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14 SUPERIOR COURT OF THE STATE OF CALIFORNIA
15 CITY AND COUNTY OF SAN FRANCISCO

17 JOSEPH HOLDER, PETER CANTISANI,
DOLORES HUERTA, JUDY BERTELSEN,
18 CHARLES L. KRUGMAN, DAVID
HAGUE GOGGIN, ALYCE E. FRET LAND,
19 HELEN ACOSTA, MARY C. KENNEDY,
CHARLES FOX, MARTY KRASNEY,
20 MITCH CLOGG, BEN P. VAN METER,
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22 KENNETH MARTIN STEVENSON,
LARRY MARKS, HARRY JOHN RAPF,
23 MERRILEE DAVIES, BERNICE M.
KANDARIAN, VICTORIA POST, and
24 VERONICA ELSEA, individuals,

25 Plaintiffs/Petitioners,

26 v.

27 *(see following page)*
28

ENDORSED
FILED
San Francisco County Superior Court

AUG 08 2006

GORDON PARK-LI, Clerk
BY WEBLEY RAMIREZ Deputy Clerk

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No. CPF 06-506171

Action Filed: March 21, 2006

Action Remanded to this Court:
July 17, 2006

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

Date: August 31, 2006
Time: 9:30 a.m.
Dep't: 302
Judge: Hon. Ronald E. Quidachay

Trial Date: None Set

1 BRUCE MCPHERSON, as California
2 Secretary of State; ELAINE GINNOLD, as
3 Elections Official of Alameda County;
4 CANDACE J. GRUBBS, as Elections
5 Official of Butte County; VICTOR E.
6 SALAZAR, as Elections Official of Fresno
7 County; ANN BARNETT, as Elections
8 Official of Kern County; THERESA NAGEL,
9 as Elections Official of Lassen County;
10 CONNY McCORMACK, as Elections
11 Official of Los Angeles County; MARSHA
12 WHARFF, as Elections Official of
13 Mendocino County; MAXINE MADISON, as
14 Elections Official of Modoc County;
15 KATHLEEN WILLIAMS, as Elections
16 Official of Plumas County; MIKEL HASS, as
17 Elections Official of San Diego County;
18 DEBBIE HENCH, as Elections Official of
19 San Joaquin County; COLLEEN BAKER, as
20 Elections Official of Siskiyou County; and
21 DOES 1 through 50,

22 Defendants/Respondents.

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1 INTRODUCTION

2 The Diebold AccuVote-TSx ("AV-TSx") voting system is unreliable, vulnerable to
3 manipulation and inaccessible to disabled voters. Nonetheless, Defendant/Respondent
4 Secretary of State Bruce McPherson certified the AV-TSx for use in California, and
5 Defendant/Respondent County Elections Officials¹ propose to require millions of California
6 voters to use the AV-TSx in upcoming elections. Allowing use of the AV-TSx violates
7 California law and presents a grave threat to the legitimacy of the November 7, 2006 general
8 election. Petitioners therefore move this Court for: (1) a Writ of Mandate ordering the
9 Secretary of State to rescind his February 17, 2006 certification of the AV-TSx; (2) a Writ of
10 Mandate ordering the Secretary of State not to certify any AV-TSx systems which do not
11 comply with state law; (3) a Writ of Mandate ordering the County Elections Officials not to
12 purchase, lease, or contract for the purchase or lease of the AV-TSx voting system certified
13 on February 17, 2006; (4) a Writ of Mandate ordering the County Elections Officials not to
14 purchase, lease, or contract for the purchase or lease of any AV-TSx systems which do not
15 comply with state law; (5) a preliminary injunction barring the County Elections Officials
16 from using the AV-TSx voting system in the November 7, 2006 general election; and (6) a
17 preliminary injunction barring the County Elections Officials from contracting for or
18 purchasing the AV-TSx for use in the November 7, 2006 general election.

19 The Secretary of State's certification of this uncertifiable electronic voting system was
20 made in error and, unless a writ of mandate issues, millions of California voters will suffer
21 for that error. A preliminary injunction is also warranted because Petitioners and other
22 California voters will suffer irreparable harm to their fundamental rights if the AV-TSx
23 system is used in the upcoming general election; there is undisputed evidence that the voting
24 system at issue is illegal under the California Elections Code; legal, alternative systems are
25 available; and the public has a compelling interest in preserving the reliability, accuracy, and

26 _____
27 ¹Defendant/Respondent County Election Officials are Registrars of Voters or other
28 responsible elections officials in counties that Petitioners are informed and believe intend to
use the AV-TSx in upcoming elections.

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1 legitimacy of the elections process.

2 **FACTUAL BACKGROUND**

3 **A. The Secretary Of State Recognized That The AV-TSx Did Not Meet The**
4 **Requirements Of State Law, But Nonetheless “Conditionally Certified” The**
5 **System.**

6 On February 17, 2006, Defendant/Respondent California Secretary of State Bruce
7 McPherson “conditionally” certified an electronic voting system manufactured by Diebold
8 Election Systems, Inc. (the “Diebold Voting System” or “Voting System”) for use in
9 elections in California, including the November 7, 2006 statewide general election. The
10 Diebold Voting System includes both the AccuVote-OS (“AV-OS”), an optical scanner that
11 reads votes from paper ballots, and the AV-TSx, a Direct Recording Electronic (“DRE”)
12 device on which a voter indicates his or her choices by pressing on a computer
13 “touchscreen” display.

14 The conditional certification implicitly acknowledged that the system had substantial
15 vulnerabilities that fell short of state law requirements.² Just days before the certification,
16 experts from the Secretary of State’s own Voting Systems Technology Assessment Advisory
17 Board (“VSTAAB”) submitted a report entitled “Security Analysis of the Diebold
18 AccuBasic Interpreter” (the “VSTAAB Report”). The VSTAAB Report, which was not
19 made public until *after* the Secretary of State certified the voting system, revealed numerous
20 and significant flaws in the AV-TSx’s software. For example, the VSTAAB Report noted
21 that the AV-TSx “had not been subjected to thorough testing and review by” the national
22 Independent Testing Authority (“ITA”) that approved the system in 2005. *See* Declaration
23 of Michael Gallo In Support Of Verified Petition For Writ Of Mandate And Motion For
24 Preliminary Injunction (“Gallo Decl.”), Ex. A at 1. The VSTAAB Report confirmed that the

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26 ²The certification sought to skirt these known vulnerabilities by unilaterally imposing
27 physical security measures on the AV-TSx including requirements that the system’s memory
28 cards be covered with “tamper-evident” seals and that they only be programmed in “a
secured facility.” As discussed below, these attempts at “band-aid” physical security
solutions were unlawfully adopted and ineffectual as a means of overcoming the
inadequacies of the AV-TSx.

1 AV-TSx's software architecture, in particular its AccuBasic language and interpreter,
2 contained "interpreted code" and did not comply with the Federal Election Commission's
3 2002 voluntary voting system standards. *Id.*, Ex. A at 35. The VSTAAB Report also
4 confirmed earlier reports that the AccuBasic script used in the Voting System's memory
5 cards can be replaced with malicious script that would allow an attacker to tamper with vote
6 counts and reports and then conceal that tampering.³ *Id.*, Ex. A at 18-19.

7 The Secretary of State also recognized before certification that the AV-TSx's printer
8 produces a paper record that is inadequate under state law. In a September 9, 2005, opinion
9 article in the San Jose Mercury, the Secretary of State wrote that paper records produced by
10 systems such as the AV-TSx were "too risky" to be used in an election because they are "not
11 printed on ballot quality paper and might not retain their quality during the often-lengthy
12 recount and legal challenge periods." Gallo Decl., Ex. B.

13 The Diebold Voting System's failure to provide access for disabled voters was also
14 well known prior to its certification. A November 11, 2005 report by the Secretary of
15 State's voting systems consultant confirmed that blind and low-vision voters could not use
16 the AV-TSx to verify the accuracy of their paper audit trail. Gallo Decl., Ex. C at 5. Again,
17 this is a direct violation of state law. *See* Elec. Code §19251(a). The report also questioned
18 whether the AV-TSx, which "does not provide support for assistive devices for the
19 physically disabled such as sip and puff or jelly buttons," satisfied the equal access
20 requirements of the Help America Vote Act ("HAVA"). Gallo Decl., Ex. C at 8. The
21 Secretary of State unilaterally required that the AV-TSx comply with HAVA. *Id.*, Ex. J at 5.

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27 ³An independent test of Diebold's voting systems by computer security expert Harri
28 Hursti in December 2005 first revealed that the system could be "hacked" using the system's
memory cards. *See* Verified Petition for Writ of Mandate ("Petition") ¶¶92-96.

1 **B. New Flaws In The Voting System And Shortcomings In Mandated Security**
2 **Measures Have Been Discovered Since The February 17, 2006 Certification.**

3 **1. An Independent Study Reveals A Security Flaw Experts Describe As**
4 **The Worst Ever Documented In An Electronic Voting System.**

5 Just weeks after the Secretary of State's certification, another independent analysis of
6 the AV-TSx by Harri Hursti, a Finish computer security expert, working with Utah elections
7 officials, uncovered several new, profound security flaws. The May 11, 2006 report—
8 initially redacted to prevent hacking of the system, but recently made public to illustrate the
9 vulnerability of the AV-TSx—is attached as Exhibit D to the Gallo Declaration.

10 Computer security professionals believe the vulnerabilities described in the report are
11 the worst ever discovered in a voting machine. See Declaration of Dr. Aviel Rubin In
12 Support Of Verified Petition For Writ Of Mandate And Motion For Preliminary Injunction
13 ("Rubin Decl.") ¶¶25-28. Exploitation of the newly-discovered vulnerabilities requires only:
14 (1) a standard off-the-shelf memory card loaded with malicious files named according to
15 Diebold's known naming scheme; and (2) access to an AV-TSx terminal. Rubin Decl. ¶¶27-
16 28; Gallo Decl., Ex. D at 3-8. By following a simple procedure, a person can take control of
17 the AV-TSx and manipulate vote totals in a way that cannot be detected by either electronic
18 or physical screening, or cured by a later reinstallation of the Voting System's operating
19 system. Gallo Decl., Ex. D at 5-8. This newly discovered security hole is even more
20 dangerous because, as described below, the current security measures for the AV-TSx
21 machines and memory cards are incapable of preventing, or even detecting, tampering with
22 the Diebold Voting System.

23 **2. Evidence Suggests The Secretary Of State's Conditions Of Certification**
24 **Were Ignored And/Or Ineffective In The June 2006 Primary.**

25 The Secretary of State's certification of the Voting System purported to be
26 "conditional" on Diebold's and County Elections Officials' adoption of certain security
27 measures. Gallo Decl., Ex. E ¶4(g). Those measures had not been tested, were not
28 subjected to public or expert scrutiny, and were not passed in accordance with the state

1 Administrative Practices Act. Petition ¶¶164-167. Poll workers' experience during the June
2 2006 primary shows these measures were either not followed or were ineffective.

3 At least one county—San Diego County, a defendant in this action—allowed its poll
4 workers to take the AV-TSx units home for several days before the June election. See
5 Declaration of Brad Friedman In Support Of Verified Petition For Writ Of Mandate And
6 Motion For Preliminary Injunction (“Friedman Decl.”) ¶4; Declaration of Brian Baer In
7 Support Of Verified Petition For Writ Of Mandate And Motion For Preliminary Injunction
8 (“Baer Decl.”) ¶¶7, 9; Declaration of Patricia Mack Newton In Support Of Verified Petition
9 For Writ Of Mandate And Motion For Preliminary Injunction (“Newton Decl.”) ¶¶8-10. By
10 giving these poll workers unrestricted, unsupervised access to a machine with known
11 security vulnerabilities, San Diego County Elections Officials both increased the risk of
12 tampering and invalidated the ITA certification that is required for use of the AV-TSx voting
13 system. See Friedman Decl., Ex. A at 2 (requiring that in order to qualify for ITA
14 certification “[p]rogrammed memory cards shall be stored securely at all times with logged
15 accesses and transfers”); Elec. Code §19251(d) (requiring ITA certification). The risk
16 associated with this unrestricted access is compounded by the fact that mandated “tamper-
17 evident” seals on the AV-TSx are ineffective against tampering. Baer Decl. ¶17 (seals did
18 not “break” and could be removed, and replaced, without showing signs of tampering);
19 Newton Decl. ¶16 (same). The Secretary of State’s security procedures rely heavily on these
20 purportedly tamper-evident seals. Gallo Decl., Ex. E ¶f.

21 The Secretary of State’s conditions of certification also did nothing to prevent a
22 programming error that shut down voting in Kern County for several hours on June 6,
23 disenfranchising an estimated 500 voters. Gallo Decl., Ex. F at 14. This was not the first
24 time a Diebold system failure turned Californian voters away from the polls. In the 2004
25 primary election, Diebold’s Precinct Control Modules failed on a massive scale, resulting in
26 the likely disenfranchisement of voters. Petition ¶65; Gallo Decl., Ex. G at 5.

27 California was not alone in experiencing problems with the AV-TSx. On July 20,
28 2006, the Election Review Panel for Cuyahoga County, Ohio, assessed the performance of

1 the AV-TSx in the county's May 2, 2006, federal primary. The panel discovered, among
2 other things, that the AV-TSx's printers destroyed some paper audit trails due to printer jams
3 (Gallo Decl., Ex. Q at 152-53, 217) and several AV-TSx units "crashed, froze, or
4 malfunctioned during boot-up or use on Election Day, an unknown number of which were
5 returned to service without further investigation" (*id.* at 44-45). The panel also discovered
6 that once vote data is inputted into Diebold's GEMS central tabulator program, the votes in
7 each race cease to be traceable back to a specific voting machine, with the result that "[i]f a
8 security breach were to be discovered on any DRE after an election, it would be difficult to
9 determine which ballots came from it." *Id.* at 137.

10 LEGAL STANDARDS

11 I. PRELIMINARY INJUNCTION.

12 In deciding whether to issue a preliminary injunction, a trial court must evaluate two
13 interrelated factors: (i) the likelihood that the party seeking the injunction will ultimately
14 prevail on the merits of his claim, and (ii) the balance of harm presented, *i.e.*, the
15 comparative consequences of the issuance and nonissuance of the injunction. *Common*
16 *Cause of California v. Board of Supervisors*, 49 Cal. 3d 432, 441-442 (1989). The greater
17 the plaintiff's showing on one of these factors, the less must be shown on the other to
18 support an injunction. *Butt v. State of California*, 4 Cal. 4th 668, 678 (1992).

19 II. MANDAMUS RELIEF.

20 When petitioners seek to compel a state official to conduct an election according to
21 law, mandamus is the proper remedy. *Dean v. Superior Court (Lever)*, 62 Cal.App.4th 639,
22 642 (1998); *see also Wenke v. Hitchcock*, 6 Cal.3d 746, 751 (1972) (accord).

23 Under Elections Code Section 13314(a), any elector may seek a writ of mandate
24 alleging that any neglect of duty by the Secretary of State or other elections official has
25 occurred, or is about to occur. Issuance of a peremptory writ of mandate is warranted on
26 proof of both of the following: (1) that the error, omission, or neglect is in violation of the
27 Elections Code or the Constitution, and (2) that issuance of the writ will not substantially
28 interfere with the conduct of the election. Elec. Code §13314(a)(2); *see Dean v. Superior*

1 *Court (Lever)*, 62 Cal.App.4th at 642.

2 Under Code of Civil Procedure section 1085, the granting of a writ of mandate is
3 discretionary. *Ault v. Council of City of San Rafael*, 17 Cal. 2d 415, 417 (1941). A writ of
4 mandate should be granted if petitioners establish two basic requirements: (1) a clear,
5 present and ministerial duty on the part of the defendant; and (2) a clear, present and
6 beneficial right in the petitioner to the performance of that duty. *Catalina Investments, Inc.*
7 *v. Jones*, 98 Cal.App.4th 1, 6 (2002).

8 ARGUMENT

9 I. PETITIONERS ARE ENTITLED TO A PRELIMINARY INJUNCTION.

10 A. Petitioners And Millions Of Other California Voters Will Suffer Irreparable 11 Injury If Injunctive Relief Is Not Granted.

12 This November, California voters will vote for Governor and other important state
13 offices, and will decide a series of ballot propositions which will determine vital issues such
14 as future investments in state infrastructure and whether parents or guardians must be
15 notified before a minor terminates her pregnancy.

16 Irreparable injury will occur if California voters are permitted to cast their votes in this
17 election on a voting system that fails to meet state law requirements with respect to security,
18 auditability and disability access. The California Supreme Court has observed that:

19 “[A] fundamental goal of a democratic society is to attain the free and pure
20 expression of the voters’ choice of candidates. To that end, our state and federal
21 Constitutions mandate that the government must, if possible, avoid any feature
22 that might adulterate or, indeed, frustrate, that free and pure choice”
(*Canaan v. Abdelnour*, 40 Cal. 3d 703, 716 (1985), quoting *Gould v. Grubb* 14
Cal. 3d 661, 677 (1975))

23 Use of the AV TSx creates a profound risk that votes, and even election outcomes, in
24 the November election will be manipulated in an undetectable manner, and that disabled
25 voters will be disenfranchised by inability to access that voting system. Such
26 disenfranchisement and/or manipulation would have a profound negative impact on our
27 democracy by striking at its fundamental core—a fair and trustworthy elections process.
28 These risks present a clear case of irreparable harm.

1 Petitioners need not, however, prove here that these risks will materialize in order to
2 establish sufficient irreparable harm. California's legislature has chosen to allow its citizens
3 to vote only on voting systems that meet certain prescribed requirements of reliability,
4 access, security, and legitimacy. See Elec. Code §§19200, 19205, 19222, 19227, 19250,
5 19251. "[O]nce the legislature prescribes a particular voting procedure, the right to vote *in*
6 *that precise manner* is a fundamental right." *Charfauros v. Board of Elections*, 249 F.3d
7 941, 953 (9th Cir. 2001) (emphasis added).⁴ If Petitioners and other California voters vote
8 on a voting system that fails to meet these requirements, it will violate these statutory
9 protections and deny Petitioners' fundamental rights to vote and to have those votes counted
10 correctly under the California Constitution. This constitutes irreparable injury irrespective
11 of whether one concludes that vote manipulation is probable or that disabled voters will
12 actually be turned away as a result of these violations.

13 **B. Petitioners Are Likely To Prevail On The Merits.**

14 As described in more detail below, the evidence submitted by Petitioners provides
15 more than reasonable grounds to believe that the AV-TSx fails to meet the plain language of
16 applicable state statutory and constitutional requirements. This fact alone establishes
17 sufficient likelihood of success on the merits to support a preliminary injunction. *AFL-CIO*
18 *v. Deukmejian*, 212 Cal. App. 3d 425, 435 (1989) (affirming grant of preliminary injunction
19 where challenged practice was contrary to "plain language" of statute); *Idaho Watersheds*
20 *Project v. Hahn*, 187 F.3d 1035, 1037 (9th Cir. 1999) (reversing denial of preliminary
21 injunction where plaintiffs established likelihood of success on the merits by showing the
22 agency failed to act in accordance with "[t]he plain language of the regulation"); see also
23 *Crespin v. Kizer*, 226 Cal. App. 3d 498, 511 (1990) (where the meaning of a statute is clear,
24 the court cannot insert qualifying provisions not included in the plain language of the
25 statute).

26 _____
27 ⁴In analyzing constitutional challenges to election laws, the California Supreme Court
28 follows closely the analysis of the United States Supreme Court. *Canaan v. Abdelnour*, 40
Cal. 3d at 710 (1985).

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

4 Elections Code Section 19205 provides that the Secretary of State's voting system
5 specifications and regulations "shall include": (a) the machine or device and its software
6 shall be suitable for the purpose for which it is intended, (b) the system shall preserve the
7 secrecy of the ballot, and (c) the system shall be safe from fraud or manipulation. The
8 AV-TSx's well-documented security flaws demonstrate that it is not suitable for use in its
9 present form, and is susceptible to fraud and manipulation. Although the Secretary of
10 State's certification order seeks to allay concerns about the vulnerability of the Diebold
11 Voting System by mandating certain physical and procedural "mitigation" measures, these
12 *untested* measures—the inadequacy of which has already been demonstrated—are not
sufficient to ensure the integrity of votes cast on that AV-TSx.

13 **a. The AV-TSx's Well-Documented Security Flaws Make It Illegal**
14 **For Use In California Elections.**

15 The VSTAAB Report, prepared by computer security experts at the direction of the
16 Secretary of State, identified a host of security flaws in the Diebold software that could
17 compromise votes cast on the AV-TSx. Gallo Decl., Ex. A.⁵ In addition to confirming the
18 presence of interpreted code (*see* Section III.B.4., *infra*), the VSTAAB Report found that the
19 AccuBasic script used in the small, removable memory cards of the AV-OS and AV-TSx
20 can be modified to allow an attacker to tamper with vote counts and then conceal that
21 tampering. *Id.*, Ex. A at 18-19. The VSTAAB Report also described a number of
22 previously undiscovered and/or unreported "serious vulnerabilities" in the AV-TSx
23 interpreted code that would allow an attacker to modify vote totals, or otherwise compromise
24 the integrity of an election. *Id.* at 11-18. Critically, these bugs would not be detected by any
25 amount of functionality testing. *Id.* at 2.

26
27 ⁵The VSTAAB Report is only the latest in a long series of reports critical of the
28 security of Diebold products. *See* Rubin Decl. ¶¶7-12. Furthermore, Diebold has a history
of serious misrepresentations regarding the AV-TSx that led to the system's decertification
in 2004 by Respondent McPherson's predecessor. *See* Gallo Decl. ¶10; Exs. H & I.

1 To permanently address these flaws, the VSTAAB Report recommended significant
2 remedial measures including (1) fixing all identified bugs in the Accubasic interpreter;
3 (2) addressing fundamental flaws in the programming practices used to build the interpreter;
4 (3) revising the interpreter source code to eliminate any implicit assumption that the memory
5 card could not be tampered with; (4) protecting the Accubasic object code by embedding it
6 in non-removable storage and/or protecting it with strong cryptography; and (5) changing the
7 architecture of the AV-TSx to not store code on memory cards, or to eliminate the interpreter
8 and interpreted code altogether. *Id.* at 31-36. The VSTAAB Report opined that these
9 architectural changes were necessary to ensure the long-term integrity of elections. *Id.* at 36-
10 37. However, the Secretary of State did not mandate any of these changes, instead opting
11 for much weaker measures.

12 The VSTAAB report also failed to discover a flaw in the AV-TSx that voting security
13 professionals agree is the most serious ever found in a voting system. Rubin Decl. ¶25.
14 This flaw, described in detail in the May 11, 2006, report by Harri Hursti, can be exploited
15 with a few minutes of access to an AV-TSx. Rubin Decl. ¶28. If a party were to install
16 malicious code into the machine, even aggressive testing mechanisms might not detect the
17 problem, and reinstalling the machine's operating system would not necessarily cure it.
18 Declaration of Dr. Douglas Jones In Support Of Verified Petition For Writ Of Mandate And
19 Motion For Preliminary Injunction ("Jones Decl."), ¶40.

20 **b. The Mitigation Measures Mandated By The Secretary Of State**
21 **Have Been Proven Ineffective.**

22 The Secretary of State has not publicly commented on the latest security hole
23 discovered by Hursti earlier this year, or on the San Diego County Registrar's decision to
24 give poll workers unfettered access to AV-TSx machines for days prior to an election.

25 In response to the problems described in the VSTAAB Report, however, the Secretary
26 of State has acknowledged that the AV-TSx does have security problems. Gallo Decl.,
27 Ex. J. His solution to these problems was to condition Diebold certification on County
28 Elections Officials' adoption of physical and procedural mitigation measures to reduce the

1 risk of election fraud. *Id.* Those measures are inadequate.

2 *First*, the mitigation measures mandated by the Secretary of State are inadequate on
3 their own terms. The certification order mandates the following procedures: (1) resetting
4 the encryption key on all AV-TSx units; (2) assigning each memory card a permanent serial
5 number; (3) programming the memory cards in a secured facility and sealing them into their
6 assigned units with a serialized, tamper-evident seal; (4) maintaining a log of which memory
7 cards and which seals are assigned to which units, and using that log to verify the integrity of
8 the unit on election day; (5) maintaining a chain of custody log for each unit and memory
9 card from the time of its programming to the conclusion of the official canvass; (6) strictly
10 controlling access to the server computer on which the Diebold GEMS tabulation software is
11 stored. *Id.*, Ex. E.⁶

12 Almost all these procedures are drawn from the VSTAAB Report's recommendations
13 for *short-term* election safeguards. *Id.*, Ex. A at 36.⁷ The VSTAAB Report acknowledged
14 that "[w]hile these strategies do not completely eliminate all risk, we expect they would be
15 capable of reducing the risk to a level that is manageable for local elections in the short
16 term." *Id.* (emphasis added). By contrast, according to the VSTAAB Report:

17 [i]n the longer term, or for statewide elections, the risks of not fixing the
18 vulnerabilities in the AccuBasic interpreter become more pronounced. Larger
19 elections, such as a statewide election, provide a greater incentive to hack the
20 election and heighten the stakes *For statewide elections, or looking farther
into the future, it would be far preferable to fix the vulnerabilities discussed in
this report. (Id. at 36-37 (emphasis added))*

21 Despite a clear warning from his own technical experts that the AV-TSx is not secure

22
23 ⁶Oddly, the Secretary of State failed to adopt the VSTAAB Report's recommendation
24 that the memory cards remain installed in the AV-TSx units during transport to the county
25 facility at the end of election day. Gallo Decl., Ex. A at 31, 36. The entire point of security
26 seals and maintaining chains of custody is lost if the individuals transporting the memory
27 cards from the polling place to the location where the votes are to be counted have
28 unsupervised access to the memory cards.

⁷The VSTAAB Report also lists these procedural and physical safeguards as potential
"long-term" mitigations. Gallo Decl., Ex. A at 30-31. However, the Report's discussion of
the "long-term" mitigation list states that it includes "the full set of mitigations that might be
possible in the long run." *Id.* at 30. There is no suggestion in the Report that physical and
procedural safeguards alone are sufficient as a long-term solution.

1 enough for high stakes, statewide elections without a major overhaul, the Secretary of
2 State's certification did not require Diebold to make any immediate structural changes, or set
3 any schedule for Diebold to do so. Diebold admits that it cannot make the recommended
4 structural changes in time for this year's elections. *Id.*, Ex. K at 2 ("we have internally
5 discussed changes to include removing the interpreters and interpreted code . . . we could
6 submit this software and firmware package to the ITA for federal review by the end of the
7 this [sic] year").

8 *Second*, even if the VSTAAB recommendations were sufficient to address the security
9 issues the VSTAAB actually analyzed, independent analysts have discovered additional
10 flaws the VSTAAB recommendations—including those adopted by the Secretary of State—
11 do not address. For instance, the May 11, 2006 Hursti report, discussed *supra* in Factual
12 Background Section B.1, identified multiple security holes the VSTAAB team failed to
13 uncover. The Secretary of State's own experts have relied on Hursti's expertise in the past.
14 *See Declaration of Joseph Holder In Support Of Verified Petition For Writ of Mandate*
15 ("Holder Decl."), Ex. A.

16 Perhaps more importantly, the VSTAAB Report assumed that the hypothetical person
17 seeking to alter ballot results did not have any inside confederates, or access to passwords or
18 cryptographic keys. Gallo Decl., Ex. A at 7. This assumption is untenable—history has
19 shown that election fraud has been perpetrated by every class of participant, from voter to
20 polling place election judge to election administrator to voting system maintenance
21 technician. Whereas with paper ballot-based voting systems even insider fraud could be
22 addressed with a manual recount, such a recount is not possible for votes cast on DRE
23 machines with an inadequate paper trail like the AV-TSx. The insider access problem is
24 especially acute because an unknown number of AV-TSx machines are being given to poll
25 workers days before elections. *See Friedman Decl.* ¶4; *Baer Decl.* ¶¶7, 9; *Newton Decl.* ¶¶8-
26 10. There is no indication that background checks are being performed on these poll
27 workers. *See Baer Decl.* ¶3; *Newton Decl.* ¶3.

28 *Third*, the safeguards mandated by the Secretary of State were conceived without

1 regard for the reality of elections in California. There is no evidence the Secretary of State
2 made any inquiry into the feasibility or efficacy of adoption of the physical and procedural
3 measures mandated in his certification order.⁸ For example, the Secretary of State's reliance
4 on tamper-evident seals and chain of custody logs to protect the integrity of the AV-TSx
5 memory cards is misplaced. Tamper-evident seals, even serialized ones, can be easily
6 removed and replaced. Baer Decl. ¶17; Newton Decl. ¶16. And voting machines are often
7 minimally secured and unsupervised for long periods prior to an election. Baer Decl. ¶9;
8 Newton Decl. ¶10. In fact, some poll workers have stored AV-TSx machines in private
9 vehicles (Newton Decl. ¶10), something which at least one Respondent admits is
10 unacceptable under state law (Friedman Decl. ¶5). The Secretary of State's office has
11 admitted that the AV-TSx is vulnerable if third parties gain "access and control for a lengthy
12 period of time." Gallo Decl., Ex. L.

13 Moreover, the Secretary of State's order burdens County Elections Officials, and
14 ultimately poll workers, with several new complicated tasks—resetting encryption keys,
15 applying and verifying tamper-evident seals, maintaining chain of custody logs and
16 controlling physical access to various locations—in addition to the many existing tasks
17 associated with elections. Many of these new security-related tasks must be carried out
18 rigorously in order to be effective in the face of a dedicated attempt to tamper with the vote.
19 However, the Secretary of State has not provided additional resources to ensure compliance
20 with the procedures that he has mandated. The current pool of volunteer poll workers may
21 not be capable of handling their new responsibilities; election workers report that their
22 training is often confusing and inadequate, and that they would have a difficult time
23 performing security functions in addition to what they are already required to do on election
24 day. Baer Decl. ¶¶4-5, 18; Newton Decl. ¶¶4-7, 17-18.

25 The integrity of the vote is crucial to the legitimacy of our democratic form of
26

27 ⁸The Secretary of State cannot reasonably have relied on the expertise of the authors of
28 the VSTAAB Report in this regard—these computer scientists had at best limited expertise
of physical and procedural, as opposed to programming, safeguards to the vote.

1 government, and its preservation cannot be entrusted to the insecure and untrustworthy
2 Diebold AV-TSx voting machine. The Secretary of State's attempt to compensate for the
3 AV-TSx's well-documented vulnerability to malicious attack with a patchwork of untested
4 and inadequate physical and procedural security measures is akin to dressing a major wound
5 with Band-Aids.

6 **2. Use Of The AV-TSx Violates The "Auditability" Requirement Under**
7 **Elections Code Sections 19250(a)-(d).**

8 DRE voting systems like the AV-TSx must include an auditable "voter verified paper
9 trail." Elec. Code §§19250(a)-(d). A voter verified paper audit trail is "a component of a
10 direct recording electronic voting system that prints a contemporaneous paper record copy of
11 each electronic ballot and allows each voter to confirm his or her selections before the voter
12 casts his or her ballot." Elec. Code §19251(c). A "paper record copy" is "an *auditable*
13 document printed by a voter verified paper audit trail component that corresponds to the
14 voter's electronic vote and lists the contests on the ballot and the voter's selections for those
15 contests." Elec. Code §19251(e) (emphasis added).

16 The AV-TSx purports to satisfy the auditability requirement with an attached printer,
17 the AccuView Printer Module (the "Printer"). The Printer produces a record of the voter's
18 vote on a continuous roll of thermal paper, which fully-sighted voters can supposedly view
19 through a small window and then accept or reject the record. *See* Holder Decl., Ex. B. If the
20 voter rejects the record as incorrect, the Printer marks the paper roll at the bottom of the
21 entry. The rejected record is not removed from the roll. All paper records, including
22 rejected votes, are spooled into a sealed canister inside the machine. Because the reel-to-reel
23 system records the order of voting and was not designed for easy auditing, it raises privacy
24 concerns and is ill-suited for large-scale elections. Rubin Decl. ¶¶41-46.

25 The AV-TSx and Printer do not produce a document that voters can count on to be
26 auditable. To be "auditable" under California law, the thermal paper roll must be useable
27 not only in the one percent manual tally described in Section 15360 of the Elections Code,
28 but also in any full recount. *See* Elec. Code §19253(b)(1). The Secretary of State apparently

1 never tested whether the Printer produced an auditable record, and there are several
2 legitimate concerns about whether an effective manual audit of votes recorded by the Printer
3 on thermal paper rolls can be performed.

4 *First*, there are questions about the ability of thermal roll paper to withstand the rigors
5 of a manual audit or recount. The Secretary of State himself has expressed a lack of
6 confidence in thermal paper records because they “are not printed on ballot-quality paper
7 and might not retain their quality during the often-lengthy recount and legal challenge
8 periods.” Gallo Decl., Ex. B. *Second*, there is substantial evidence that an audit of votes
9 memorialized on thermal paper rolls would be so time-consuming as to be impracticable in
10 actual election situations. Sacramento County Registrar of Voters Jill LaVine testified at a
11 Congressional hearing that when she attempted to manually audit votes recorded on thermal
12 paper rolls in late 2002, it took 127 hours to verify 114 relatively complex ballots, more than
13 one hour per ballot. *Id.*, Ex. M at 210-11. *Third*, as the California Association of Clerks and
14 Elections Officials noted in a September 1, 2005 letter to Governor Schwarzenegger, there
15 are several reasons why DRE paper records make it “extremely problematic” to conduct the
16 precinct-specific 1% manual recounts required by Elections Code Section 15360:
17 (1) eligible provisional ballots would be “indistinguishable from the ineligible ballots due to
18 the inability to identify which records represent the eligible and/or ineligible images;”
19 (2) because early voters can vote outside of their precinct, early voters from multiple
20 precincts may cast their votes on a single DRE, making it “onerous and time consuming, if
21 not impossible” to determine which votes are associated with a particular precinct; (3) there
22 may be potential mechanical problems, including printer jams and illegible print; and
23 (4) “[t]ranslation . . . for the purposes of performing the 1% manual tally will be difficult and
24 time consuming.” Gallo Decl., Ex. N.

25 The Secretary of State is authorized to certify only those voting systems that produce
26 auditable paper trails. Elec. Code §19250(a). Because the AV-TSx’s thermal paper roll is
27 not auditable, the Secretary of State’s certification of the AV-TSx violates Section 19250(a).
28 Similarly, any Elections Official who contracts for, purchases or plans to use the AV-TSx in

1 upcoming elections violates Sections 19250(b) and (c) of the Elections Code.

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

4 The Elections Code requires not only that the AV-TSx produce a paper record of each
5 voter's electronic vote, but also that the information on this paper record be conveyed to
6 voters via both a visual and "nonvisual method." See Elec. Code §§19250(a) (requirement
7 for "*accessible* voter verified paper trail") (emphasis added); 19251(a) (defining
8 "accessible"); 19250(d) (requiring all DREs to "include a method by which a voter may
9 electronically verify, through a nonvisual method, the information that is contained on the
10 paper record copy of that voter's ballot.").

11 The AV-TSx fails this mandatory accessibility requirement because it does not have a
12 nonvisual method of conveying the contents of the paper record to the voter. A review of
13 the AV-TSx and its Printer performed by Steven Freeman—a technical consultant to the
14 Secretary of State—unambiguously states that the AV-TSx does not provide blind voters
15 with the opportunity to verify the vote using the paper audit record. Gallo Decl., Ex. C at 5.
16 Assistive technology expert and blind voter Noel Runyan confirms this deficiency.
17 Declaration of Noel Runyan In Support Of Verified Petition For Writ Of Mandate And
18 Motion For Preliminary Injunction ("Runyan Decl.") ¶61.

19 In addition to being a *per se* violation of Elections Code Section 19250(d), the
20 AV-TSx's failure to provide a nonvisual confirmation of the paper audit trail is especially
21 troubling because the voter verified paper audit trail is the official record of the vote in a
22 contested election (Elec. Code §19253(b)(1)) and the voter verified paper audit trail is used
23 to perform all recounts (Elec. Code §19253(b)(2)). It is absolutely essential to a fair and
24 accurate election that all voters, including blind or low-vision voters, be able to verify the
25 markings on the paper record.

26 The AV-TSx also violates Elections Code Section 19227(b), which requires at least
27 one voting system at each polling place to "provide access to individuals who are blind or
28 visually impaired." The AV-TSx cannot be used to satisfy this requirement because it does

1 not provide sufficient access to visually impaired voters. Runyan Decl. ¶¶55-59, 61, 63.

2 **4. Use Of The AV-TSx Violates Elections Code Sections 19250(a)-(c)**
3 **Because The System Does Not Meet The “Federal Qualification”**
4 **Requirement.**

5 The Elections Code provides that only those voting systems that have received “federal
6 qualification” may be certified by the Secretary of State or contracted for, purchased, or used
7 by county elections officials. Elec. Code §§19250(a)-(c). The Elections Code defines two
8 components of “federal qualification.” *First*, a voting system must be approved by a
9 Nationally Recognized Testing Laboratory.⁹ *Second*, the voting system must meet or exceed
10 the standards set forth in the Federal Election Commission’s Voting Systems Performance
and Test Standards of 2002 (“2002 Standards”). Elec. Code §19251(d).^{10,11}

11 The Diebold AV-TSx system does not satisfy the second requirement for “federal
12 qualification” because it does not meet the standards set forth in Section 4.2.2 of the 2002
13 Standards. Section 4.2.2 provides, in relevant part: “Self-modifying, dynamically loaded, or
14 interpreted code is prohibited, except under the security provisions outlined in Section
15 6.4.e.”¹² Gallo Decl., Ex. P at 4-4. Section 6.4.1.e permits self-modifying, dynamically

16
17 ⁹In June 2005, the AV-TSx was approved by a Nationally Recognized Testing
Laboratory—Wyle Laboratories. However, subsequent testing by the Secretary of State’s
18 office revealed serious problems with the “qualified” AV-TSx including printer jams that
destroyed several voting records and defective system software that caused numerous
19 shutdowns and the potential for loss or corruption of voting records. Gallo Decl., Ex. O at 3-
5. Independent testing has also revealed massive security flaws in the AV-TSx not
20 identified during Wyle Laboratories’ testing of the system. Rubin Decl. ¶¶17, 25-28. The
failure of Wyle Laboratories to identify such fundamental problems calls into question the
21 value of their testing procedures. Additionally, there are doubts about the independence of
Nationally Recognized Testing Laboratories. All Nationally Recognized Testing
22 Laboratories—including Wyle Laboratories—are hired and paid by vendors who seek
federal qualification of their voting systems creating a clear conflict of interest. *See* Rubin
23 Decl. ¶¶32-38; Jones Decl. ¶¶18-19.

24 ¹⁰The Voting Systems Performance and Test Standards of 2002 replace the
Performance and Test Standards for Punch Card, Mark Sense, and Direct Recording
25 Electronic Voting Systems of 1990 described in Elections Code Section 19251(d). Gallo
Decl., Ex. P at 1-2.

26 ¹¹No federal statute requires compliance with the Federal Election Commission’s
voluntary guidelines. However, Elections Code Sections 19250(a-c) and 19251(d) make
27 compliance with these guidelines *mandatory*.

28 ¹²The reference to Section 6.4.e is a typographic error. The Voting System Standards
does not include a Section 6.4.e. It is generally understood that the reference to 6.4.e should
(continued . . .)

1 loaded, or interpreted code only where, “[a]fter initiation of Election Day testing, no source
2 code or compilers or assemblers shall be resident or accessible.” *Id.* at 6-7.

3 The Secretary of State’s VSTAAB experts confirmed that the memory card used in the
4 AV-TSx contains interpreted code in the form of AccuBasic scripts. Gallo Decl., Ex. A at
5 35. These scripts’ compiler and interpreter are resident and accessible after the initiation of
6 election day testing and therefore do not qualify for exemption under Section 6.4.1.e of the
7 Voting Systems Standards. Rubin Decl. ¶24. Thus, as the Secretary of State’s own experts
8 concluded, “[t]o be in compliance [with federal rules restricting interpreted code] it would
9 seem that AccuBasic would have to be eliminated, or the standard would have to be
10 changed.” Gallo Decl., Ex. A at 35. In other words, the interpreted code in the AV-TSx
11 does not and cannot comply with Section 4.2.2 of the Voting Systems Standards. Rubin
12 Decl. ¶24; Gallo Decl., Ex. A at 35. It therefore fails to satisfy the mandatory “federal
13 qualification” requirement of Elections Code Section 19250.

14 In addition to being a *per se* violation of the Elections Code, the presence of interpreted
15 code along with a resident and accessible compiler and interpreter poses a serious security
16 risk because it allows the interpreted code to be altered *after* the voting system has been
17 security tested and certified. Rubin Decl. ¶22. The AV-TSx’s “interpreted code” is
18 translated from its original human-readable form to a machine-readable form *within the*
19 *voting machine itself* every time the voting machine uses the code. This means that anyone
20 with access to the interpreted code on the voting machine can change the human-readable
21 code before it is run, whether before, during or after an election. *Id.* Where interpreted code
22 is stored on memory cards, as with the AV-TSx, the security risk is especially severe
23 because memory cards are particularly vulnerable to attack and can be programmed
24 maliciously with inexpensive, commercially available equipment. *Id.* ¶23; *see also id.*,
25 Ex. F.

26 Because the AV-TSx does not satisfy Section 4.2.2 of the Voting Systems Standards

27 _____
28 (... continued)
be a reference to Section 6.4.1.e. *See* Rubin Decl. ¶24.

1 and, thus, does not meet the second requirement of “federal qualification,” the Secretary of
2 State’s certification of the AV-TSx violated Section 19250(a) of the Elections Code. By
3 extension, any County Elections Official who contracts for, purchases or plans to use the
4 AV-TSx in upcoming elections would violate Sections 19250(b) and (c) of the Elections
5 Code, which restrict the purchase and use of voting systems lacking federal qualification.

6 **5. The AV-TSx Also Violates State Law Because It Does Not Satisfy**
7 **HAVA Requirements.**

8 The Secretary of State’s conditional certification of the AV-TSx required that the
9 system comply with the Help America Vote Act. Gallo Decl., Ex. E ¶j. The Secretary of
10 State’s own experts have questioned whether the AV-TSx’s lack of accessibility functions,
11 including the absence of sip and puff or jelly buttons, fails to satisfy HAVA. Gallo Decl.,
12 Ex. C at 12. Compliance with HAVA could also require that the AV-TSx provide a non-
13 visual confirmation of the contents of the paper audit trail, a function that the AV-TSx also
14 lacks. *Id.* at 8, 12. Accessibility expert Noel Runyan confirms that these missing functions,
15 as well as other design flaws, render the AV-TSx noncompliant with HAVA. *See* Runyan
16 Decl. ¶¶11, 30-71.

17 **6. Use Of The AV-TSx Violates Petitioners’ Constitutional Rights.**

18 Several provisions of the California Constitution protect the right of all citizens to vote,
19 and to have their votes counted. Cal. Const. Art. 2, §§2.0 (“A United States citizen 18 years
20 of age and resident in this State may vote.”), 2.5 (“A voter who casts a vote in an election in
21 accordance with the laws of this State shall have that vote counted.”). The right of every
22 qualified elector to have his or her vote, and those of all other electors, accurately counted so
23 that all votes are give equal weight is protected by the California Constitution’s guarantee of
24 equal protection of the laws *Id.* Art. I, §7; *Choudhry v. Free*, 17 Cal. 3d 660, 664-69 (1976)
25 (strict scrutiny applicable if a classification has a “‘real and appreciable impact’ upon the
26 equality, fairness and integrity of the electoral process”); *Libertarian Party v. Eu*, 83 Cal.
27 App. 3d 470, 472-73 (1978) (accord). Finally, the right to vote is protected by California
28 Constitution Article 1, Section 2, the state analog to the First Amendment. *See Edelstein v.*

1 *City & County of San Francisco*, 29 Cal. 4th 164, 168 (2002). The right to vote “may be the
2 most fundamental of all.” *Board of Supervisors v. Local Agency Formation Comm’n*, 3 Cal.
3 4th 903, 913 (1992).

4 As described above, the AV-TSx fails to meet standards of reliability, accessibility and
5 security mandated by the California Elections Code. See Section I.B.1-5, *supra*. Forcing
6 Petitioners and other California voters to use this flawed system—which may result in votes
7 being manipulated and/or not counted and will not provide equal access to disabled voters—
8 while other voters are permitted to use reliable and accessible systems violates disabled
9 voters’ fundamental right to vote and constitutional right to equal protection of the law. See
10 Section I, *supra*.

11 **7. Use Of The AV-TSx Is Unlawful Because The Secretary Of State’s**
12 **“Conditional Certification” Was Invalid And Unlawful.**

13 **a. The Secretary Of State’s “Conditional Certification” Imposed**
14 **Conditions Without Notice Or Hearing In Violation Of The**
15 **California Administrative Procedures Act.**

16 Elections Code Section 19205 directs the Secretary of State to establish “regulations
17 governing voting machines, voting devices, vote tabulating devices, and any software used
18 for each, including the programs and procedures for vote tabulating and testing.” The
19 physical and procedural security measures that the Secretary of State’s February 17, 2006
20 certification required County Elections Officials to adopt in order to use Diebold machines
21 are invalid because they are “regulations” subject to the Administrative Procedures Act
22 (“APA”) that were adopted without complying with the APA.

23 The APA, Government Code Sections 11340 *et seq.*, sets forth procedures that state
24 officers must use to adopt regulations. *Tidewater Marine W., Inc. v. Bradshaw*, 14 Cal. 4th
25 557, 568 (1996); *Sherwin-Williams Co. v. South Coast Air Quality Mgmt. Dist.*, 86 Cal. App.
26 4th 1258, 1282-83 (2001). Coverage of the APA is broadly construed. Gov’t Code §11346
27 (“[e]xcept as provided in Section 11346.1, the provisions of this chapter are applicable to the
28 exercise of any quasi-legislative power conferred by any statute heretofore or hereafter
enacted”). The procedures required under the APA include public notice of the proposed

1 regulation, an opportunity for comment by interested parties, and review by the Office of
2 Administrative Law. *Sherwin-Williams*, 86 Cal. App. 4th at 1282-83.

3 The APA defines “Regulation” as “every rule, regulation, order, or standard of general
4 application or the amendment, supplement, or revision of any rule, regulation, order, or
5 standard adopted by any state agency to implement, interpret, or make specific the law
6 enforced or administered by it, or to govern its procedure.” Gov’t Code §11342.600.
7 Regulations subject to the APA have two principal identifying characteristics: (1) the
8 agency must intend its rule to apply generally, rather than in a specific case—*i.e.* it must
9 declare how a certain class of cases will be handled; and (2) the rule must implement,
10 interpret, or make specific the law enforced or administered by the agency, or govern the
11 agency’s procedure. *Sherwin-Williams*, 86 Cal. App. 4th at 1283 (citing Gov’t Code
12 §11342(g) and *Tidewater Marine Western*, 14 Cal. 4th at 571).

13 Under the APA and the *Sherwin-Williams* two-part test, the use procedures mandated
14 by the Secretary of State are “regulations.” *First*, the procedures apply generally to the
15 entire class of counties that intend to use AV-TSx machines. The Secretary’s February 17,
16 2006 press release claimed that he was “*mandating* the additional use procedures” and that
17 counties “wishing to use either the upgraded OS system or the upgraded, paper audit trail-
18 retrofitted touch screen (TSX) system for elections in 2006 must comply with these
19 requirements.” Gallo Decl., Ex. J (*emphasis added*). This mandate defines how a certain
20 class of cases will be addressed—*i.e.*, it decides the standards that counties using a certain
21 class of voting systems must satisfy. *Sherwin-Williams*, 86 Cal. App. 4th at 1283. *Second*,
22 the Secretary’s use procedures implement Elections Code 19205(c), which expressly
23 requires him to establish “regulations” to ensure that voting systems “shall be safe from
24 fraud or manipulation.” *See AAPD v. Shelley*, 324 F. Supp. 2d 1120, 1131 (C.D. Cal. 2004)
25 (“subjecting the certification process, but not the decertification process to the APA would
26 be more likely result, as §19205 [governing certification] specifically refers to “regulations”
27 and §19222 [governing decertification] does not”).

28 A regulation subject to the APA must comply with the APA’s requirements. *See* Gov’t

1 Code §11340.5(a); *State Water Res. Control Bd. v. Office of Admin. Law*, 12 Cal. App. 4th
2 697, 706 (1993). The Secretary’s “requirements” did not satisfy the APA’s public notice
3 and hearing requirements: the Secretary did not file a copy of the proposed regulation
4 (Gov’t Code §11346.2(a)), file a statement of reasons for the regulation and identify any
5 reports supporting the adoption of the regulation (Gov’t Code §11346.2(b)), or hold a public
6 hearing on the new regulations (Gov’t Code §11346.8). Because the regulations do not
7 satisfy these statutory requirements, they are invalid as a matter of law. *See* Gov’t Code
8 §11340.5(a); *State Water Resources*, 12 Cal. App. 4th at 706.

9 **b. The Secretary Of State’s “Conditional Certification” Improperly**
10 **Delegates To County Elections Officials Responsibility For**
11 **Ensuring The AV-TSx’s Compliance With State Law.**

12 The Secretary of State’s certification also improperly delegates election law
13 enforcement to County Elections Officials and private elections system vendors.

14 A delegated power, when made subject to the delegatee’s judgment or discretion, “is
15 purely personal and may not be further delegated in the absence of express statutory
16 authorization.” *Schechter v. County of Los Angeles*, 258 Cal. App. 2d 391, 396 (1968). The
17 Elections Code delegates enforcement of voting laws to the Secretary of State. Elec. Code
18 §19205. The Elections Code also mandates that the Secretary of State “shall not approve
19 any voting system, or part of a voting system, unless it fulfills the requirements of this code
20 and the regulations of the Secretary of State.” *Id.* §19200.

21 When the Secretary of State certified the AV-TSx, he made certification “conditional”
22 on “compl[iance] with all applicable state and federal statutes, regulations, rules and
23 requirements,” including the FEC’s 2002 Voting System Standards/Guidelines. Gallo Decl.,
24 Ex. E ¶j. The Certification stated that “[a]ny voting system purchased with funds allocated
25 by the Secretary of State’s Office shall meet all applicable state and federal standards,
26 regulations and requirements,” including the FEC’s 2002 Voting System
27 Standards/Guidelines. *Id.* ¶l. As described in Section II.D. *supra*—and as the Secretary’s
28 experts have acknowledged (Gallo Decl., Ex. A at 35)—the AV-TSx does not satisfy the
FEC’s 2002 Standards, made applicable to voting systems in California by virtue of

1 Elections Code Section 19250(a). By approving the system nonetheless, while
2 simultaneously proclaiming that certified systems must meet federal and state law and that
3 vendors are liable for “any representation that a voting system complies with all applicable
4 state and federal requirements,” the Secretary of State has improperly delegated his authority
5 to enforce the voting standards contained in the Elections Code. In fact, the Secretary of
6 State’s certification implicitly acknowledges that the AV-TSx, despite being certified, may
7 not be compliant with state and federal regulations. *See id.*, Exs. E, J. The certification
8 makes an end run around this problem by forcing county elections officials who will
9 purchase AV-TSx systems with funds “allocated by” the Secretary to enforce the Elections
10 Code if they find that the AV-TSx does not comply with applicable state and federal
11 requirements. *Id.* This is an unlawful delegation of the Secretary of State’s sole and
12 personal responsibility to approve only those systems which fulfill the requirements of the
13 Elections Code (*see* Elec. Code §19200)¹³ and is invalid as a matter of law. *Schecter*, 258
14 Cal. App. 2d at 396.

15 **C. The Balance Of The Equities Favors Petitioners.**

16 Petitioners are not seeking to delay the election; rather, they seek to ensure that the
17 election is run according to clear mandates of California law. Petitioners acknowledge that
18 the stakes in this matter are high. The voting rights of millions of California voters, and the
19 legitimacy of the election process itself, hang in the balance.

20 Petitioners acknowledge that if the Court grants this motion, Respondents will bear a
21 burden in changing to a different voting system. However, this burden is significantly
22 reduced by the availability of alternative systems, including optical scan systems, already in
23 use throughout the state. Other viable, and more secure, alternatives are also available for
24 disabled voters, including accessible ballot-marking devices. *See* Declaration of Ion Sancho
25 In Support Of Verified Petition For Writ Of Mandate And Motion For Preliminary
26

27 ¹³The Secretary also failed to satisfy his duty to make findings that the certified system
28 satisfied the requirements of state law. Elec. Code §19207.

1 Injunction (“Sancho Decl.”) ¶¶6-14. Additionally, Respondents’ own strategic decisions
2 have delayed rather than expedited resolution of this case. After Petitioners filed this
3 Petition on March 21, 2006, Respondents improperly removed the petition to federal court
4 and opposed all efforts to shorten time to hear Petitioners’ remand motion, which was
5 successful. Respondents should be estopped from arguing that any delay of their own
6 making is a ground for denying a preliminary injunction.

7 **II. MANDAMUS IS PROPER UNDER EITHER ELECTIONS CODE SECTION**
8 **13314 OR CIVIL PROCEDURE CODE SECTION 1085.**

9 As described in Section I.B, *supra*, the Diebold Voting System does not comply with
10 state law, rendering the system uncertifiable under state law. Consequently, the system
11 should not have been certified, cannot be used in California elections, and cannot be
12 purchased by County Elections Officials.

13 There is no dispute that both the Secretary of State and the County Elections Officials
14 have a clear, present and ministerial duty to comply with the mandatory requirements of the
15 state Elections Code. The applicable provisions of the Elections Code mandate that the
16 Secretary of State not approve a voting system unless, *inter alia*, it “has received federal
17 qualification” (Elec. Code §19250(a)), provides an “accessible” paper audit trail (*id.*), and is
18 suitable for its purpose and is safe from fraud or manipulation (Elec. Code §§19205, 19200).
19 Similarly, state law prohibits County Elections Officials from using a system unless it “has
20 received federal qualification” (Elec. Code §19250(a)), provides an “accessible” paper audit
21 trail (*id.*), and meets the requirements of HAVA (Gallo Decl., Ex. E at ¶j). There is also no
22 dispute that Petitioners have a clear, present and beneficial right to the performance of
23 Respondents’ duties under the Elections Code. The Legislature has prescribed the minimum
24 requirements for voters’ exercise of the franchise, and “once the legislature prescribes a
25 particular voting procedure, the right to vote *in that precise manner* is a fundamental right.”
26 *Charfauros*, 249 F.3d at 953.

27 Mandamus under Elections Code Section 13314 and/or Civil Procedure Code Section
28 1085 is proper in this case because (1) the Diebold Voting System does not satisfy state law;

1 and (2) if mandamus issues in a timely manner, Respondents will have ample time to secure
2 alternative voting systems. The next California election is more than three months away,
3 and Respondent County Elections Officials have ample time to make alternative
4 arrangements.¹⁴

5 **CONCLUSION**

6 For the foregoing reasons, the AV-TSx system violates state law, rendering County
7 Election Officials' use of this system, and its continued certification by the Secretary of
8 State, illegal. The Court should issue the Writ and grant Petitioners' Motion For Preliminary
9 Injunction.

10
11 DATED: August 7, 2006.

12 Respectfully,

13 JOHN EICHHORST
14 MICHAEL L. GALLO
15 JASON S. TAKENOUCI
16 D'LONRA C. ELLIS
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28

¹⁴In the alternative, Respondents should be estopped from arguing that mandamus is improper due to lack of time to make alternative arrangements because Respondents' own strategic decisions have delayed resolution of this case.