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San Francisco County Superior Court
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SUPERIOR COURT OF THE STATE OF CALIFORNIA

CITY AND COUNTY OF SAN FRANCISCO

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

Plaintiffs/Petitioners,

v.

(see following page)

No. CPF 06-506171

Action Filed: March 21, 2006

Action Remanded to this Court: July 17, 2006

PETITIONERS' REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR WRIT OF MANDATE AND PRELIMINARY INJUNCTION

Date: September 14, 2006
Time: 9:30 a.m.
Dep't: 302
Judge: Hon. Ronald E. Quidachay

Trial Date: None Set

(Hon. Peter J. Busch recused)

BRUCE MCPHERSON, as California Secretary of State; ELAINE GINNOLD, as Elections Official of Alameda County; CANDACE J. GRUBBS, as Elections Official of Butte County; VICTOR E. SALAZAR, as Elections Official of Fresno County; ANN BARNETT, as Elections Official of Kern County; THERESA NAGEL, as Elections Official of Lassen County; CONNY McCORMACK, as Elections Official of Los Angeles County; MARSHA WHARFF, as Elections Official of Mendocino County; MAXINE MADISON, as Elections Official of Modoc County; KATHLEEN WILLIAMS, as Elections Official of Plumas County; MIKEL HASS, as Elections Official of San Diego County; DEBBIE HENCH, as Elections Official of San Joaquin County; COLLEEN BAKER, as Elections Official of Siskiyou County; and DOES 1 through 50,

Defendants/Respondents.

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INTRODUCTION

The Secretary of State asserts that he can rewrite the Elections Code to turn mandatory provisions into voluntary ones, and create new regulations that, unlike any other agencies' regulations, are immune from the Administrative Procedure Act. He also asserts that he can certify voting systems despite their acknowledged failure to meet the plain language requirements of state law. He is wrong on all counts. The Legislature has imposed specific requirements on the use of electronic voting systems. This Court should strictly enforce those requirements because they protect the fundamental core of our representative democracy—each citizen's right to vote and have his or her vote counted correctly.

The Secretary of State's own expert confirms that the AV-TSx contains a "vulnerability [that] is undoubtedly the most serious security vulnerability I have ever seen in any electronic voting machine." Wagner Decl. ¶22. "It is truly dangerous." *Id.* For this reason, and others identified in Petitioners' opening brief, the AV-TSx and its certification violate California law. These violations are not cured by "pretty good" stop-gap security measures or expressions of good intentions, exigency or willingness to respond after election fraud occurs. The Court should apply the law, grant the motion and thereby assure California Voters that their Constitutional rights to have their votes counted correctly are being protected.

ARGUMENT

I. PETITIONERS ARE ENTITLED TO MANDAMUS RELIEF.

Petitioners' opening brief demonstrated they are entitled to mandamus relief because the AV-TSx does not comply with California law. Pets. Br. at 24-25. A writ of mandate is required here to remedy the Secretary of State's unlawful certification of the AV-TSx. [1]

[1]Elections Code Section 19222 provides that the Secretary of State's withdrawal of his previous approval of a voting system "shall not be effective as to any election conducted within six months of that withdrawal." Petitioners ask that the Court invalidate the certification of the AV-TSx, but they acknowledge that the Court may order the lesser remedy of mandating that the Secretary of State withdraw his unlawful certification of the AV-TSx.

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Contrary to Respondents' argument (Resp. Br.[2] at 9-11), the Court must independently assess whether the Secretary of State's actions comply with California law. When a state agency has authority to adopt regulations to implement a statute, "no regulation adopted is valid or effective unless consistent and not in conflict with the statute and reasonably necessary to effectuate the purpose of the statute." Gov't Code §11342.2. Accordingly, when an agency interprets its governing statutes, the courts must "independently judge the text of the statute." *Yamaha Corp. of America v. State Bd. of Equalization*, 19 Cal. 4th 1, 7 (1998). In other words, "[t]he quasi-legislative standard of review is '*inapplicable* when the agency is not exercising a discretionary rule-making power, but merely *construing* a controlling statute.'" *Id.* at 12 (emphasis in original).

The Secretary of State's certification of the AV-TSx explicitly, and necessarily, construes the requirements of California law, including requirements that Petitioners allege were not satisfied. *See* Gallo Decl. Ex. E at ¶j ("voting systems certified for use in California shall comply with all applicable state and federal statutes, regulations, rules and requirements"). Respondents' own briefs admit that the Secretary of State's certification of the AV-TSx was contrary to mandatory provisions of California law. *See* Resp. Br. at 18 (admitting failure to satisfy "nonvisual" access requirement of Elec. Code §19250); *id.* at 24 (admitting failure to satisfy the Administrative Practices Act). Where, as here, an agency's interpretation of a statute is contrary to the terms or intent of the statute, it is entitled to no deference at all (*Traverso ex rel. Dept. of Transp.*, 46 Cal. App. 4th 1197, 1206-1207 (1996)) and this Court can and must exercise its independent judgment in determining whether the Secretary of State's actions comply with state law. *See Yamaha*, 19 Cal. 4th at 8; *see also Nevada County Office of Educ. v. Riles*, 149 Cal. App. 3d 767, 773 (1983).

Similarly, the Court's review cannot be limited to the administrative record where, as here, the agency fails to comply with statutory law. *See Yamaha*, 19 Cal. 4th at 8. Such a restriction would prevent consideration of evidence that the Secretary of State himself relied

[2]We refer to the Secretary of State's brief as "Resp. Br."

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on in his failed attempt to address the "dangerous" security gaps in the AV-TSx. *See* Wagner Decl. ¶¶22-28.

II. PETITIONERS' MOTION SHOULD BE GRANTED.

A. Petitioners Are Likely To Prevail On The Merits Of Their Claim That Certification And Use Of The AV-TSx Violates California Law.

1. Certification And Use Of The Diebold AV-TSx Violates Elections Code Section 19205 Because The AV-TSx Is Not Suitable For The Purpose For Which It Was Intended, Or Safe From Fraud Or Manipulation.

The AV-TSx's admitted security flaws make it illegal for use in California elections. Petitioners' opening brief described how, prior to the certification of the AV-TSx, computer security experts from the Secretary of State's Voting Systems Technology Assessment Advisory Board ("VSTAAB") panel identified serious vulnerabilities in the AV-TSx's software that would allow an attacker to modify vote totals, or otherwise compromise the integrity of an election. Pets. Br. at 9-10; *see also* Gallo Decl. Ex. A at 2, 11-18 (VSTAAB Report).[3] Petitioners also described the so-called "Hursti II" vulnerability and noted that computer security experts believe it is the worst security hole ever discovered in a voting machine. Pets. Br. at 4.[4] Petitioners also presented evidence that, if a party exploited the Hursti II vulnerability to install malicious code into the AV-TSx, the problem would be very difficult to detect or cure. Jones Decl. ¶40.

Respondents do not challenge Petitioners' evidence that the AV-TSx suffers from serious security vulnerabilities. In fact, Respondents' declarant David Wagner, lead author of the VSTAAB report, acknowledges "real and serious" security flaws in Diebold's voting

---

[3]Respondents argue that Petitioners' undisputed evidence of a long history of security flaws and serious misrepresentations regarding the AV-TSx (Pets. Br. at 9 n.5) is irrelevant because it relates to "earlier versions" of the system. Resp. Br. at 15 n.9. However, neither Respondents, nor Diebold, have presented any evidence to suggest that corrective action has been taken to address the systemic problems that Diebold appears to experience with each successive version of their system.

[4]Respondents argue that because the Secretary of State was unaware of Hursti II when he made his certification decision, evidence about it is not relevant to the Court's inquiry into whether the AV-TSx complies with the law. That is plainly absurd—if the Hursti II vulnerability makes the AV-TSx unsafe for use in elections, then the AV-TSx cannot be used, regardless of whether Hursti II was discovered before or after the initial certification.

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machine sofware. Wagner Decl. ¶17. Wagner also confirms the severity of Hursti II:

> The "Hursti-II" vulnerability is undoubtedly the most serious vulnerability I have ever seen in any electronic voting machine. It is truly dangerous. If left unmitigated, there is the potential that a sophisticated attacker who has access to a single TSx machine could, by exploiting the "Hursti-II" vulnerability, tamper with the vote totals on many machines throughout the county, perhaps without being detected, and possibly change the outcome of a close election. (*Id.* ¶22)

Because of the AV-TSx's undisputed security vulnerabilities, the AV-TSx is susceptible to fraud or manipulation in violation of Elections Code Section 19250, and the Secretary of State's certification of the AV-TSx is illegal.

Respondents argue that the AV-TSx is properly certified for use in California elections because the Secretary of State has imposed conditions on its use to try to mitigate the severe flaws described above. However, the Secretary of State's mitigation measures are inadequate. *First*, the mitigation measures were drawn from the VSTAAB panel's recommendations for measures adequate for *local elections in the short term;* the Secretary of State did not adopt VSTAAB's proposed solutions for the longer term, or for high stakes elections, which would have required Diebold to make changes to the AV-TSx and its software. Pets. Br. at 11-12. *Second,* the VSTAAB Report and the Secretary of State's conditions of use make the unrealistic assumption that the hypothetical person seeking to alter ballot results does not have inside confederates, or access to passwords or cryptographic keys. *Id.* at 12. *Third,* it is unrealistic to expect that the conditions of use will be followed with sufficient rigor to have their desired effect. *Id.* at 12-13. In fact, Petitioners have presented evidence that, for example, poll workers had unsupervised and unfettered access to AV-TSx machines for long periods of time prior to elections. *See id.* at 4-5 (citing pollworker declarations).

Respondents' response is (1) to offer a statement from Wagner that the Secretary of State's mitigation measures are "satisfactory" for the November elections and (2) to assert that the alleged lack of electoral fraud during the June primaries shows the mitigation measures are working. Resp. Br. at 15-16. Neither of these responses is sufficient to overcome Petitioners' arguments.

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Mr. Wagner, while acknowledging the profound potential impact if the AV-TSx's vulnerabilities are exploited, offers lukewarm support for the idea that the Secretary of State's use conditions, if properly implemented by counties, offer a reasonable stop-gap approach. Mr. Wagner states in his declaration that:

> [W]hile these use procedures are not perfect, they do help to reduce the risk, *if the procedures are followed diligently*. (Wagner Decl. ¶29)(emphasis added)
>
> *In the long term, better solutions will probably be needed*, but in the meantime I believe the short-term mitigations are a satisfactory way to address these issues. (*Id.* ¶18) (emphasis added)
>
> [The use procedures are] a reasonable set of safeguards to protect our elections *until a better solution can be put in place*. (*Id.* ¶33) (emphasis added)

Mr. Wagner's declaration begs the question of why, if better solutions will be needed *in the future* to prevent exploitation of the AV-TSx's security flaws, short-term, stop-gap measures are adequate *now* to meet legal requirements applicable to this voting system. The VSTAAB Report opined that significant changes to the AV-TSx's hardware and software architecture were necessary to ensure the long-term integrity of elections (Gallo Decl. Ex. A at 31-37) and also recommended that these changes be made *before* use of the AV-TSx in high-stakes, statewide elections. *Id.* at 36-37 ("For statewide elections, or looking farther into the future, it would be far preferable to fix the vulnerabilities discussed in this report"). After the VSTAAB Report was issued, Diebold admitted it could not make the recommended architectural changes in time for the November elections (Gallo Decl. Ex. L); Mr. Wagner's declaration appears to be an attempt to put the best face on Diebold's inability to timely make real changes to the AV-TSx by claiming that mitigation measures previously described as suitable for the short term, and local elections, are now "good enough" for more important elections, assuming they could be diligently followed. The reality, of course, is that the AV-TSx simply is not sufficiently secure to meet legal requirements, and that no amount of rationalization can make expanded use of stop-gap security measures adequate to cure the AV-TSx's ills.[5]

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[5]Mr. Wagner's declaration also underscores Petitioners' case for relief beyond the (continued . . .)

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Another significant problem is that the Secretary of State's use conditions—which would not apply to the architectural changes recommended by the VSTAAB—are effective, if at all, only if rigorously observed. Petitioners' opening brief presented evidence that some of the use conditions were ineffective (*e.g.*, evidence that allegedly tamper resistant seals could be easily removed or circumvented)[6] or not observed (*e.g.*, evidence that pollworkers in San Diego county were given unrestricted access to AV-TSx machines). *See* Pets. Br. at 5, 12-13 (citing pollworker declarations). Respondents *do not controvert (or even address) this evidence*, thereby effectively conceding that the diligence premise of Mr. Wagner's opinion is false. Instead, Respondents simply argue that the lack of documented attempts to manipulate the vote in the June elections shows the use conditions are a success. However, there is no evidence Respondents made a systematic attempt to investigate and/or document possible vote fraud on the AV-TSx units or even to assess compliance with the use conditions. Also, given the severity of the AV-TSx's security problems, the possibility that vote manipulation would be undetectable or simply escape detection, and Mr. Wagner's doubts about the long term efficacy of the mitigation measures, the fact the June primary

(. . . continued)
November elections. Mr. Wagner is unequivocal that the Secretary of State's mitigation measures are inadequate as a long run solution to the AV-TSx's security problems. Respondents suggest that additional security measures will be adopted by the Secretary of State in due course, but there is no guarantee that that is the case—the current certification allows the AV-TSx to be used in any election going forward. Respondents state that Diebold has agreed to make the architectural changes recommended by the VSTAAB panel by the end of the year (McDannold Decl. ¶37) but the evidence they rely on does not stand for that proposition. *See id.* Ex. L (letter from Diebold stating that, if it made the changes recommended by the VSTAAB panel, "we *could* submit this software and firmware package" to the ITA for review by the end of the year (emphasis added)). In other words, there is no assurance that any of the architectural changes that the VSTAAB (and Mr. Wagner) deem necessary will *ever* be made. For that reason, Petitioners request that, even if the Court determines that barring the use of the AV-TSx in November would be improvident, it nonetheless enjoin the County Elections Officials from using the AV-TSx in its present form in future elections, and that it grant mandamus relief ordering the Secretary of State to withdraw the certification of the AV-TSx (which withdrawal would become effective in six months under Elections Code Section 19222).

[6]Tamper resistant seals identical to those used by at least one Respondent county are easily obtainable via the Internet. McPharlin Decl. ¶¶2-7 & Exs. A-D. The San Diego County Registrar's poll worker training video also shows how the seals are easily removed without showing evidence of tampering. Gallo Supp. Decl. Ex. D.

election may have been unmarred by vote fraud provides little comfort as to the November election or other future elections.

2. The AV-TSx's Voter Verified Paper Audit Trail Does Not Satisfy The Elections Code's "Auditability" Requirement.

There is no dispute that DRE voting systems like the AV-TSx must include a device that prints an auditable "voter verified paper audit trail" ("VVPAT"), a "paper record copy" of the votes cast by a voter. Elec. Code §§19250(a), 19251(c). A "paper record copy" is "an *auditable* document" that can be used by "*each* voter to confirm his or her selections" before their ballot is cast. Elec. Code §§19251(c),(e) (emphasis added). The VVPAT must also be useable in all voter audits, including a full recount. *See* Elec. Code §19253(b)(1).

Petitioners' opening brief demonstrated that the AV-TSx's VVPAT (created by an attached printer module, the AccuVote) is inadequate for at least two reasons. *First*, the AV-TSx's VVPAT cannot be reviewed by blind or visually impaired voters. *Second*, Petitioners presented evidence that the AV-TSx's VVPAT—which is printed on a thermal paper roll—would not support a full manual recount because of the low quality of the paper and because the process of counting thermal paper VVPATs to be so time-consuming as to be impracticable. *See* Pets. Br. at 15-16; Gallo Decl. Ex. B (article by Secretary of State expressing doubts about thermal paper records), Ex. M (a manual audit of Sacramento County thermal paper rolls took more that an hour per ballot).[7]

Respondents admit that the AV-TSx's VVPAT cannot be used by blind or visually impaired voters to confirm their selections. *See* Resp. Br. at 18. This failing alone is a clear statutory violation and should entitle Petitioners to an injunction and mandamus. Moreover, Respondents do not address Petitioners' arguments concerning the problems posed by a full

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[7]Petitioners have also presented evidence of recurrent failures of the AV-TSx printers, in particular paper jams leading to destruction of VVPATs. *See* Gallo Decl. Ex. Q at 152-53, 217 (problems in Cuyahoga County, Ohio, in 2006). Contrary to Respondents' claim that there were no problems performing required manual one-percent audits of votes in the June primary election, printer jams caused a VVPAT failure rate of more that six percent in Los Angeles County's audit of the AV-TSx. Alter Decl. ¶¶2-6 & Ex. A (problems in Los Angeles, California, in 2006).

manual recount using a thermal paper VVPAT. Respondents' assertions that the AV-TSx's thermal paper VVPAT will last longer than the federally mandated retention period (Resp. Br. at 17) are irrelevant to whether those thermal paper VVPATs are durable enough to remain legible during a full recount (which the Secretary of State himself doubts[8]) or whether, in the event of a ballot challenge, a full manual recount of, for example, an entire congressional district's VVPATs could be practicably conducted.

3. The AV-TSx Violates Requirements For Disabled Access Under Elections Code Sections 19227(b) And 19250(d).

California law requires that DRE voting systems "shall include" a paper trail that provides "nonvisual" confirmation of its contents. Elec. Code §19250(d). The Legislature added the "nonvisual" requirement "to assure that information provided for verification to visually impaired voters accurately reflects *what is printed on the AVVPAT.*" Gallo Supp. Decl. Ex. A at 3 (emphasis added).

The Secretary of State admits that the AV-TSx does not meet this mandatory requirement. Resp. Br. at 18. This judicial admission, standing alone, establishes Petitioners' right to injunctive and mandamus relief. *See* Pets. Br. at 8 (citing *AFL-CIO v. Deukmejian*, 212 Cal. App. 3d 425, 435 (1989); *Idaho Watersheds Project v. Hahn*, 187 F.3d 1035, 1037 (9th Cir. 1999); *Crespin v. Kizer*, 226 Cal. App. 3d 498, 511 (1990)).

Respondents claim, falsely, that they must violate Section 19250(d) in order to comply with federal law. Resp. Br. at 18 & n.12. In fact, the Secretary of State has already certified a ballot-marking device for the disabled, the AutoMARK, for use in California elections. Gallo Supp. Decl. Ex. B. The AutoMARK complies with federal law (*see id.*, ¶2) and, because it is not a DRE—the AutoMARK assists disabled voters in marking their own paper ballot—the AutoMARK is not subject to Section 19250(d).[9]

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[8]Respondents' argument that the Secretary of State's prior doubts are irrelevant now that VVPATs are required by law is specious—there is nothing in the Elections Code that requires a *thermal paper roll* VVPAT such as the one at issue here.

[9]Even if, contrary to the Secretary of State's own admission, there were no alternatives, that would not justify the certification of the AV-TSx for non-disabled voters.

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4. The AV-TSx Violates Elections Code Sections 19250(a)-(c) Because It Does Not Meet The "Federal Qualification" Requirement.

Only those voting systems that have received "federal qualification" may be certified by the Secretary of State, or used by county elections officials. Elec. Code §§19250(a)-(c). The AV-TSx does not meet the definition of "federal qualification" because its software does not meet or exceed the standards set forth in the Federal Election Commission's Voting Systems Performance and Test Standards of 2002 ("2002 Standards"). Pet. Br. at 17-19 As the Secretary of State's own experts noted in the VSTAAB Report, the AV-TSx's software architecture, in particular its AccuBasic language and interpreter, contains "interpreted code" in violation of the 2002 Standards.[10] Gallo Decl. Ex. A at 35.

Respondents argue that the AV-TSx's compliance with the 2002 Standards is demonstrated by its approval for use by a national Independent Testing Authorities ("ITA"). *See, e.g.*, Resp. Br. at 20 n.14 & 15. However, the Elections Code's definition of federal qualification makes clear that ITA testing and compliance with the 2002 Standards are two distinct, independent requirements:

> "Federal qualification" means the system has been certified . . . by a Nationally Recognized Test Laboratory *and* has met or exceeded the minimum requirements set forth in the Performance and Text Standards for Punch Card, Mark Sense, and Direct Recording Electronic Voting Systems, or in any successor voluntary standard document.[11] (Elec. Code §19251(d)) (emphasis added)

Moreover, the Secretary of State knew before certification that the VSTAAB had concluded (1) that the AV-TSx "had not been subjected to thorough testing and review" by an ITA and (2) that the AV-TSx's AccuBasic language and interpreter violated the 2002 Standards. Gallo Decl. Ex. A at 1, 18-19 & 35.[12] Therefore, the Secretary of State could not reasonably

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[10]The 2002 Standards provide that "[s]elf-modifying, dynamically loaded, or interpreted code is prohibited, except under the security provisions outlined in Section 6.4.e." Gallo Decl. Ex. P at 4-4. Petitioners' opening brief argued that the AV-TSx did not meet any applicable exceptions and Respondents did not controvert this.

[11]The 2002 Standard replaced the Performance and Test Standards for Punchcard, Marksense, and Direct Recording Electronic Voting Systems of 1990 described in Elections Code Section 19251(d). Gallo Decl. Ex. P at 1-2.

[12]The VSTAAB also noted that no amount of ITA qualification testing would have discovered the security bugs discovered by the VSTAAB. Gallo Decl. Ex. A at 2. In (continued . . .)

rely on ITA approval of the AV-TSx as proof of compliance with the 2002 Standards.

Respondents also argue that the phrase "interpreted code" can refer to a "spectrum of different types of code, including code that is *not* prohibited by the [2002 Standards]." Resp. Br. at 20-21 (emphasis original). According to a declaration submitted by Respondents—which purports to describe the intention of one of the drafters of the 2002 Standards—there is a distinction between the kind of interpreted code contained in the AV-TSx, which is not prohibited by the 2002 Standards, and "classical" interpreted code, which is prohibited. Declaration of Steven V. Freeman ¶¶3-4. This attempt to rewrite the 2002 Standards to allow "non-classical" interpreted code should not be given any evidentiary weight.

First, the plain language of the 2002 Standards—which prohibits the use of interpreted code, with limited exceptions—should govern here. *Second*, prior to this litigation, the VSTAAB admitted that the presence of interpreted code in the AV-TSx violated the 2002 Standards. Gallo Decl. Ex. A at 35 ("To be in compliance [with the 2002 Standards' restrictions on interpreted code] it would seem that AccuBasic would have to be eliminated, or the standard would have to be changed"). *Third,* as both the VSTAAB and Petitioners' experts have noted, interpreted code—whether "classical" or not—makes the AV-TSx vulnerable to attacks that can manipulate the vote and disrupt elections. Gallo Decl. Ex. A at 18-19 (describing exploitation of AccuBasic to insert malicious script into voting machines); Rubin Decl. ¶¶22-24 (describing dangers of AV-TSx's interpreted code). The presence of interpreted code in the AV-TSx not only poses a substantial risk of electoral fraud, it is a *per se* violation of Section 19250 that requires a writ of mandate and/or preliminary injunction to issue.

5. The AV-TSx Also Violates The Secretary Of State's Order That Requires Voting Systems To "Comply With All Applicable State And Federal Statutes," Including The Help America Vote Act (HAVA).

The Secretary of State's AV-TSx certification included an express directive that it

(. . . continued)
addition, Mr. Wagner concedes that even the VSTAAB did not discover the "Hursti II" vulnerability.

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"comply with all applicable state and federal statutes, regulations, rules and requirements, including . . . the Help America Vote Act of 2002." Gallo Decl. Ex. E at ¶j. The AV-TSx does not comply with HAVA because (1) it lacks features that would make it accessible to disabled voters, such as compatibility with sip and puff devices or jelly buttons (Pets. Br. at 19; *see also* Runyan Decl. ¶¶11, 30-71) and (2) as Respondents concede, it does not permit blind voters to verify the text that appears on the paper record before it is cast and counted. Pets. Br. at 19; Resp. Br. at 18.

In response, Respondents point to the irrelevant fact that there is no private right of action under HAVA and that no state statutes or codes expressly incorporate HAVA. Respondents' arguments do not change the fact, however, that the Secretary of State both adopted a certification condition that made compliance with HAVA mandatory and simultaneously certified a voting system that does not satisfy his own mandate.

6. The AV-TSx Violates Petitioners' Constitutional Rights.

The right of all citizens to vote, and to have their votes counted, is a fundamental right protected by several provisions of the California Constitution. Pets. Br. at 19-20. Moreover, "once the legislature prescribes a particular voting procedure, the right to vote *in that precise manner* is a fundamental right." *Charfauros v. Bd. of Elections*, 249 F.3d 941, 953 (9th Cir. 2001) (emphasis added). Petitioners have shown that the AV-TSx's substandard security and accessibility violate numerous provisions of the Elections Code mandating the manner in which voting systems should operate. Petitioners and other California voters will be denied their fundamental right to vote and have their votes counted—a right that is absolutely essential to the proper functioning of our democratic process—if they are forced to use the AV-TSx in upcoming elections. Respondents' response—which essentially is to claim the AV-TSx does not violate any laws and therefore cannot impinge on Petitioners' constitutional rights—is not credible in light of the evidence discussed above.

7. The "Conditional Certification" Of The AV-TSx Violated The Administrative Procedure Act.

Petitioners' opening brief explained how the Secretary of State's conditions of

certification were subject to the mandates of the Administrative Procedure Act ("APA"). Pets. Br. at 20-21 (and cases cited therein). The APA applies to "the exercise of *any quasi-legislative power* conferred by any statute heretofore or hereafter enacted." Gov't Code §11346 (emphasis added). The Secretary of State now admits that his conditions of certification were an exercise of "quasi-legislative power." Resp. Br. at 9.

Respondents do not even attempt to address the cases Petitioners cite for the principle that the APA applies here. Instead the Secretary of State asserts, without any authority, that his regulations were exempt from APA because they were not arbitrary or capricious. Resp. Br. at 23-24. This is simply wrong. The APA's mandatory provisions apply to all regulations that fall under the APA's purview, not just those that are "arbitrary or capricious." *See* Gov't Code §11346.[13] The APA applies regardless of whether an agency's actions are "interpretive" or "quasi-judicial." *Tidewater Marine W., Inc. v. Bradshaw*, 14 Cal. 4th 557 (1996) ("If the Legislature did not intend the APA to apply to interpretive regulations, we do not think it would have expressly included interpretive regulations in this definition [of 'regulation']").

The APA is designed to encourage better policy by forcing agencies to present their regulations to the public rather than simply imposing them. *Tidewater Marine*, 14 Cal. 4th at 568-69. The APA would be rendered toothless if, as the Secretary of State urges, agencies could avoid its restrictions by inserting disguised regulations into conditions of use or similar documents. The public's right to participate in administrative decisions is especially strong where, as here, those decisions affect something so fundamental as the integrity of votes cast in elections and the adequacy of protections intended to prevent election fraud.[14]

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[13]The Secretary of State also relies on dicta from a federal case, *AAPD v. Shelley*, 324 F. Supp. 2d 1120 (C.D. Cal. 2004). Resp. Br. at 24. The *AAPD* court was focusing on a decertified company's argument that *decertification* should be subject to the APA. 324 F. Supp. 2d at 1130. It never addressed whether certification, especially under the specific conditions at issue in this case, should be subject to the APA.

[14]The Secretary of State's AV-TSx certification was also an improper delegation of election law enforcement to county officials, because it required them to use the AV-TSx in compliance with federal and state law (with which the Secretary of State knew the AV-TSx did not—and could not—comply). Pets. Br. at 22-23.

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B. The Balance Of The Equities Favors Petitioners.

Petitioners' strong likelihood of prevailing on the merits of their claim against the use of the AV-TSx is matched by the seriousness of the harm they will suffer if use of the AV-TSx is not enjoined, or a writ of mandamus issued. In the upcoming election, California voters will choose their Governor and all of their representatives in Congress and the State Assembly. They will also decide the fate of several important statewide ballot measures.

Use of the insecure, inaccessible and illegal AV-TSx voting system in such a high-stakes statewide election poses an unacceptable threat to Petitioners' fundamental right to vote. For that right to mean anything, Petitioners must be able to trust that the voting systems that they and other California voters use will faithfully record, store and count their votes. Respondents' empty assurances that there is no evidence that the AV-TSx has been used to commit election fraud provide little comfort, given the admittedly undetectable nature of known methods for exploiting the system's gaping security holes.

Good alternatives exist, and there is still time to implement them.[15] The AutoMARK, a paper ballot marking device, is the first voting system certified by the Secretary of State for disabled access voting. For the June 2006 primary election, the Secretary of State certified the AutoMARK for use in conjunction with Diebold optical scanners. Every respondent county has Diebold optical scanners, used to count absentee ballots; several use the optical scanners for all voters other than the disabled. There is no competent evidence that AutoMARK machines are unavailable or that the counties could not purchase or lease them by using their emergency no-bid contracting powers. Several California counties are using the AutoMARK, and could provide guidance and assistance for pollworker training

[15]Petitioners believe all Respondent County Elections Officials are capable of conducting the November 2006 general election with optical scan, paper ballot voting systems augmented with ballot marking devices for disabled voters. Respondents have provided no evidence showing that this is not the case. However, as an alternative to enjoining use of the AV-TSx in all counties, this Court could limit the scope of its order to those counties that rely primarily on Diebold precinct-based optical scanners. Those counties plan to use only a limited number of AV-TSx units for disabled access voting. They have already made arrangements for printing of paper ballots with sufficient extras to handle the small number of disabled voters who would use a ballot marking device rather than the AV-TSx to vote.

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and voter education. The burden of making these changes pales in comparison to the irreparable harm Petitioners will suffer if use of the AV-TSx is allowed.[16]

III. RESPONDENTS' OTHER ARGUMENTS HAVE NO BASIS IN LAW.

The Petition For Mandamus Is Properly Brought Under The Elections Code. Elections Code Section 13314 provides: "Any elector may seek a writ of mandate alleging that an error or omission has occurred, or is about to occur, in the placing of any name on, or in the printing of, a ballot, sample ballot, voter pamphlet, or other official matter, *or that any neglect of duty has occurred, or is about to occur.*" Elec. Code §13314(a)(1) (emphasis added). Section 13314 was formed by the merger of two separate statutes, Section 6403 and Section 10015. *See* Sections 19-21 of 1976 Stats. ch. 1275. Section 6403 applied—and its successor, Section 13314, still applies—broadly to errors outside the printing of ballots. *Cf. Knoll v. Davidson*, 12 Cal. 3d 335, 344 (1974) (mandamus petition under Section 6403 is a proper means to challenge the constitutionality of Elections Code provisions).[17] Moreover, venue in San Francisco is proper under Code of Civil Procedure Section 401(1) for an action brought pursuant to Elections Code 13314. *See* Petition ¶54.

Petitioners Have No Adequate Remedy At Law. Despite Respondents' arguments to the contrary, Petitioners have no adequate remedy at law—the harm to voters and the election process accrues the moment that the AV-TSx, an illegal system, is used in the election. Respondents ignore the statutory authorization of mandamus relief (Elec. Code §13314) and confuse Petitioners' challenge to the *machinery* of the election with a losing candidate's challenge to the *outcome* of an election.

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[16]Respondents argue that Petitioners' challenge is not timely given the proximity of the November elections. However, Petitioners filed their petition soon after the Secretary of State's certification, and have pursued this litigation diligently—the timing of the hearing on Petitioners' claims is a function of when the Secretary of State made his certification. The practical effect of denying Petitioners' relief here because of claimed exigency will be to encourage the Secretary of State to make certification decisions at the last minute in order to foreclose possible legal challenges.

[17]The language in *Songstad v. Superior Court*, 93 Cal. App. 4th 1202 (2001) cited by Respondents is inapplicable dicta. *Songstad* dealt with the title and summary of a prequalification petition, not a challenge to voting procedures; the court did not even cite, much less rely on, the "neglect of duty" language in Section 13314.

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1 A Writ Of Mandamus Would Be Effective Against All Respondents. Despite
2 Respondents' arguments to the contrary, the writ of mandate, if granted, would effect all
3 Respondents. Even those counties that have already purchased AV-TSxs can be enjoined
4 from purchasing additional AV-TSxs, or other illegal systems, in the future.
5 Petitioners Do Not Seek A Mandatory Injunction. Despite Respondents' arguments to
6 the contrary, Petitioners seek a prohibitory, not a mandatory, injunction. *See* Notice of
7 Motion And Motion at 1 (seeking an injunction "barring Respondent County Elections
8 Officials from using the AV-TSx" in the November elections). Under Respondents' flawed
9 reasoning, any injunction that resulted in the enjoined party making alternative
10 arrangements—a universe that includes nearly all injunctions—would be a "mandatory" one.
11 More importantly, Petitioners' requested injunction would be based on statutory prohibitions
12 against the use of systems which violate California law. *See, e.g.*, Elec. Code §19250(c).
13 Petitioners have established that the AV-TSx violates California law, and these unambiguous
14 violations support an injunction.
15 No Bond Is Required. Respondents argue that Petitioners should be required to post a
16 bond. Courts have the discretion to dispense with a security requirement, or to request only
17 nominal security, where requiring security would effectively deny access to judicial review.
18 *California ex rel. Van De Kamp v. Tahoe Regional Planning Agency*, 766 F.2d 1319, 1325
19 (9th Cir. 1985). Requiring a bond here, especially in such a large amount, would preclude
20 any pre-election injunction of voting systems or procedures.

21 **CONCLUSION**

22 For the foregoing reasons, the Court should issue the Writ and grant Petitioners'
23 Motion For Preliminary Injunction.
24 DATED: September 8, 2006.
25 Respectfully,
26 By: John Eichhorst /KST
27 JOHN EICHHORST
Attorneys for Plaintiffs/Petitioners
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