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SAN DIEGO COUNTY, CA

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and Deborah Seiler

**IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN DIEGO**

37-2007-00084017-CU-WM-CTL

COUNTY OF SAN DIEGO; and DEBORAH SEILER, in her official capacity as Registrar of Voters for the County of San Diego,
Plaintiffs/Petitioners,
v.
DEBRA BOWEN in her official capacity as California Secretary of State; and DOES 1 through 50, inclusive,
Defendants/Respondents.

No.
COMPLAINT FOR DECLARATORY RELIEF AND INJUNCTIVE RELIEF; AND PETITION FOR WRIT OF MANDATE
Date:
Time:
Dept.:
I/C Judge:

Plaintiffs/Petitioners, County of San Diego ("San Diego") and Deborah Seiler, in her official capacity as the Registrar of Voters for the County of San Diego, allege as follows:

PRELIMINARY STATEMENT

- San Diego is a political subdivision of the State of California and is organized and existing under the laws of the State of California.
- Deborah Seiler is the Registrar of Voters ("ROV") for the County of San Diego and is the chief elections official for San Diego. San Diego, through its ROV is responsible for the conduct of all state and federal elections in the County and is authorized to contract with all other local jurisdictions to conduct local elections on behalf of such entities.

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1 3. The ROV is also responsible for the tabulation of ballots and certification of
2 elections results to the Secretary of State, the Board of Supervisors, or other local jurisdictions
3 on whose behalf the ROV conducts elections. Certification of elections results must occur on or
4 before the 28th day after the election. (Elections Code § 15372.)

5 4. Defendant/Respondent Debra Bowen (“Bowen”) is the Secretary of State for the
6 State of California and is the chief elections official for the State. Bowen is sued in her official
7 capacity.

8 5. The true names and capacities of defendants/respondents Does 1 through 50,
9 inclusive, are unknown to San Diego and the ROV, and San Diego and the ROV therefore sue
10 said defendants by such fictitious names pursuant to California Code of Civil Procedure section
11 474. San Diego and the ROV will amend this complaint/petition to allege the true names and
12 capacities of the defendants/respondents sued herein as Does 1 through 50, inclusive, when
13 ascertained.

14 6. San Diego and the ROV are informed and believe and thereon allege that at all
15 times herein mentioned each individual defendant/respondent was an elected official, agent,
16 servant, or representative of each or some of the other co-defendants/respondents, and in doing
17 these acts herein referred to, each defendant/respondent was acting within the course and scope
18 of their authority as such elected official, agent, servant, representative, with the express and/or
19 implied approval, permission, knowledge, consent and ratification of all co-
20 defendants/respondents, and was in some manner responsible for the occurrence hereinafter
21 alleged, and such defendants/respondents are jointly and severally liable for the injuries and
22 damages hereinafter described.

23 **FIRST CAUSE OF ACTION**

24 **(Declaratory Relief)**

25 7. San Diego and the ROV refer to and incorporate herein by reference Paragraphs 1
26 through 6 inclusive as though set forth fully herein.

27 8. Bowen was elected as the Secretary of State in November 2006, and took office in
28 January 2007.

1 9. In March 2007, Bowen embarked upon what she termed a “top-to-bottom review”
2 of voting systems certified for use in California. In reality, Bowen did not review all voting
3 systems but rather focused on just three of the nine voting systems in use in California (Hart,
4 Diebold and Sequoia) that primarily utilize Direct Recording Electronic (“DRE”) machines.

5 10. On August 3, 2007, six months before the February 2008 Presidential Primary,
6 Bowen withdrew the certification of San Diego’s voting system and then immediately issued a
7 Conditional Re-Approval of its voting system subject to forty restrictions, requirements and
8 conditions.

9 11. San Diego’s voting system, which consisted of a central tabulation program
10 (GEMS 1.18.24) touch screen voting machines (AccuVote-TSX) and optical scanners for paper
11 ballots (AccuVote-OS), had previously been certified for use in California by Bowen’s
12 predecessor Bruce McPherson in February 2006.

13 12. Bowen’s Conditional Re-Approval included the two following provisions:

14 19. Any post-election auditing requirements imposed as a
15 condition of this certification shall be paid for by the vendor.
16 Jurisdiction users are required to conduct the audits and the vendor is
17 required to reimburse the jurisdiction.

18 20. After consultation with jurisdiction users, the Secretary of
19 State shall establish additional post-election manual count auditing
20 requirements, including:

- 21 • Increased manual count sample sizes for close races, based on
22 an adjustable sample model, where the size of the initial
23 sample depends on a number of factors, including the
24 apparent margin of victory, the number of precincts, the
25 number of ballots cast in each precinct, and a desired
26 confidence level that the winner of the election has been
27 called correctly. In establishing sampling requirements for
28 close races, the Secretary of State may impose a specific
sampling threshold for a given vote differential or percentage
of the margin of victory, taking into account the number of
electors and the number and size of precincts in the race;
- Escalation requirements for expanding the manual count to
additional precincts when discrepancies are found; and
- Uniform procedures to increase transparency and
effectiveness of post-election manual count audits.

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1 13. On October 25, 2007, Bowen issued modifications and additions to her
2 Conditional Re-Approval of August 3, 2007. In relevant part, Bowen added the following
3 condition to Paragraph 20 of the Conditional Re-Approval:

4 Elections officials must comply with these requirements as set forth by the
5 Secretary of State in the document entitled "Post-Election Manual Tally
6 Requirements" and any successor document. The vendor shall reference
compliance with the "Post-Election Manual Tally Requirements" in its Use
Procedures for the voting system.

7 14. The Post-Election Manual Tally ("PEMT") requirements also issued by Bowen on
8 October 25, 2007, among other things, specifically mandate that Election Officials conduct a
9 manual tally of 10% of randomly selected precincts for any contest where the apparent margin
10 of victory (based on the Semifinal-Official Canvass Results [Elections Code § 353.5], i.e.,
11 election night results) is less than one-half of one percent and detail specific procedures to be
12 followed for an expansion of the manual tally if there is a "variance" between the Semifinal-
13 Official Canvass and the manual tally.

14 15. The PEMT requirements also provide that:

15 a. Determination of whether a contest is within one-half of one percent is to
16 be based on the results of all precincts wherever located, whether limited to a single county,
17 multiple counties, or the whole state;

18 b. The 10% manual tally is to be completed during the 28-day canvass period
19 after the election; and

20 c. Bowen reserves the right to adjust or suspend any conditions of
21 recertification for a vendor or jurisdiction as she deems prudent and necessary.

22 16. On October 25, 2007, Bowen also mandated that the PEMT requirements would
23 be applicable to California counties with voting systems manufactured by Sequoia Voting
24 Systems, Inc.

25 17. On December 6, 2007, sixty days before the February 2008 Presidential Primary,
26 Bowen extended the applicability of the PEMT requirements to California counties with voting
27 systems manufactured by Hart Intercivic and ES&S.

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1 18. San Diego's vendor, formerly Diebold Election Systems, Inc., now known as
2 Premier Election Systems ("Premier") has stated that it will not pay the costs associated with the
3 PEMT requirements.

4 19. San Diego and the ROV are also informed and believe and on such information
5 and belief allege that other vendors throughout the state that are subject to this condition have
6 uniformly advised their customers that they will not reimburse counties for these costs.

7 20. San Diego is therefore placed in the position of having to incur substantial costs as
8 a result of Bowen's mandated PEMT requirements with no viable source of prompt
9 reimbursement.

10 21. As the chief elections official of the State, Bowen is required by the Elections
11 Code to adopt regulations governing the use of voting systems, including the use of voting
12 machines, voting devices, and vote tabulating devices (Elections Code §§ 15601, 19100) and to
13 adopt specifications and regulations for the purpose of determining whether voting machines,
14 voting devices, and vote tabulating devices: 1) are suitable for the purpose for which they are
15 intended; 2) preserve the secrecy of the ballot; and 3) are safe from fraud or manipulation.
16 (Elections Code § 19205).

17 22. The California Administrative Procedures Act ("APA") is set forth in Government
18 Code sections 11340 through 11361.

19 23. The APA provides in relevant part that "[n]o state agency shall issue, utilize,
20 enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order,
21 standard of general application, or other rule, which is a regulation as defined in Section
22 11342.600, unless [it] has been adopted as a regulation and filed with the Secretary of State
23 pursuant to this chapter." (Gov't Code § 11340.5.)

24 24. Government Code section 11342.600 defines "regulation" as "every rule,
25 regulation, order, or standard of general application or the amendment, supplement, or revision
26 of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or
27 make specific the law enforced or administered by it, or to govern its procedure."

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1 25. A policy or procedure falls within the definition of a regulation and is subject to
2 the APA if the promulgating agency intends to apply it generally rather than in a specific case
3 and the agency adopts it to implement, interpret, or make specific the law enforced by the
4 agency.

5 26. When a policy or procedure falls within the definition of a “regulation” within the
6 meaning of the APA, the promulgating agency must comply with the procedures for formalizing
7 such regulation.

8 27. To be effective, regulations adopted in conformance with the APA must be within
9 the scope of authority conferred and in accordance with standards prescribed by other provisions
10 of law. (Gov’t Code § 11342.1.)

11 28. “Whenever by the express or implied terms of any statute a state agency has
12 authority to adopt regulations to implement, interpret, make specific or otherwise carry out the
13 provisions of the statute, no regulation adopted is valid or effective unless consistent and not in
14 conflict with the statute and reasonably necessary to effectuate the purpose of the statute.”
15 (Gov’t Code § 11342.2.)

16 29. Failure to comply with the APA nullifies the rule.

17 30. San Diego and the ROV are informed and believe and on such information and
18 belief allege that Bowen intends the PEMT requirements to apply generally rather than in a
19 specific case in that the PEMT requirements are, at the very least, to be applied to all counties
20 that utilize the Premier, Sequoia, Hart and ES&S voting systems for all future elections
21 beginning with the February 2008 Presidential Primary.

22 31. The PEMT requirements have been issued to implement the provisions of the
23 Elections Code that Bowen is charged with enforcing.

24 32. San Diego and the ROV are informed and believe, and on such information and
25 belief allege that Bowen contends that the PEMT requirements are valid and enforceable and
26 expects San Diego and other counties throughout the State to comply with PEMT requirements.

27 33. On the other hand, San Diego and the ROV contend that the PEMT requirements
28 are void for the following reasons:

1 a. Before proceeding with her “top-to-bottom review” Bowen failed to adopt
2 regulations that established objective criteria for determining whether voting systems are
3 defective, obsolete or otherwise unacceptable pursuant to Elections Code section 19222. There
4 were therefore no objective standards against which voting systems under review could be
5 judged.

6 b. Bowen failed to adopt regulations that established the process for
7 certification and decertification of voting systems or individual components of voting systems.

8 c. Bowen failed to promulgate regulations in conformity with the basic
9 minimum procedural requirements required by the APA for the use of voting systems as
10 required by Elections Code section 15601.

11 d. Bowen failed to study and adopt regulations in conformity with the basic
12 minimum procedural requirements required by the APA governing the use of voting machines,
13 voting devices and vote tabulating devices as required by Elections Code section 19100.

14 e. Bowen failed to establish specifications and regulations in conformity with
15 the basic minimum procedural requirements required by the APA governing voting machines,
16 voting devices, vote tabulating devices and any software as required by Elections Code section
17 19205.

18 f. The Legislature has already established post election manual tally
19 requirements that are to be included as part of the Official Canvass and has expressly defined the
20 purpose of the post election manual tally. (Elections Code § 15360.) The 10% PEMT
21 requirements therefore exceed the requirements established by the Legislature for conducting
22 post election manual tallies and infringe on the Legislature’s authority to set policy.

23 g. To the extent that as part of the 10% PEMT Bowen expects Elections
24 Officials to go beyond determining whether the vote tabulating machines functioned properly
25 and to attempt to discern voter intent as Elections Officials would do as part of a recount, Bowen
26 has again exceeded the authority granted to her by the Legislature in the Elections Code and is
27 infringing on the Legislature’s authority to establish policy as well as grounds and procedures
28 for conducting a recount as part of an election contest.

1 h. The PEMT requirements conflict with the procedures governing election
2 contests established by the Legislature as set forth in Division 16 of the Elections Code and are
3 not reasonably necessary to effectuate the purpose of the Elections Code.

4 34. Based upon the foregoing, a clear, actual and present controversy has arisen
5 between San Diego and the ROV and Bowen, which controversy cannot be resolved without a
6 judicial determination.

7 35. Accordingly, San Diego and the ROV seek a judicial determination of the
8 respective rights, duties, and obligations of San Diego and the ROV on the one hand, and
9 Bowen, in her official capacity as Secretary of State, on the other, with respect to the
10 enforceability of the PEMT requirements mandated by Bowen. San Diego and the ROV also
11 seek a judicial determination that the PEMT requirements mandated by Bowen are void and
12 unenforceable that San Diego and the ROV are not legally required to comply with such
13 requirements.

14 36. San Diego and the ROV do not have a plain, speedy and adequate remedy in the
15 ordinary course of law other than the relief sought in this petition, in that San Diego and the
16 ROV would be required to dedicate scarce resources and many employees to attempt to
17 complete the 10% PEMT concurrently with the Official Canvass and such efforts would
18 materially disrupt and possibly prohibit San Diego and the ROV from timely completing the
19 Official Canvass within the 28 day timeframe required by the Elections Code.

20 37. Failure to timely complete the Official Canvass would prevent Bowen from
21 certifying California's election results.

22 38. Unless and until enjoined, defendants, and each of them, will expect San Diego
23 and the ROV to comply and will attempt to enforce the void PEMT requirements.

24 39. San Diego and the ROV therefore request that the court issue an injunction
25 prohibiting defendants, and each of them, from enforcing the PEMT requirements.

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1 **SECOND CAUSE OF ACTION**

2 **(Writ of Mandate)**

3 40. San Diego and the ROV refer to and incorporate herein by reference Paragraphs 1
4 through 39 as though fully stated herein.

5 41. San Diego and the ROV have a right and duty to conduct elections in accordance
6 with the provisions of the Elections Code and without having to comply with the void PEMT
7 requirements.

8 42. Bowen has the duty to comply with provisions of the Elections Code and to not
9 promulgate rules and regulations that are in excess of her authority as the Secretary of State and
10 which conflict with the provisions of the Elections Code.

11 43. In fulfilling her obligation to promulgate rules and regulations as set forth in the
12 Elections Code, Bowen also has the duty to comply with the provisions and requirements of the
13 Administrative Procedures Act.

14 44. San Diego and the ROV do not have a plain, speedy and adequate remedy in the
15 ordinary course of law other than the relief sought in this petition, in that San Diego and the
16 ROV would be required to dedicate scarce resources and many employees to attempt to
17 complete the 10% PEMT concurrently with the Official Canvass and such efforts would
18 materially disrupt and possibly prohibit San Diego and the ROV from timely completing the
19 Official Canvass within the 28 day timeframe required by the Elections Code.

20 45. Failure to timely complete the Official Canvass would prevent Bowen from
21 certifying California's election results.

22 46. San Diego and the ROV request that the court issue a writ of mandate directing
23 respondents, and each of them, to rescind Bowen's PEMT requirements immediately and not
24 require any county subject to the PEMT requirements to comply with the directives contained in
25 Bowen's letter of October 25, 2007.

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1 WHEREFORE, plaintiffs/petitioners, County of San Diego and the ROV, pray for
2 judgment, against defendants/respondents, and each of them, as follows:

3 As to the First Cause of Action:

4 1. Declaring that the directives contained in the document entitled Post Elections
5 Manual Tally Requirement issued by Bowen on October 25, 2007, are void and unenforceable in
6 that:

7 a. Before proceeding with her “top-to-bottom review” Bowen failed to adopt
8 regulations that established objective criteria for determining whether voting systems are
9 defective, obsolete or otherwise unacceptable pursuant to Elections Code section 19222. There
10 were therefore no objective standards against which voting systems under review could be
11 judged.

12 b. Bowen failed to adopt regulations that established the process for
13 certification and decertification of voting systems or individual components of voting systems.

14 c. Bowen failed to promulgate regulations in conformity with the basic
15 minimum procedural requirements required by the APA for the use of voting systems as
16 required by Elections Code section 15601.

17 d. Bowen failed to study and adopt regulations in conformity with the basic
18 minimum procedural requirements required by the APA governing the use of voting machines,
19 voting devices and vote tabulating devices as required by Elections Code section 19100.

20 e. Bowen failed to establish specifications and regulations in conformity with
21 the basic minimum procedural requirements required by the APA governing voting machines,
22 voting devices, vote tabulating devices and any software as required by Elections Code section
23 19205.

24 f. The Legislature has already established post election manual tally
25 requirements that are to be included as part of the Official Canvass and has expressly defined the
26 purpose of the post election manual tally. The 10% PEMT requirements therefore exceed the
27 requirements established by the Legislature for conducting post election manual tallies and
28 infringe on the Legislature’s authority to set policy.

g. To the extent that as part of the 10% PEMT Bowen expects Elections Officials to go beyond determining whether the vote tabulating machines functioned properly and to attempt to discern voter intent as Elections Officials would do as part of a recount, Bowen has again exceeded the authority granted to her by the Legislature in the Elections Code and is infringing on the Legislature's authority to establish policy as well as grounds and procedures for conducting a recount as part of an election contest.

h. The PEMT requirements conflict with the procedures governing election contests established by the Legislature as set forth in Division 16 of the Elections Code and are not reasonably necessary to effectuate the purpose of the Elections Code.

2. For a preliminary injunction prohibiting defendants from enforcing or attempting to enforce the PEMT requirements.

As to the Second Cause of Action:


3. For the issuance of a peremptory writ directing Debra Bowen, in her official capacity at the Secretary of State for the State of California to rescind the directives contained in document dated October 25, 2007 entitled "Post Election Manual Tally Requirements" and to delete references in Condition 20 of her Conditional Re-Approval of the County's voting system dated August 3, 2007, to the Post Election Manual Tally Requirements and to refrain from attempting to enforce such directives.

As to each Cause of Action:

4. For costs of suit incurred herein; and

5. For such other and further relief as the court deems just and proper.

DATED: December 18, 2007 JOHN J. SANSONE, County Counsel

By 
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Attorneys for Plaintiffs/Petitioners County of
San Diego and Deborah Seiler, Registrar of Voters