not Been Shown To Meet State Requirements.	24
2		
3	1. The AV-TSx And Its Attached Printer Destroy Vote Records And Experience Frequent Crashes During Testing By California Elections Officials In 2005.	25
4		
5	2. The Secretary Of State’s Staff Report Confirms That The Diebold TSx’s AccuView Printers Do Not Comply With Federal And State Accessibility Requirements.	26
6		
7	3. The Secretary Of State Failed To Examine Whether The AV-TSx Thermal Paper Roll Records Can Meet California Mandatory Audit And Recount Requirements.	26
8		
9	IV. THE SECRETARY OF STATE “CONDITIONALLY” APPROVED THE AV-TSX DESPITE ITS RECOGNIZED FAILURE TO SATISFY STATE LAW.	28
10		
11	A. The Certification Addresses Security Issues By Mandating The “Short Term” Mitigation Measures From The VSTAAB Report Without Any Public Discussion Of The Efficacy Or Feasibility Of Those Measures, Or The Need For More Substantial Fixes.	29
12		
13	B. The Secretary Of State’s Certification Order Does Not Require Diebold To Remove Forbidden Interpreted Code From Its Memory Cards.	30
14		
15	C. The Secretary Of State’s Certification Order Improperly Delegates Responsibility For Ensuring That The Diebold System Complies With State And Federal Law To Diebold And County Elections Officials.	31
16		
17		
18	V. SUMMARY OF LEGAL DEFECTS IN THE AV-TSX CERTIFICATION.	32
19		
20	A. Certification Of The Diebold AV-TSx And Use Of That System By County Elections Officials Violates Petitioners’ Fundamental Constitutional Rights.	32
21		
22	B. Certification Of The Diebold AV-TSx And Any Use Of That System By County Elections Officials Violates The “Federal Qualification” Requirement Under Elections Code Sections 19250(a-b) And 19251(d).	33
23		
24	C. Certification Of The Diebold AV-TSx Violates The Help America Vote Act.	34
25		
26	D. Certification Of The Diebold AV-TSx And Any Use Of That System By County Elections Officials Violates The “Accessible Voter Verified Paper Audit Trail” Requirements Of The California Elections Code.	35
27		
28		

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

E. The Secretary Of State’s “Conditional” Certification Of The Diebold AV-TSx Violates The California Elections Code And Administrative Procedures Act By Imposing New Regulations On Voting Without Public Hearing Or Comment. 36

F. Certification Of The Diebold AV-TSx And Any Use Of That System By County Elections Officials Violates Elections Code Section 19205. 38

G. The Secretary Of State’s “Conditional” Certification Is An Improper Delegation Of Authority. 39

VI. COUNTY ELECTIONS OFFICIALS’ FAILURE TO CONDUCT A FULL ONE PERCENT MANUAL AUDIT OF ALL BALLOTS CAST ALSO THREATENS THE INTEGRITY OF THE VOTE. 40

CAUSES OF ACTION 41

RELIEF REQUESTED 48

HOWARD
RICE
NEMEROVSKI
CANADY
FALK
& RABKIN
Professional Corporation

1 Plaintiffs and Petitioners Joseph Holder, Peter Cantisani, Dolores Huerta, Judy
2 Bertelsen, Charles L. Krugman, David Hague Goggin, Alyce E. Fretland, Helen Acosta,
3 Mary C. Kennedy, Charles Fox, Marty Krasney, Mitch Clogg, Ben P. Van Meter, Nancy
4 Tilcock, Charles O. Lowery, Jr., Lillian Ritt, Harold C. Case, Susan J. Case, Kenneth Martin
5 Stevenson, Larry Marks, Harry John Rapf, Merrilee Davies, Bernice M. Kandarian, Victoria
6 Post, and Veronica Elsea (collectively "Petitioners") allege as follows:
7

8 INTRODUCTION

9 1. Petitioners bring this Verified Petition For Writ Of Mandate, Declaratory And
10 Injunctive Relief (the "Petition") to protect their fundamental rights to vote and to protect the
11 integrity of their votes in California elections. Petitioners seek to reverse a decision by the
12 California Secretary of State improperly certifying an electronic voting system that does not
13 satisfy state law requirements and that presents unacceptable risks of vote manipulation,
14 election uncertainty and disputation, and incorrect election outcomes. Petitioners also seek
15 to prevent county election officials from using electronic voting equipment that does not
16 comply with applicable state law (or the federal requirements it incorporates), and from
17 expending their limited resources to purchase computerized voting systems that do not meet
18 these requirements and should not have been certified for use in California.

19 2. On February 17, 2006, Defendant/Respondent California Secretary of State Bruce
20 McPherson "conditionally" certified an electronic voting system manufactured by Diebold
21 Election Systems, Inc. (the "Diebold Voting System" or "Voting System") for use in
22 elections in California, including statewide elections to be held on June 6, 2006 and
23 November 7, 2006. The Diebold Voting System includes both the AccuVote-OS ("AV-
24 OS"), an optical scanner that reads votes from paper ballots, and the AccuVote-TSx ("AV-
25 TSx"), a Direct Recording Electronic ("DRE") device that allows a voter to vote by pressing
26 choices displayed on a computer "touchscreen."

27 3. As is explained in greater detail below, the Secretary of State's "conditional"
28 certification of the Voting System was improper and unlawful on numerous independent

1 grounds:

2 (a) *First*, the Secretary of State's certification of the AV-TSx violated
3 Petitioners' constitutional rights to vote, to have their votes counted, and to equal protection
4 of laws with respect to their votes in California elections. The Diebold AV-TSx does not
5 meet disability access requirements and is fraught with demonstrated substantive
6 vulnerabilities to "hacking," fraud and vote manipulation. Indeed, the Secretary's own
7 experts' analysis recognized that the Diebold Voting System failed to meet the requirements
8 of state law, that it has a large number of security flaws, and that there are additional known
9 security vulnerabilities outside the limited scope of their investigation. Moreover, the AV-
10 TSx does not meet accessibility requirements and its thermal paper "toilet roll" voting record
11 is inadequate to meet the vote audit and/or recount requirements. Use of the Diebold Voting
12 System poses a grave and present danger to the integrity of California elections in violation
13 of Petitioners' constitutional rights.

14 (b) *Second*, the Secretary of State's certification decision was unlawful
15 because, as his own voting experts acknowledged, the Voting System software was not
16 compliant with federal voluntary standards for voting system software because it contains
17 prohibited "interpreted code." The federal voluntary standards were adopted as mandatory
18 requirements in California law and the acknowledged presence of "interpreted code" in the
19 Voting System renders the Secretary of State's certification illegal.

20 (c) *Third*, the Secretary's attempt to impose "conditions" on the certification
21 was improper and unlawful. The Secretary's certification purports to require counties using
22 the Voting System to implement certain physical security regulations. However, these stop-
23 gap physical security regulations were designed to be *short-term* measures for *local*
24 elections, and they were designed by computer scientists with at best limited expertise in the
25 areas of physical and procedural, as opposed to programming, safeguards to the integrity of
26 the vote. The Secretary of State also did not address the feasibility or efficacy of adoption of
27 the new physical security regulations by California county election officials and poll
28 workers. For example, they may be ineffective because the AV-TSx memory cards, which

1 the measures are designed to protect, appear to be accessible and programmable *even when*
2 *the cards are inserted and sealed into AV-TSx terminals*. Moreover, these new regulations
3 were not previously disclosed, have never been tested, and materially change the way in
4 which elections using the Voting System will be conducted. Nonetheless, the Secretary of
5 State improperly adopted them without holding a public hearing on the new regulations or
6 subjecting them to public scrutiny.

7 (d) *Fourth*, the Secretary of State’s certification of the Voting System violated
8 California law requirements with respect to audits of election results. The AV-TSx system
9 does not include a paper ballot that can be subjected to the election audit required by state
10 law. California law requires that county elections officials perform a manual (*i.e.* non-
11 computer assisted) recount of at least 1% of each county’s ballots, and perform a full manual
12 recount under certain circumstances. While votes counted by the other main component of
13 the Diebold Voting System, the AV-OS optical scanner, can be easily audited by using the
14 original paper ballots that were passed through the scanner, the AV-TSx records votes
15 electronically from the AV-TSx’s touchscreen, then prints them on a continuous roll of thin
16 thermal paper. The AV-TSx system does not utilize, and has not been certified as utilizing,
17 an “auditable” paper trail in accordance with the Elections Code. In fact, the Secretary of
18 State has never tested the usability or the durability of the AV-TSx’s thermal paper roll
19 under the conditions of the 1% and sometimes full manual audit required by the Elections
20 Code, and the evidence shows that the AV-TSx is not auditable by any reasonable standard.

21 (e) *Fifth*, the Secretary of State’s certification of the AV-TSx system was
22 improper because the AV-TSx does not comply with California requirements that a paper
23 record be “accessible” to blind and visually impaired voters. California law requires that all
24 DREs, such as the AV-TSx, create *accessible* voter-verified paper trails. By statute, a DRE
25 must be able to convey the information contained in the paper trail by both visual *and* non-
26 visual means, such as through an audio component. As the Secretary of State has already
27 acknowledged, the AV-TSx does not provide an audible “read-back” of its thermal paper roll
28 record for blind and visually-impaired voters. Rather, it provides an audible “read-back” of

HOWARD
RICE
NEMEROVSKI
CANADY
FALK
& RABKIN

1 an electronic vote record that may or may not be the same as the information shown on the
2 thermal roll paper trail. As such, any thermal paper roll records generated by the AV-TSx
3 are not “accessible” to blind and visually impaired voters.

4 (f) *Sixth*, the Secretary of State’s certification of the AV-TSx also was
5 improper because the system fails to comply with Section 301 of the federal Help America
6 Vote Act because the AV-TSx has no feature to enable low-dexterity individuals to vote
7 privately and independently. Compliance with the act is made mandatory in California
8 under the Secretary of State’s certification of the system.

9 (g) *Seventh*, perhaps recognizing the problems inherent in his certification of
10 machines that failed to comply with state and federal requirements, the Secretary of State
11 added language to his certification order purporting to shift potential liability for non-
12 compliance with state law and federal requirements to Diebold and, more objectionably, to
13 the county elections officials responsible for purchasing voting machines. In light of the
14 Secretary of State’s statutory duty to insure that voting machines he certifies comply with
15 the law, this was an improper delegation of duty.

16 4. On information and belief, Defendants/Respondents county elections officials
17 (“County Elections Officials”) plan to purchase or use the AV-TSx system in statewide
18 elections in 2006.

19 5. The procedural and substantive flaws in the AV-TSx certification compel a
20 finding that the AV-TSx system, as it is currently configured, cannot be used for elections in
21 California and should not have been certified. Petitioners therefore seek: (1) a writ of
22 mandate requiring that the Secretary of State to rescind the certification of the AV-TSx; (2) a
23 writ of mandate requiring that the County Elections Officials not use, or make contracts for
24 the use of, the AV-TSx in the general election scheduled for November 7, 2006; (3)
25 declaratory relief that the AV-TSx certification is invalid as a matter of law; (4) declaratory
26 relief that the new regulations and requirements accompanying the AV-TSx certification are
27 invalid as a matter of law; (5) injunctive relief barring the Secretary of State from re-
28 certifying the AV-TSx until its security, auditability and accessibility flaws have been

HOWARD
RICE
NEMEROVSKI
CANADY
FALK
& RABKIN
Professional Corporation

1 addressed; and (6) injunctive relief barring counties' purchase or use of the AV-TSx until it
2 meets the requirements of state law.

3 6. Petitioners also bring this action to address a different, but related, violation of
4 the Elections Code. Pursuant to Elections Code 15360, county elections officials are
5 required to manually audit ballots tabulated on voting systems from one percent of a
6 county's precincts. This audit helps protect against fraud and problems in the voting
7 systems' technology. On information and belief, some county elections officials are not
8 complying with Elections Code 15360, either because they are not conducting any post-
9 election manual audit, or because they are not including absentee and early voter mail-in
10 ballots as part of their audits. Petitioners seek a declaration that neither of these procedures
11 complies with Elections Code 15360.

12
13 **THE PARTIES**

14 7. Plaintiff/Petitioner JOSEPH HOLDER is a resident and registered voter of San
15 Joaquin County, California.

16 8. Plaintiff/Petitioner PETER CANTISANI is a resident and registered voter of
17 Alameda County, California. Mr. Cantisani is also blind.

18 9. Plaintiff/Petitioner DOLORES HUERTA is a resident and registered voter of
19 Kern County, California.

20 10. Plaintiff/Petitioner JUDY BERTELSEN, M.D. is a resident and registered voter
21 of Alameda County, California.

22 11. Plaintiff/Petitioner CHARLES L. KRUGMAN is a resident and registered voter
23 of Fresno County, California. Mr. Krugman is also blind.

24 12. Plaintiff/Petitioner DAVID HAGUE GOGGIN is a resident and registered voter
25 of Humboldt County, California.

26 13. Plaintiff/Petitioner ALYCE E. FRET LAND is a resident and registered voter of
27 Humboldt County, California.

28 14. Plaintiff/Petitioner HELEN ACOSTA is a resident and registered voter of Kern

1 County, California.

2 15. Plaintiff/Petitioner MARY C. KENNEDY is a resident and registered voter of
3 Los Angeles County, California.

4 16. Plaintiff/Petitioner CHARLES FOX is a resident and registered voter of Marin
5 County, California. Mr. Fox has advanced multiple sclerosis, low vision, and full
6 quadriplegia.

7 17. Plaintiff/Petitioner MARTY KRASNEY is a resident and registered voter of
8 Marin County, California.

9 18. Plaintiff/Petitioner MITCH CLOGG is a resident and registered voter of
10 Mendocino County, California.

11 19. Plaintiff/Petitioner BEN P. VAN METER is a resident and registered voter of
12 Modoc County, California.

13 20. Plaintiff/Petitioner NANCY TILCOCK is a resident and registered voter of
14 Placer County, California.

15 21. Plaintiff/Petitioner CHARLES O. LOWERY, JR., is a resident and registered
16 voter of San Diego County, California.

17 22. Plaintiff/Petitioner LILLIAN RITT is a resident and registered voter of San
18 Diego County, California.

19 23. Plaintiff/Petitioner HAROLD C. CASE is a resident and registered voter of San
20 Luis Obispo County, California.

21 24. Plaintiff/Petitioner SUSAN J. CASE is a resident and registered voter of San Luis
22 Obispo County, California.

23 25. Plaintiff/Petitioner KENNETH MARTIN STEVENSON is a resident and
24 registered voter of Santa Barbara County, California.

25 26. Plaintiff/Petitioner LARRY MARKS is a resident and registered voter of
26 Siskiyou County, California.

27 27. Plaintiff/Petitioner HARRY JOHN RAPF is a resident and registered voter of
28 Trinity County, California.

HOWARD
RICE
NEMEROVSKI
CANADY
TALK
& RABKIN
Professional Corporation

1 28. Plaintiff/Petitioner MERRILEE DAVIES is a resident and registered voter of
2 Tulare County, California.

3 29. Plaintiff/Petitioner BERNICE M. KANDARIAN is a resident and registered
4 voter of Santa Clara County, California. Ms. Kandarian has low vision. Ms. Kandarian is
5 the President of the Council of Citizens with Low Vision International.

6 30. Plaintiff/Petitioner VICTORIA POST is a resident and registered voter of San
7 Francisco County, California. Ms. Post is also blind.

8 31. Plaintiff/Petitioner VERONICA ELSEA is a resident and registered voter of
9 Santa Cruz County, California. Ms. Elsea is also blind.

10 32. Defendant/Respondent BRUCE MCPHERSON is the Secretary of State of
11 California and the Chief Elections Officer for the state.

12 33. Defendant/Respondent ELAINE GINNOLD is the Acting Registrar of Voters for
13 the County of Alameda and is responsible for conducting statewide primary and statewide
14 general elections in that county. On information and belief, Alameda County intends to use
15 Diebold AV-TSx touchscreen systems in upcoming 2006 elections.

16 34. Defendant/Respondent VICTOR E. SALAZAR is the Registrar of Voters for the
17 County of Fresno and is responsible for conducting statewide primary and statewide general
18 elections in that county. On information and belief, Fresno County intends to use Diebold
19 AV-TSx touchscreen systems in upcoming 2006 elections.

20 35. Defendant/Respondent CAROLYN WILSON CRNICH is the Registrar of Voters
21 for the County of Humboldt and is responsible for conducting statewide primary and
22 statewide general elections in that county. On information and belief, Humboldt County
23 intends to use Diebold AV-TSx touchscreen systems in upcoming 2006 elections.

24 36. Defendant/Respondent ANN BARNETT is the Registrar of Voters for the County
25 of Kern and is responsible for conducting statewide primary and statewide general elections
26 in that county. On information and belief, Kern County intends to use Diebold AV-TSx
27 touchscreen systems in upcoming 2006 elections.

28 37. Defendant/Respondent THERESA NAGEL is the County Clerk for the County of