

1 being certified, may be noncompliant with state and federal regulations. *See* Ex. 22 at 5.
2 The certification makes an end run around this problem by forcing third parties—
3 presumably County Elections Officials who will purchase AV-TSx systems—to enforce the
4 Elections Code if they find that the AV-TSx does not comply with these regulations. *Id.*

5 178. The Secretary of State’s certification was an unlawful delegation of his sole and
6 personal responsibility to approve only those systems that fulfill the requirements of the
7 Elections Code. *See* Elec. Code §19200.

8
9 **VI. COUNTY ELECTIONS OFFICIALS’ FAILURE TO**
10 **CONDUCT A FULL ONE PERCENT MANUAL AUDIT OF**
11 **ALL BALLOTS CAST ALSO THREATENS THE INTEGRITY**
12 **OF THE VOTE.**

13 179. Elections Code Section 15360 provides that, in every election, County Elections
14 Officials must manually count ballots tabulated by voting devices in one percent of the
15 county’s precincts, chosen at random. Elec. Code §15360. *See also* Elections Code
16 §19253(b)(1) (providing that for DREs, the voter verified paper trail shall be used for the
17 one percent manual audit). This one percent manual audit is especially important to insure
18 the integrity and accuracy of the vote in an era when most counties count their votes entirely
19 by machine and, as described above, the counts produced by these machines are vulnerable
20 to manipulation.

21 180. On information and belief, County Elections Officials in several California
22 counties have not performed the statutorily required one percent manual recount in previous
23 elections, and are not intending to do so in upcoming elections. County Elections Officials
24 have manually audited one percent of ballots cast on election day, but have not manually
25 audited one percent of absentee or early-voter mail-in ballots. This procedure does not
26 comply with Elections Code Section 15360.

1 **FIRST CAUSE OF ACTION**
2 **(Declaratory Relief That Certification And Use Of The AV-TSx**
3 **Violates The California Constitution)**

4 181. Paragraphs 1 through 180 are incorporated herein by reference.

5 182. As described above, the Secretary of State certified the AV-TSx for use in all
6 future California elections despite the failure of that system to satisfy applicable legal
7 requirements for accessibility, security, and verifiability both by the voter and for purposes
8 of audit and/or recount.

9 183. By certifying the AV-TSx despite these critical failures, the Secretary of State has
10 opened the door for counties to purchase and use AV-TSx systems in future elections, and
11 elections officials in several counties have indicated they will use the AV-TSx in future
12 elections.

13 184. Certification of the AV-TSx by Defendant/Respondent Secretary of State and any
14 purchase or use of the AV-TSx by Defendants/Respondents County Elections Officials
15 violates Petitioners' rights to vote under Article 2, Section 2 of the California Constitution.

16 185. Certification of the AV-TSx by Defendant/Respondent Secretary of State and any
17 purchase or use of the AV-TSx by Defendants/Respondents County Elections Officials
18 violates Petitioners' rights to have their votes and the votes of other California voters
19 counted correctly under Article 2, Section 2.5 of the California Constitution.

20 186. Certification of the AV-TSx by Defendant/Respondent Secretary of State and any
21 purchase or use of the AV-TSx by Defendants/Respondents County Elections Officials
22 violates Petitioners' right to equal protection of the laws under Article 1, Section 7 of the
23 California Constitution by uniquely burdening the fundamental rights of those Petitioners
24 who vote in counties that use the AV-TSx to vote and to have votes counted correctly.

25 187. An actual controversy exists over whether Defendants/Respondents County
26 Elections Officials violate Petitioners' rights under the California Constitution if they use the
27 AV-TSx in future California elections.

28 188. A declaration by this Court is needed to resolve the dispute over the validity of
the Secretary of State's certification and potential use of the AV-TSx by County Elections

1 Officials.

2
3 **SECOND CAUSE OF ACTION**
4 **(Mandamus Pursuant To Elections Code §13314(a) Against All**
5 **Defendants/Respondents)**

6 189. Paragraphs 1 through 180 are incorporated herein by reference.

7 190. As described above, the AV-TSx fails to satisfy state law requirements, including
8 those regarding accessibility, security, and auditability.

9 191. Defendant/Respondent Secretary of State has neglected his duties by issuing a
10 “conditional certification” for the AV-TSx in violation of the Elections Code and the
11 Constitution.

12 192. Petitioners are registered voters in California who are electors within the meaning
13 of Elections Code Section 13314(a). Pursuant to Elections Code Section 13314(a),
14 Petitioners are entitled to a writ of mandate ordering Defendant/Respondent to rescind his
15 “conditional certification” of the AV-TSx and not to approve any AV-TSx systems that do
16 not comply with state law.

17 193. Defendant/Respondent Secretary of State has neglected his duties under Elections
18 Code Sections 19200, 19205, 19222, 19227, and 19250 to ensure the security, integrity and
19 accessibility of elections conducted by certifying the AV-TSx for use in future state-wide
20 elections.

21 194. Absent mandamus relief from this Court, Defendants/Respondents County
22 Elections Officials are about to neglect their statutory duties under Elections Code Section
23 19250(b) by purchasing and/or using the AV-TSx in future elections.

24 195. Issuance of a peremptory writ barring the use of the AV-TSx will not
25 substantially interfere with future elections.

26 196. Petitioners have no plain and speedy alternative remedy at law.

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1 **THIRD CAUSE OF ACTION**
2 **(Mandamus Pursuant to Code Civ. Proc. §1085**
3 **Against All Defendants/Respondents)**

4 197. Paragraphs 1 through 180 are incorporated herein by reference.

5 198. As described above, the AV-TSx fails to satisfy state law requirements, including
6 those regarding accessibility, security, and auditability.

7 199. Defendant/Respondent Secretary of State has neglected his duties by issuing a
8 “conditional certification” for the AV-TSx in violation of the Elections Code and the
9 California Constitution.

10 200. Although Petitioners believe Section 13314(a) is the proper basis for mandamus
11 in this case, and on that basis seek relief under that section, if the Court finds this section
12 inapplicable, Petitioners alternatively seek relief under Civil Procedure Code Section 1085,
13 which provides that mandamus may issue to “compel performance of an act which the law
14 specially enjoins.”

15 201. By issuing his “conditional certification” of the AV-TSx for future state-wide
16 elections, Defendant/Respondent Secretary of State has failed to perform duties required of
17 him under Elections Code Sections 19200, 19205, 19222, 19227, and 19250 to ensure the
18 security, integrity and accessibility of elections.

19 202. Absent mandamus relief from this Court, Defendants/Respondents County
20 Elections Officials are about to neglect their statutory duties under Elections Code Section
21 19250(b) by purchasing and/or using the AV-TSx in future elections.

22 203. Issuance of a peremptory writ barring the use of AV-TSx will not substantially
23 interfere with future elections.

24 204. Petitioners have made a formal demand that Defendant/Respondent Secretary of
25 State rescind his certification of the AV-TSx. Petitioners have also made a formal demand
26 that Defendants/Respondents County Elections Officials cancel any plans to use or purchase,
27 and refrain from using or purchasing, the AV-TSx.

28 205. Petitioners have no plain and speedy alternative remedy at law.

1 **FOURTH CAUSE OF ACTION**
2 **(Administrative Mandamus Pursuant to Code Civ. Proc. §1094.5**
3 **Against All Defendants/Respondents)**

4 206. Paragraphs 1 through 180 are incorporated herein by reference.

5 207. As described above, the AV-TSx fails to satisfy state law requirements, including
6 those regarding accessibility, security, and auditability.

7 208. Although Petitioners believe that mandamus under Section 13314(a) and/or
8 Section 1085 is the proper basis for mandamus in this case, in the alternative Petitioners seek
9 relief under Civil Procedure Code Section 1094.5.

10 209. By issuing his “conditional certification” of the AV-TSx for future state-wide
11 elections, Defendant/Respondent Secretary of State has failed to perform duties required of
12 him under Elections Code Sections 19200, 19205, 19222, 19227, and 19250 to ensure the
13 security, integrity and accessibility of elections.

14 210. Absent mandamus relief from this Court, Defendants/Respondents County
15 Elections Officials are about to neglect their statutory duties under Elections Code Section
16 19250(b) by purchasing and/or using the AV-TSx in future elections.

17 211. Issuance of a peremptory writ ordering rescission of the certification of the AV-
18 TSx will not substantially interfere with the conduct of future elections in California.

19 212. Petitioners have made a formal demand that Defendant/Respondent Secretary of
20 State rescind his certification of the AV-TSx. Petitioners have also made a formal demand
21 that Defendants/Respondents County Elections Officials cancel any plans to use or purchase,
22 and refrain from using or purchasing, the AV-TSx.

23 213. Petitioners have no plain and speedy alternative remedy at law.

24 **FIFTH CAUSE OF ACTION**
25 **(Declaratory Relief Pursuant to Code Civ. Proc. §1060)**

26 214. Paragraphs 1 through 180 are incorporated herein by reference.

27 215. As described above, the AV-TSx fails to satisfy state law requirements, including
28 those regarding accessibility, security, and auditability.

1 County Elections Officials if they choose to purchase or use the AV-TSx without complying
2 with the APA.

3 225. A declaration by this Court is needed to resolve the controversy over the validity
4 of the Secretary of State’s “conditional certification” in light of the new regulations adopted
5 thereby.

6
7 **SEVENTH CAUSE OF ACTION**
8 **(Declaratory Relief Pursuant To Code Civ. Proc. §1060)**

9 226. Paragraphs 1 through 180 are incorporated herein by reference.

10 227. As described above, the AV-TSx fails to satisfy state law requirements, including
11 those regarding accessibility, security, and auditability.

12 228. By certifying the AV-TSx despite these critical failures, the Secretary of State has
13 opened the door for counties to purchase and use AV-TSx systems in future elections, and
14 elections officials in several counties have indicated they will use the AV-TSx in future
15 elections. As a result, Petitioners and other California voters will be forced to use a voting
16 system that fails to satisfy the minimum requirements of state law.

17 229. In issuing his conditional certification with respect to the AV-TSx, the Secretary
18 of State has attempted to impose a duty upon County Elections Officials who seek to use the
19 AV-TSx in future California elections to ensure that AV-TSx “shall meet all applicable state
20 and federal standards, regulations and requirements.”

21 230. The AV-TSx does not meet applicable requirements of state law, including
22 federal standards incorporated into state law.

23 231. In issuing his conditional certification with respect to the AV-TSx, the Secretary
24 of State has imposed physical security regulations upon County Elections Officials who seek
25 to use the AV-TSx in future California elections.

26 232. Volunteer election poll workers are not qualified or trained to implement these
27 physical security regulations and there is no evidence that County Elections Officials have
28 the resources and ability adequately to implement these security regulations imposed by the

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1 Secretary of State.

2 233. An actual controversy therefore exists whether County Elections Officials may
3 contract for, purchase, or use the AV-TSx in future California elections given (i) the fact that
4 the AV-TSx does not satisfy the “legal compliance” requirement imposed by the Secretary
5 of State as a condition to his certification; and (ii) the inability of County Elections Officials
6 to comply adequately with physical security requirements imposed by the Secretary of State.

7 234. A declaration by this Court is needed to resolve the controversy over whether
8 County Elections Officials can purchase and/or use the AV-TSx in future elections.

9
10 **EIGHTH CAUSE OF ACTION**
11 **(Declaratory Relief Pursuant To Civ. Code §1060)**

12 235. Paragraphs 1 through 180 are incorporated herein by reference.

13 236. As described above, County Elections Officials are not manually auditing one
14 percent of votes cast as absentee or early voting ballots, but nonetheless tabulated on voting
15 systems.

16 237. An actual controversy exists whether these manual audit procedures violate
17 Elections Code Section 15360.

18 238. A declaration by this Court is needed to resolve the controversy over whether
19 County Elections Officials must perform one-percent manual audits after all elections and to
20 include in those audits absentee and early voting ballots.

21
22 **NINTH CAUSE OF ACTION**
23 **(Injunctive Relief Pursuant To Civ. Code §§3420 & 3422)**

24 239. Paragraphs 1 through 180 are incorporated herein by reference.

25 240. As described above, the Secretary of State certified the AV-TSx despite: (1) the
26 system’s failure to satisfy state law; (2) the system’s acknowledged vulnerability to fraud;
27 and (3) the absence of any evidence that the AV-TSx provides a record that can be audited
28 pursuant to state law.

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1 241. By certifying the AV-TSx despite these critical failures, the Secretary of State has
2 opened the door for counties to purchase and use AV-TSx systems in future elections, and
3 elections officials in several counties have indicated they will use the AV-TSx in future
4 elections. As a result, Petitioners and other California voters will be forced to use a voting
5 system that fails to satisfy the requirements of state law.

6 242. Petitioners and other California voters will suffer irreparable injury if they are
7 forced to use a voting system that fails to satisfy the requirements of state law.

8 243. Petitioners have no plain, speedy or adequate alternative remedy at law.

9
10 **RELIEF REQUESTED**

11 244. WHEREFORE, PETITIONERS pray for judgment as follows:

12 245. For a declaration that use of the currently certified version of the AV-TSx voting
13 system in future California elections violates Petitioners' rights under the California
14 Constitution.

15 246. For a Writ of Mandate ordering Defendant/Respondent Secretary of State to
16 rescind his February 17, 2006 approval of the AV-TSx.

17 247. For a Writ of Mandate ordering Defendant/Respondent Secretary of State to not
18 approve any AV-TSx systems which do not comply with state law.

19 248. For a Writ of Mandate ordering Defendants/Respondents County Elections
20 Officials to not purchase or lease, or contract for the purchase or lease of, the AV-TSx
21 voting system approved by the Secretary of State on February 17, 2006.

22 249. For a Writ of Mandate ordering Defendants/Respondents County Elections
23 Officials to not purchase or lease, or contract for the purchase or lease of, any AV-TSx
24 systems which do not comply with state law.

25 250. For a declaration that the Secretary of State's February 17, 2006 certification of
26 the AV-TSx is invalid.

27 251. For a declaration that the conditions contained in the Secretary of State's
28 February 17, 2006 certification of the AV-TSx were regulations that are subject to the

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1 Administrative Procedures Act (“APA”), and that the certification is invalid for failure to
2 satisfy APA requirements.

3 252. For a declaration that County Elections Officials cannot contract for or purchase
4 the AV-TSx in the version approved by the Secretary of State on February 17, 2006 because
5 the AV-TSx fails to satisfy the minimum requirements of state law.

6 253. For a declaration that County Elections Officials must perform a manual recount
7 of ballots tabulated on voting systems in one percent of the county’s precincts, and that the
8 recount must include absentee and early ballots.

9 254. For a permanent injunction enjoining Defendant/Respondent Secretary of State,
10 and his agents, servants, and employees, and all persons acting under, in concert with, or for
11 him:

12 (a) To rescind his February 17, 2006 approval of the AV-TSx;

13 (b) From certifying the AV-TSx, or any modified version of the AV-TSx,
14 which does not satisfy the requirements of state law; and from imposing any new regulations
15 on County Elections Officials without satisfying the requirements of the Administrative
16 Procedures Act.

17 255. For a permanent injunction enjoining Defendants/Respondents County Elections
18 Officials, and their agents, servants, and employees, and all persons acting under, in concert
19 with, or for them:

20 (a) To withdraw from any contracts for the purchase and/or lease of any AV-
21 TSx systems which were approved by the Secretary of State’s February 17, 2006
22 certification;

23 (b) From using in an election any AV-TSx systems which were approved by the
24 Secretary of State’s February 17, 2006 certification; from using in any election any version
25 of the AV-TSx system which does not satisfy the requirements of state law; from spending
26 public funds to purchase and/or lease any AV-TSx systems which were approved by the
27 Secretary of State’s February 17, 2006 certification; from spending public funds to purchase
28 and/or lease any version of the AV-TSx system which does not satisfy the requirements of

1 state law.

2 256. For such other and further relief as the Court may deem just and proper.

3
4 DATED: March 20, 2006.

5 JOHN EICHHORST
6 MICHAEL L. GALLO
7 JASON S. TAKENOUCI
8 D'OLONRA C. ELLIS
9 HOWARD RICE NEMEROVSKI CANADY
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12 LAW OFFICES OF LOWELL FINLEY

13 By: 

14 JOHN EICHHORST

15 Attorneys for Plaintiffs/Petitioners

16 HOWARD
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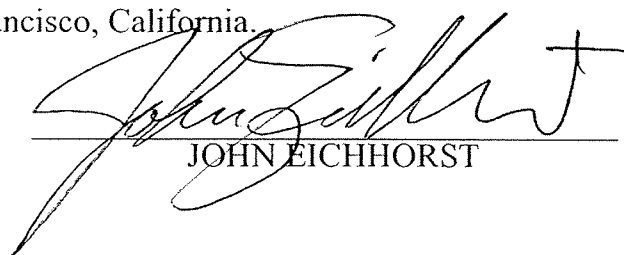
1 **VERIFICATION**

2 I, John Eichhorst, declare as follows

3 I, John Eichhorst, have read the foregoing VERIFIED PETITION FOR WRIT OF
4 MANDATE and accompanying APPENDIX and know the contents thereof. I certify that,
5 on information and belief, the matters alleged in the petition are true.

6 I declare under penalty of perjury under the laws of the State of California that the
7 foregoing is true and correct.

8 Executed on March 20, 2006 at San Francisco, California.

9 
10 _____
11 JOHN EICHHORST

13 HOWARD
14 RICE
15 NEMEROVSKI
16 CANADY
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