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12 SUPERIOR COURT OF THE STATE OF CALIFORNIA

13 COUNTY OF SAN FRANCISCO

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

23 Plaintiffs/Petitioners,  
24

25 v.

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

ENDORSED  
FILED  
San Francisco County Superior Court

MAR 21 2006

GORDON PARK-LI, Clerk

BY: DEBORAH STEPPE  
Deputy Clerk

No. CPF 06-506171

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

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

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

Defendants/Respondents.

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

## 8 INTRODUCTION

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

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

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

1 grounds:

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

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

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

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

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

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



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

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

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

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

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

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

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

### 13 THE PARTIES

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

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

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

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

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

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

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

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

1 County, California.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 Lassen and is responsible for conducting statewide primary and statewide general elections  
2 in that county. On information and belief, Lassen County intends to use Diebold AV-TSx  
3 touchscreen systems in upcoming 2006 elections.

4 38. Defendant/Respondent CONNIE MCCORMACK is the County Clerk for the  
5 County of Los Angeles and is responsible for conducting statewide primary and statewide  
6 general elections in that county. On information and belief, Los Angeles County intends to  
7 use Diebold AV-TSx touchscreen systems in upcoming 2006 elections.

8 39. Defendant/Respondent MICHAEL SMITH is the Registrar of Voters for the  
9 County of Marin and is responsible for conducting statewide primary and statewide general  
10 elections in that county. On information and belief, Marin County intends to use Diebold  
11 AV-TSx touchscreen systems in upcoming 2006 elections.

12 40. Defendant/Respondent MARSHA WHARFF is the County Clerk for the County  
13 of Mendocino and is responsible for conducting statewide primary and statewide general  
14 elections in that county. On information and belief, Mendocino County intends to use  
15 Diebold AV-TSx touchscreen systems in upcoming 2006 elections.

16 41. Defendant/Respondent MAXINE MADISON is the County Clerk for the County  
17 of Modoc and is responsible for conducting statewide primary and statewide general  
18 elections in that county. On information and belief, Modoc County intends to use Diebold  
19 AV-TSx touchscreen systems in upcoming 2006 elections.

20 42. Defendant/Respondent JIM MCCAULEY is the County Clerk for the County of  
21 Placer and is responsible for conducting statewide primary and statewide general elections in  
22 that county. On information and belief, Placer County intends to use Diebold AV-TSx  
23 touchscreen systems in upcoming 2006 elections.

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

28 44. Defendant/Respondent MIKEL HASS is the Registrar of Voters for the County

1 of San Diego and is responsible for conducting statewide primary and statewide general  
2 elections in that county. On information and belief, San Diego County intends to use  
3 Diebold AV-TSx touchscreen systems in upcoming 2006 elections.

4 45. Defendant/Respondent DEBORAH HENCH is the Registrar of Voters for the  
5 County of San Joaquin and is responsible for conducting statewide primary and statewide  
6 general elections in that county. On information and belief, San Joaquin County intends to  
7 use Diebold AV-TSx touchscreen systems in upcoming 2006 elections.

8 46. Defendant/Respondent JULIE RODEWALD is the County Clerk for the County  
9 of San Luis Obispo and is responsible for conducting statewide primary and statewide  
10 general elections in that county. On information and belief, San Luis Obispo County intends  
11 to use Diebold AV-TSx touchscreen systems in upcoming 2006 elections.

12 47. Defendant/Respondent JOSEPH E. HOLLAND is the County Clerk for the  
13 County of Santa Barbara and is responsible for conducting statewide primary and statewide  
14 general elections in that county. On information and belief, Santa Barbara County intends to  
15 use Diebold AV-TSx touchscreen systems in upcoming 2006 elections.

16 48. Defendant/Respondent COLLEEN BAKER is the County Clerk for the County of  
17 Siskiyou and is responsible for conducting statewide primary and statewide general elections  
18 in that county. On information and belief, Siskiyou County intends to use Diebold AV-TSx  
19 touchscreen systems in upcoming 2006 elections.

20 49. Defendant/Respondent DERO B. FORSLUND is the County Clerk for the  
21 County of Trinity and is responsible for conducting statewide primary and statewide general  
22 elections in that county. On information and belief, Trinity County intends to use Diebold  
23 AV-TSx touchscreen systems in upcoming 2006 elections.

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

28 51. All Defendants/Respondents, apart from the Secretary of State, are referred to

1 herein collectively as the "County Elections Officials."

2 52. Petitioners are unaware of the true names and capacities of the individuals sued  
3 herein as Does 1 through 50, inclusive, and therefore sue these Defendants/Respondents by  
4 such fictitious names pursuant to Code of Civil Procedure Section 474. Petitioners will  
5 amend this Petition to state the true names and capacities of such fictitiously named  
6 Defendants/Respondents when ascertained. Petitioners are informed and believe, and on  
7 that basis allege, that the Defendants/Respondents fictitiously named as Does 1 through 25  
8 are County Elections Officials from California counties who seek to purchase or use Diebold  
9 Voting Systems in California elections and/or are failing or threatening to fail their election  
10 audit responsibilities under Elections Code 153600. Petitioners are informed and believe,  
11 and on that basis allege, that the Defendants/Respondents fictitiously named as Does 26  
12 through 50 are also in some manner connected with the matters alleged herein and similarly  
13 subject to the relief requested herein.

#### 14 **JURISDICTION AND VENUE**

15 53. Petitioners bring this action for mandamus pursuant to Elections Code Section  
16 13314(a) and/or Code of Civil Procedure Section 1085, for administrative mandamus  
17 pursuant to Code of Civil Procedure Section 1094.5, for declaratory relief pursuant to Code  
18 of Civil Procedure Section 1060 and Government Code Section 11350, and for injunctive  
19 relief pursuant to Civil Code Sections 3420 through 3422. This Court has jurisdiction over  
20 actions arising under California law.  
21

22 54. Pursuant to Elections Code Section 13314(b)(1) and Code of Civil Procedure  
23 Section 393, venue in this action is proper in Sacramento County. However, "whenever it is  
24 provided by any law of this State that an action or proceeding against the State or a  
25 department, institution, board, commission, bureau, officer or other agency thereof shall or  
26 may be commenced in, tried in, or removed to the County of Sacramento, the same may be  
27 commenced and tried in any city or city and county of this State in which the Attorney  
28 General has an office." Code Civ. Proc. §401(1). *See Harris v. Alcoholic Beverage Control*

1 *Appeals Board*, 197 Cal. App. 2d 759, 762 (1961). The State Attorney General has an  
2 office located at 455 Golden Gate Avenue, #11000, San Francisco, 94102. Thus, venue in  
3 this action is proper in the County of San Francisco.

## 4 5 **COMMON ALLEGATIONS**

### 6 **I. THE EVOLUTION OF LEGAL REQUIREMENTS** 7 **RELATING TO USE OF ELECTRONIC VOTING MACHINES** 8 **IN CALIFORNIA ELECTIONS.**

#### 9 **A. Federal Requirements.**

10 55. The chaos of the Florida recount in the 2000 Presidential election raised public  
11 consciousness about the need to modernize the nation's voting technology. Although media  
12 attention largely focused on punch card voting systems, which are now rarely used in  
13 California, Diebold's machinery also experienced a massive malfunction in Florida. At one  
14 point, a memory card in a Diebold system registered *negative* 16,022 votes for Al Gore. The  
15 malfunction led many news organizations to call the election prematurely. Elections  
16 officials eventually decided that a hand recount of the system's paper ballots was the only  
17 way to determine the true vote count.

18 56. In the debate that followed Florida's election problems, concerns were voiced  
19 about many aspects of the voting process including convenience, auditability, vote security  
20 and accessibility for the disabled. The federal government weighed in with new  
21 legislation—the Help America Vote Act of 2002—that required states to provide voting  
22 systems accessible to the disabled and provided federal funds for their acquisition.

23 57. In April 2002, the Federal Election Commission ("FEC") promulgated the  
24 voluntary *Voting Systems Performance and Test Standards* ("2002 Standards"). Those  
25 revised standards, which replaced earlier standards from 1990, provide guidance for the use  
26 of new technologies, most notably Direct Recording Electronic ("DRE") devices. DREs,  
27 often referred to as touchscreens, record votes electronically. A true and correct copy of  
28 relevant pages from the 2002 Standards is included as Exhibit 1 in the Appendix In Support  
Of Verified Petition For Writ Of Mandate, Declaratory And Injunctive Relief (the



1 “Appendix”) which is being filed concurrently with this Petition and is incorporated herein  
2 and its contents verified by reference.

3  
4 **B. California Laws Protecting The Integrity Of California Elections.**

5 58. California has taken additional steps to attempt to ensure that new voting  
6 technologies will continue to guarantee the integrity of votes in California elections.

7 (a) *First*, California made compliance with the voluntary federal standards for  
8 electronic voting machines mandatory. *See* Elec. Code §§19250(a-b), 19251(d). Under  
9 Elections Code Section 19250(a), the Secretary of State cannot approve a voting system  
10 unless it has received “federal qualification.” “Federal qualification” means the system is  
11 *both* approved by an independent testing authority (“ITA”) *and* meets or exceeds the  
12 voluntary standards set by the Federal Election Commission. Elec. Code §19251(d).

13 (b) *Second*, California passed legislation to ensure that DREs would have a  
14 “voter-verified paper audit trail” that would serve as the official record of the vote in a  
15 disputed election. *See* Elec. Code §§19250(a-b), 19251(c), 19253.

16 (c) *Third*, California passed legislation requiring that the contents of a DRE  
17 paper audit trail be “accessible” to visually impaired voters. *See* Elec. Code §§19250(a-b),  
18 19251(a). To be considered “accessible,” the contents of the paper trail must be “provided  
19 or conveyed to voters via *both* a visual *and* a nonvisual method.” Elec. Code §19251(a)  
20 (emphasis added).

21 59. The California Secretary of State is charged with enforcing the Elections Code  
22 and is responsible for certifying whether a voting system meets all the requirements of the  
23 Elections Code. Gov’t Code §12172.5. The Secretary of State cannot approve a voting  
24 system or part of a voting system “unless it fulfills the requirements of this code and the  
25 regulations of the Secretary of State.” Elec. Code §19200.

26 60. The Secretary of State is responsible for establishing “the specifications for and  
27 the regulations governing” voting systems. Elec. Code §19205. The specifications and  
28 regulations must ensure that the system is “suitable for the purpose for which it is intended”

1 and is “safe from fraud or manipulation.” *Id.*

2 61. County Elections Officials must follow both valid regulations of the Secretary of  
3 State and the general mandates of the Elections Code. *See* Elec. Code §§19201(b),  
4 19250(b), Gov’t Code §26802. Counties cannot use voting systems “unless [the voting  
5 system] has received the approval of the Secretary of State prior to any election at which it is  
6 to be first used.” Elec. Code §19201(a). They also cannot “purchase or contract for a voting  
7 system, in whole or in part, unless it has received the approval of the Secretary of State”  
8 (Elec. Code §19201(b)) and met the requirements for federal qualification. Elec. Code  
9 §§19250(b), 19251(d).

## 11 II. THE DUBIOUS HISTORY OF DIEBOLD VOTING 12 SYSTEMS IN CALIFORNIA AND ELSEWHERE.

### 13 A. California’s Disastrous Experiment With Diebold Voting Systems In The 14 March 2004 Primary Results In Decertification Of The AV-TSx.

15 62. Diebold marketed and sold its systems—including an earlier version of the AV-  
16 TSx touchscreen at issue here—in California for use in the 2004 elections.

17 63. Based on representations from Diebold that federal qualification was imminent  
18 and that Diebold would comply with certain conditions, the Secretary of State conditionally  
19 certified the AV-TSx on November 20, 2003.

20 64. On February 11, 2004, the Secretary of State asked Diebold to implement two  
21 safeguards to its systems before the March 2004 primary election. First, Diebold was  
22 required to print an image of each of the ballots cast. Second, Diebold was required to  
23 provide voters an option of using a paper ballot.

24 65. During the March 2004 primary election, Diebold voting systems experienced  
25 operating problems which severely curtailed voting in San Diego County and significantly  
26 affected voting in Alameda County. In a special report on the March 2004 elections, the  
27 Secretary of State concluded that:

28 (a) Diebold neither alerted elections officials about this equipment problem, nor  
did it indicate to counties that additional poll worker training or documentation was

1 necessary to address this problem. Diebold's own investigation report concedes that its  
2 equipment created the problem, not poll worker error.

3 (b) The net effect was that the problems with the equipment, together with a  
4 lack of documentation and training by the vendor about how to resolve the problem, led to a  
5 "worst case scenario" in San Diego County, and serious difficulties in Alameda County.  
6 Most polling places had only one PCM machine. Therefore, when the device failed, there  
7 were no means for voters to access and use the touchscreen machines in that polling place.

8 (c) Without access to the touchscreens, voters could not vote. This was  
9 because San Diego County, despite repeated recommendations from the Secretary of State's  
10 office, failed to provide back-up paper ballots at polling places. Over half of San Diego's  
11 polling places could not open on time as a result of the equipment failure and the failure to  
12 provide back-up paper ballots. Voters were turned away or sent to other polling places to  
13 vote provisionally. Presumably, some of these voters cast their ballots later in the day. There  
14 was no way to estimate the number of voters who failed to return to the polls after being  
15 turned away.

16 Office of the Secretary of State's Report on the March 2, 2004 Statewide Primary Election  
17 (April 2004), at 5. A true and correct copy of this report is included in the Appendix as  
18 Exhibit 2.

19 66. Later investigations revealed that some of the problems were traceable to last-  
20 minute changes Diebold made to the voting systems.

21 67. On April 20, 2004, the Secretary of State's staff issued a staff report highly  
22 critical of Diebold. A true and correct copy of the staff report is included in the Appendix as  
23 Exhibit 3. The report concluded that Diebold:

24 (a) marketed and sold the AV-TSx system before it was fully functional, and  
25 before it was federally qualified;

26 (b) misrepresented the status of the AV-TSx system in federal testing in order  
27 to obtain state certification;

28 (c) failed to obtain federal qualification of the AV-TSx system despite

1 assurances that it would;

2 (d) failed even to pursue testing of the firmware installed on its AV-TSx  
3 machines in California until only weeks before the election, choosing instead to pursue  
4 testing of newer firmware that was even further behind in the ITA testing process and that,  
5 in some cases, required the use of other software that also was not approved in California;

6 (e) installed uncertified software on election machines in 17 counties;

7 (f) sought last-minute certification of allegedly essential hardware, software  
8 and firmware that had not completed federal testing; and

9 (g) in doing so, jeopardized the conduct of the March 2004 Primary. Ex. 3 at 5.

10 68. Citing Diebold's misconduct as outlined in the April 20, 2004, staff report, then-  
11 Secretary of State Kevin Shelley decertified the AV-TSx machines.

12 69. Secretary of State Shelley also asked the California Attorney General's office to  
13 consider bringing criminal fraud charges against Diebold. The Attorney General launched a  
14 criminal investigation but later decided to intervene in a civil False Claims Act lawsuit  
15 against Diebold. Diebold paid \$2.6 million to settle the claim.

16  
17 **B. Numerous Studies of Diebold Products By Other States Show Widespread**  
18 **Security Flaws And Problems.**

19 70. The Johns Hopkins University Study. On July 23, 2003, four computer scientists,  
20 three from the faculty of Johns Hopkins University and the fourth from the faculty of Rice  
21 University, published "An Analysis of an Electronic Voting System." The article reported  
22 on their analysis of the source code for the Diebold AccuVote-TS voting terminal, which is  
23 the predecessor of the AV-TSx. The authors concluded that "this voting system is far below  
24 even the most minimal security standards applicable in other contexts." They highlighted  
25 several issues including "unauthorized privilege escalation, incorrect use of cryptography,  
26 vulnerabilities to network threats, and poor software development processes." A true and  
27 correct copy of the Johns Hopkins report is included in the Appendix as Exhibit 4.

28 71. The Science Application International Corporation ("SAIC")/Maryland Study.

1 On September 2, 2003, Science Application International Corporation ("SAIC") issued a  
2 "Risk Assessment Report: Diebold AccuVote-TS Voting System and Processed"  
3 commission by the Governor of the State of Maryland. The report identified 328 security  
4 flaws, 26 of them "critical" and concluded that "[t]he system, as implemented in policy,  
5 procedure, and technology, is at high risk of compromise." A true and correct copy of the  
6 SAIC report is included in the Appendix as Exhibit 5.

7 72. The Nevada Study. In a report to the Nevada Secretary of State dated November  
8 26, 2003, the Chief of the Nevada Gaming Control Board's Electronic Services Division  
9 concluded that "the Diebold electronic voting machine, operating on the software analyzed  
10 in the Johns Hopkins report and the SAIC Risk Assessment Report, represents a legitimate  
11 threat to the integrity of the election process" and recommended against its use in Nevada.  
12 A true and correct copy of the Nevada Study is included in the Appendix as Exhibit 6.

13 73. The Compuware/Ohio Study. On December 2, 2003, the Ohio Secretary of State  
14 released a "DRE Technical Security Assessment" prepared by a private firm, Compuware  
15 (the "Compuware Report"). The report assessed touchscreen voting systems sold by  
16 Diebold and three other vendors. It found the Diebold AV-TS voting system had more  
17 security risks rated "high" than any other vendor. It stated that the same PIN—1111—was  
18 used on all supervisor smart cards issued nationwide, and that an unauthorized person could  
19 use it to gain access to supervisor functions on the voting terminal. The report also found  
20 that an unauthorized person could use the widely available Microsoft Access database  
21 program to change ballot definition files and election results in the Diebold GEMS software.  
22 A true and correct copy of the Compuware Report is included in the Appendix as Exhibit 7.

23 74. The RABA Technologies/Maryland Study. On January 20, 2004, the Maryland  
24 Department of Legislative Services released a report on Diebold product security entitled  
25 "Trusted Agent Report: Diebold AccuVote-TS Voting System," prepared by RABA  
26 Technologies LLC (the "RABA Report"). The RABA team, which included two prominent  
27 computer security professors and several former National Security Agency and Central  
28 Intelligence Agency computer security experts, identified numerous security vulnerabilities

1 in the Diebold GEMS tabulation software and server and in the "smart" memory cards used  
2 with the AV-TS and -TSx systems. These security vulnerabilities were confirmed and  
3 demonstrated in a single day under election day conditions after a single week of analysis  
4 and preparation by this small team of computer security experts. A true and correct copy of  
5 the RABA Report is included in the Appendix as Exhibit 8.

6  
7 **C. Computer Expert Harry Hursti's "Exploits" Demonstrate Vulnerabilities In**  
8 **The Diebold Voting System And Expose Diebold Misrepresentations.**

9 75. In May 2005, computer security expert Harri Hursti demonstrated the existence  
10 of several security vulnerabilities in the memory cards used in a Diebold system installed in  
11 Leon County, Florida. Diebold's systems use memory cards to customize ballots for a  
12 particular election and to store the voting results.

13 76. Using an actual Diebold AV-OS machine, Hursti performed several "exploits"  
14 that allowed him to control vote totals and other aspects of voting machine performance,  
15 without being detected in a later canvass, by manipulating the code on the Diebold memory  
16 cards. Hursti documented these exploits in a report dated July 4, 2005. A true and correct  
17 copy of Hursti's report is included in the Appendix as Exhibit 9.

18 77. Hursti's successful manipulation of the AV-OS was made possible by flaws in  
19 the AccuBasic code that runs both the AV-OS and AV-TSx systems. As described below, a  
20 later study by the California Secretary of State's own experts revealed that Hursti's  
21 manipulation would work on the AV-TSx and that there were many other vulnerabilities in  
22 the AccuBasic code.

23 78. As recently as August 23, 2005, Diebold denied the existence of the security  
24 vulnerability discovered by Hursti. In an August 23, 2005, letter to Janice Brewer, Arizona  
25 Secretary of State, Diebold insisted that the AV-OS "does not make use of a machine-  
26 executable program stored, and implements no ability to execute any programs from a  
27 memory card." A true and correct copy of the August 23, 2005 letter is included in the  
28 Appendix as Exhibit 10. In fact, as described below, a later study by the California

1 Secretary of State's own experts confirmed that the memory cards of both the AV-OS and  
2 AV-TSx could be used to "seize control of the machine" and "replace the running code on  
3 the machine . . . with code of the attacker's choosing."  
4

### 5 **III. DIEBOLD'S RENEWED EFFORTS TO ACHIEVE** 6 **CERTIFICATION OF ITS VOTING SYSTEM.**

7 79. On March 18, 2005, Diebold applied for re-certification of a voting system that  
8 included a reconfigured version of the AV-TSx.

9 80. Steve Freeman, the Secretary of State's technical consultant, recommended  
10 denial of certification on May 15, 2005.

11 81. Diebold later presented a different version of the AV-TSx, using firmware  
12 version 4.6.3, for state certification.

13 82. Wyle Laboratories—one of three vendor-sponsored laboratories which has been  
14 certified to test voting systems by the National Association of State Election Directors  
15 ("NASED")—recommended the AV-TSx with firmware version 4.6.3 for federal  
16 "qualification" at some point before June 27, 2005.

17 83. On June 27, 2005, NASED deemed the AV-TSx with firmware version 4.6.3  
18 "qualified" and assigned it system number N-1-06-22-22-001.

19 84. Despite the federal qualification, testing by the Secretary of State's office  
20 revealed serious problems with firmware version 4.6.3. For example, as described in an  
21 October 11, 2005 report by the Secretary of State's office, printer jams destroyed several  
22 voting records. The system software was also defective, resulting in numerous shutdowns  
23 and the potential for loss or corruption of voting records. A true and correct copy of the  
24 October 11, 2005 report is included in the Appendix as Exhibit 11.

25 85. After examining AV-TSx with firmware version 4.6.3, the Secretary of State's  
26 own panel concluded that "any system with failure rates this high is not ready for use in an  
27 election." Ex. 11 at 5.

28 86. After discovering these problems in the NASED- and ITA-qualified system, the

1 Secretary of State suspended Diebold's application.

2 87. Diebold later presented firmware version 4.6.4 for state certification.

3  
4 **A. Security Concerns Are Raised At The Public Hearing On Diebold**  
5 **Certification.**

6 88. The Secretary of State held a public hearing on the AV-TSx, with firmware  
7 version 4.6.4, on November 21, 2005. A true and correct copy of the transcript of the  
8 hearing ("Nov. 21 Hearing Transcript") is included in the Appendix as Exhibit 12.

9 89. Several speakers at the hearing informed the Secretary of State that the AV-TSx  
10 contained "executable code." *See, e.g.*, Ex. 12 at 33:10-13, 35:23-36:5, 42:1-17.

11 90. When asked whether the system contained executable code, the Secretary of  
12 State's technical consultant, Steve Freeman, responded: "I'm advised I shouldn't answer  
13 that." *Id.* at 42:14-17.

14 91. In fact, Freeman had already acknowledged that the AV-TSx contained  
15 executable code in a November 11, 2005, report. *See* Secretary of State's November 11,  
16 2005, consultant's report ("Freeman Report") at 7 ("[The AccuBasic report files] are  
17 actually loaded into the memory cards for the AV-OS and AV-TS where their logic is  
18 executed."). A true and correct copy of the Freeman report is included in the Appendix as  
19 Exhibit 13.

20  
21 **B. After Another Successful "Hack" By Hursti, The California Secretary Of**  
22 **State Finds That Additional Testing Of The Diebold Voting System Is**  
23 **Needed As A Prerequisite To Certification.**

24 92. On December 13, 2005, security expert Harri Hursti repeated his May 2005  
25 "hack" showing that the presence of interpreted code in the Diebold voting system's  
26 memory cards made it easy to manipulate election results. Hursti had been invited by the  
27 Supervisor of Elections for Leon County, Florida, to test an AV-OS system under simulated  
election conditions.

28 93. By using an off-the-shelf memory card, Hursti was able to manipulate the voting



1 results from an actual count of 6 "No" votes and 2 "Yes" votes to a reported, and inaccurate,  
2 count of 7 "Yes" votes and 1 "No" vote.

3 94. On or about December 20, 2005, Secretary of State McPherson issued a press  
4 release calling for additional testing of the Diebold Voting System. In the press release,  
5 McPherson stated that "[d]uring a thorough review of the application for the Diebold system  
6 currently pending certification, we have determined that there is sufficient cause for  
7 additional federal evaluation." A true and correct copy of the press release is included in the  
8 Appendix as Exhibit 14.

9 95. On information and belief, the Secretary of State's decision was based, in part, on  
10 the flaws revealed by Hursti's successful manipulation of the Diebold systems in Florida.

11 96. Also, on December 20, 2005, the Chief of the Secretary of State's Elections  
12 Division sent a letter to Diebold requesting that it submit source code contained on the  
13 memory cards used with the AV-OS and AV-TSx for further federal testing due to security  
14 concerns:

15 Unresolved significant security concerns exist with respect to the memory card  
16 used to program and configure the AccuVote-OS and the AccuVote-TSX  
17 components of this system because this component was not subject to federal  
18 source code review and evaluation by the Independent Testing Authorities (ITA)  
19 who examined your system for federal qualification. It is the Secretary of State's  
20 position that the source code for the Accubasic code on these cards, as well as for  
21 the Accubasic interpreter that interprets this code, should have been federally  
22 reviewed.

\*\*\*\*\*

23 . . . Therefore we are requesting that you submit the source code relating to the  
24 Accubasic code on the memory cards and the Accubasic interpreter to the ITA for  
25 immediate evaluation.

\*\*\*\*\*

26 *We require this additional review before proceeding with further consideration of*  
27 *your application for certification in California.* Once we have received a report  
28 from the federal ITA adequately analyzing this source code, in addition to the  
technical and operational specifications relating to the memory card and  
interpreter, we will expeditiously proceed with our comprehensive review of your  
application. (emphasis added)

A true and correct copy of the December 20, 2005, letter is included in the Appendix as  
Exhibit 15.

1           **C. The Secretary Of State Requests Review Of The Diebold Voting System's**  
2           **Memory Cards By Members Of His Voting Systems Technology Assessment**  
3           **Advisory Board And Their Analysis Confirms The Existence Of Known**  
4           **Security Flaws And Discovers Others.**

5           97. In or about this same period, the Secretary of State also asked members of the  
6           Voting Systems Technology Assessment Advisory Board ("VSTAAB"), an expert panel the  
7           Secretary of State's office created to help assess voting technology, to perform additional  
8           security testing of the Diebold Voting System's memory cards.

9           98. The panel had access to the AV-TSx source code for a period of four weeks.

10           **1. The VSTAAB Security Analysis.**

11           99. On or about February 14, 2006, three computer scientist members of the  
12           VSTAAB from the University of California issued a report entitled "Security Analysis of the  
13           Diebold AccuBasic Interpreter" (the "VSTAAB Report"). A true and correct copy of the  
14           VSTAAB Report is included in the Appendix as Exhibit 16.

15           100. The VSTAAB Report noted that the AV-TSx "had not been subjected to  
16           thorough testing and review by" the national ITA which had approved the system in 2005.  
17           Ex. 16 at 1.

18           101. The VSTAAB Report confirmed that the AV-TSx's software architecture, in  
19           particular its AccuBasic language and interpreter, contained "interpreted code" in violation  
20           of the Federal Election Commission's 2002 Voluntary Voting System Standards. *Id.* at 35.  
21           Compliance with these standards is mandatory under California law. Elec. Code §§19250  
22           (a-b), 19251(d).

23           102. The VSTAAB Report also confirmed Harri Hursti's finding that the AccuBasic  
24           script used in the memory cards of the AV-OS (and AV-TSx) can be replaced with  
25           malicious script that would allow an attacker to tamper with vote counts and reports and then  
26           conceal that the tampering had taken place. Ex. 16 at 18-19. The Report found that the AV-  
27           TSx had the same vulnerabilities as the AV-OS. *See id.* at 2 (noting that "[a] majority of the  
28           bugs" in the Diebold optical scan system were also present in the AV-TSx system), 19 ("The

1 AV-TSx also appears to be at risk for similar attacks.”). While the Report noted that the  
2 AV-TSx contained a “potential” protection against hacking not present in the AV-OS, it also  
3 noted that this protection was only “potential,” not actual, because the AV-TSx  
4 cryptographic protection contains a “serious flaw.” *Id.* at 2-3.

5 103. The VSTAAB Report also described a number of previously undiscovered and/or  
6 unreported “serious vulnerabilities” in the AccuBasic interpreters for both the AV-OS and  
7 AV-TSx machines that could be exploited by an attacker with unsupervised access to a  
8 memory card to modify vote totals, or otherwise compromise the integrity of an election. *Id.*  
9 at 11-18. Critically, these bugs would not be detected by any amount of functionality  
10 testing. *Id.* at 2.

11 104. The VSTAAB Report noted that the AccuBasic interpreter appears to have been  
12 written with commercial standards of software development, rather than the high-assurance  
13 standards that one would expect for an application where security was of utmost importance.  
14 *Id.* at 23.

## 16 2. The VSTAAB’s Recommended “Mitigation” Measures.

17 105. After outlining the security vulnerabilities they discovered, the authors of the  
18 VSTAAB Report recommended some possible mitigation measures. The authors divided  
19 their discussion into two categories of mitigation strategy—short-term and long-term.

20 106. As a *short-term* mitigation strategy, the VSTAAB Report recommended  
21 implementing procedural and physical safeguards to protect the Diebold machines and  
22 memory cards from tampering. The suggested *short-term* safeguards included updating the  
23 cryptographic keys on every AV-TSx machine, and certain physical security measures  
24 including chain of custody control of memory cards and the use of tamper-evident seals  
25 (ideally applied to seal the memory cards into voting system units at a central warehouse in  
26 advance of the election and not removed until the units were back in the control of county  
27 officials). The VSTAAB Report states that “[w]hile these strategies do not completely  
28 eliminate all risk, we expect they would be capable of reducing the risk *to a level that is*

1 manageable for local elections in the short term.” Ex. 16 at 36 (emphasis added). The  
2 recommended short-term strategies did not include any modification of source code, because  
3 of the time it would take time to perform the additional coding and to secure federal  
4 qualification and state certification of the code changes.

5 107. By contrast, according to the authors, “[i]n the longer term, or for statewide  
6 elections, the risks of not fixing the vulnerabilities in the AccuBasic interpreter become more  
7 pronounced. Larger elections, such as a statewide election, provide a greater incentive to  
8 hack the election and heighten the stakes . . . . For statewide elections, or looking farther  
9 into the future, it would be far preferable to fix the vulnerabilities discussed in this report.”  
10 *Id.* at 36-37 (emphasis added).

11 108. The VSTAAB Report’s recommended long-term mitigation measures primarily  
12 consisted of changing the Diebold machines’ software and or hardware including: (1)  
13 revising the source code of the AccuBasic interpreter to fix the bugs identified in the Report  
14 and to incorporate defensive programming practices, including the elimination of all “trust”  
15 in the memory card (*i.e.* eliminate any implicit assumption that the memory card could not  
16 be tampered with); (2) protecting the AccuBasic code from tampering by embedding it in  
17 non-removable storage and/or protecting it with cryptography; (3) changing the architecture  
18 of the AV-OS and AV-TSx so they do not store code on removable memory cards; and (4)  
19 changing the architecture of the AV-OS and AV-TSx to eliminate all interpreted code and  
20 bring them into compliance with the federal voluntary standards. *Id.* at 31-36.

21  
22 **3. The VSTAAB Report Acknowledges Its Limited Scope And The**  
23 **Existence Of Other Security Issues.**

24 109. The VSTAAB Report also made clear that the scope of the review the Board was  
25 allowed to perform was very limited. For example, the VSTAAB investigators limited their  
26 review to Diebold’s proprietary AccuBasic scripting language which Hursti had  
27 demonstrated was problematic. Ex. 16 at 6. In addition, the VSTAAB Report did not  
28 examine the source code for the GEMS election management system, even though the

1 investigators noted that “[i]t is widely acknowledged that a malicious person with  
2 unsupervised access to GEMS, even without knowing the passwords, can compromise  
3 GEMS and the election it controls.” *Id.*

4 110. The VSTAAB Report’s authors “did not have access to a genuine running  
5 system.” *Id.* at 8. Their analysis was based only on a “stubbed-out version of the code,” but  
6 even with this piece they were able to confirm that “one of the attacks we discovered (the  
7 only one that we tried) actually works.” *Id.*

8 111. Finally, the VSTAAB Report assumed that the hypothetical person seeking to  
9 alter ballot results did not have any inside confederates, or access to passwords or  
10 cryptographic keys. *Id.* at 7. In short, the VSTAAB Report discovered numerous security  
11 flaws in the very limited area of the Diebold Voting System software that it examined—the  
12 system’s memory cards—but did not exclude the possibility, and in fact acknowledged the  
13 likelihood, that significant additional security flaws existed in other parts of the Voting  
14 System.

15  
16 **D. The Diebold AV-TSx’s Paper Audit Trail System Has Not Been Shown To**  
17 **Meet State Requirements.**

18 112. California law requires that DREs produce an “accessible voter verified paper  
19 audit trail.” Elec. Code §19250(a-b). The Legislature imposed this requirement to protect  
20 against programming error or fraud.

21 113. In an attempt to meet California’s requirement for a voter verified paper audit  
22 trail, the current version of the AV-TSx comes with an attached printer, the AccuView  
23 Printer Module. The printer module produces a record of the voter’s vote on a continuous  
24 roll of thermal paper which fully-sighted voters are supposed to be able to view through a  
25 small window and then accept or reject the record as correct. If the voter rejects the record  
26 as incorrect, the printer is to make a mark on the paper roll at the bottom of the particular  
27 entry, but the record is not removed from the roll. All paper records, including the rejected  
28 votes and provisional votes, are spooled into a sealed canister inside the machine.

1                   **1. The AV-TSx And Its Attached Printer Destroy Vote Records And**  
2                   **Experience Frequent Crashes During Testing By California Elections**  
3                   **Officials In 2005.**

4           114. On July 20, 2005, the Secretary of State's office oversaw a "volume test" of the  
5 AV-TSx's attached printers. The volume test was performed at a warehouse supplied by the  
6 San Joaquin County Elections Department. November 14, 2005, Staff Review and Analysis  
7 at 8. A true and correct copy of the November 14, 2005, report is included in the Appendix  
8 as Exhibit 17. Most of the testers were election staff from various counties. *Id.* at 8.

9           115. The July 20, 2005, test revealed critical flaws in the hardware and software of the  
10 AV-TSx. The system destroyed or lost paper audit records, a problem which would  
11 complicate manual recounts. Ex. 11 at 6. The AV-TSx also experienced ongoing software  
12 failures, making it "possible that votes could be lost or corrupted." *Id.* at 7.

13           116. In a July 27, 2005 letter, the Secretary of State rejected Diebold's then-pending  
14 application, noting that "[i]n the course of testing your system, my staff has noted problems  
15 with paper jamming on the AccuView printer module. Additionally, my staff has noted an  
16 additional recurring problem with the AccuVote-TSX that freezes the ballot station and  
17 requires it to be rebooted. After extensive testing, these problems remain unresolved." A  
18 true and correct copy of the July 27, 2005 letter is included in the Appendix as Exhibit 18.

19           117. An October 11, 2005 report by the VSTAAB describing the test and its results  
20 concluded that "any system with failure rates this high is not ready for use in an election."  
21 Ex. 11 at 5.

22           118. In the weeks between the Secretary of State's July 2005 rejection of the AV-TSx  
23 application and the October 2005 VSTAAB report, Diebold renewed its application for the  
24 AV-TSx.

25           119. As a result of this renewed application, another volume test was held on  
26 September 28, 2005, in San Diego. Ex. 17 at 9. However, instead of County Elections  
27 Officials, this time the test was staffed by "[t]emporary workers contracted by the Secretary  
28 of State." *Id.*

          120. This second test was conducted under close supervision of Diebold staff who

1 conducted “[s]upport operations,” including “programming the voter activation cards.” *Id.*  
2 There is no indication that any of the VSTAAB experts who witnessed the first test were  
3 present at the second test. As such, although the Secretary of State’s November 14, 2005,  
4 staff report on the test stated that none of the errors experienced during the second test  
5 “resulted in the loss of the record of a vote,” (*id.* at 10) this test lacked scrutiny and  
6 verification by any independent experts. The ability of the AV-TSx’s printers to function  
7 when operated by County Elections Officials under the pressure of a statewide California  
8 election therefore remains unknown.

9  
10 **2. The Secretary Of State’s Staff Report Confirms That The Diebold**  
11 **TSx’s AccuView Printers Do Not Comply With Federal And State**  
**Accessibility Requirements.**

12 121. The Secretary of State’s November 11, 2005, consultant’s report (“Freeman  
13 Report”) on the AV-TSx system discussed the question of the Diebold TSx AccuView  
14 Printer modules’ compliance with Help America Vote Act (“HAVA”) and state law  
15 requirements for equal access to disabled voters. Ex. 13 at 8. The Freeman Report noted  
16 that the system “does not provide a blind voter with the opportunity to verify the vote using  
17 the paper audit record.” *Id.* Non-visual confirmation of the paper record is required under  
18 state law. Elec. Code §§19250(a-b), 19251(a).

19 122. The Secretary of State’s November 11, 2005, consultant’s report on the AV-TSx  
20 system disclosed that the AV-TSx “does not provide support for assistive devices for the  
21 physically disabled such as sip and puff or jelly buttons.” Ex. 13 at 12. Such devices are  
22 necessary to provide access to low-mobility and low-dexterity voters.

23  
24 **3. The Secretary Of State Failed To Examine Whether The AV-TSx**  
25 **Thermal Paper Roll Records Can Meet California Mandatory Audit**  
**And Recount Requirements.**

26 123. On information and belief, none of the Secretary of State’s tests of the AV-TSx  
27 analyzed, or purported to analyze, whether the thermal paper roll records produced by the  
28 AV-TSx’s attached printer were capable of supporting a manual audit. State law requires a

1 manual audit of at least 1% of the precincts in an election. Elec. Code §15360.

2 124. State law also requires that DRE machines produce a “paper record copy” of  
3 every vote. Elec. Code §19250(d). Elections Code Section 19251(e) defines “paper record  
4 copy” as “an auditable document printed by a voter verified paper audit trail component that  
5 corresponds to the voter’s electronic vote and lists the contests on the ballot and the voter’s  
6 selections for those contests.”

7 125. This failure to test or certify for capacity to withstand a manual audit is troubling  
8 given the Secretary of State’s own admission, in a September 9, 2005, opinion piece for the  
9 San Jose Mercury News, that “[u]sing paper receipts as secondary ballots at this point is too  
10 risky. They are designed for the voter’s review and are not printed on ballot-quality paper  
11 and might not retain their quality during the often-lengthy recount and legal challenge  
12 periods.” A true and correct copy of the opinion piece is included in the Appendix as  
13 Exhibit 19.

14 126. The California Association of Clerks and Election Officials has also questioned  
15 whether paper records generated by DREs are suitable for a manual audit. In a September 1,  
16 2005, letter to the governor, the association noted several reasons why DRE paper records  
17 would make it “extremely problematic” to conduct precinct-specific 1% manual recounts as  
18 required by Elections Code Section 15360. Those reasons include the following:

19 (a) eligible provisional ballots would be “indistinguishable from the ineligible  
20 ballots due to the inability to identify which records represent the eligible and/or ineligible  
21 images”;

22 (b) because early voters can vote outside their precinct, early voters from  
23 multiple precincts may have their votes on a single DRE, making it “onerous and time  
24 consuming, if not impossible” to determine which votes are associated with a particular  
25 precinct;

26 (c) potential mechanical problems, including printer jams and illegible print;

27 (d) because the paper record is in the voters’ chosen language,  
28 “[t]ranslation . . . for the purposes of performing the 1% manual tally will be difficult and



1 time consuming.” A true and correct copy of the September 1, 2005, letter is included in the  
2 Appendix as Exhibit 20.

3 127. The auditability of the AV-TSx’s paper record is of critical concern because, as  
4 the VSTAAB Report noted, a manual audit is the only way to detect whether the accuracy of  
5 the AV-TSx has been compromised. The report concluded: “Successful attacks can only be  
6 detected by examining the paper ballots: There would be no way to know that any of these  
7 attacks occurred; the canvass procedure would not detect any anomalies, and would just  
8 produce incorrect results. The only way to detect and correct the problem would be by  
9 recount of the original paper ballots, *e.g.* during the 1 percent manual recount.” Ex. 16 at 2.

10 128. Failure to test or certify for auditability is also a concern given the evidence that  
11 auditing a DRE paper trail printed on a continuous thermal paper roll would be totally  
12 impractical in actual election conditions. When Sacramento County Registrar Jill LaVine  
13 performed a manual audit of a DRE paper trail in late 2002, it took 127 hours to verify 114  
14 relatively complex ballots. July 7, 2004, Testimony before the House of Representatives  
15 Committee on House Administration, at 210-11. Excerpts from the transcript of LaVine’s  
16 testimony is included in the Appendix as Exhibit 21. LaVine explained: “when you pull out  
17 those long pieces of paper, they start curling like Goldilocks’ curls, and you are holding  
18 down both ends. We did them in teams of two to verify the electronic count. To read back  
19 and forth and no way to quickly read the paper ballot, it took that long to verify only 114 of  
20 the ballots.” *Id.* at 211. In San Joaquin County, where Petitioner Joseph Holder resides and  
21 votes, the 1% recount would require the counting of approximately 2,130 ballots.

22  
23 **IV. THE SECRETARY OF STATE “CONDITIONALLY”**  
24 **APPROVED THE AV-TSX DESPITE ITS RECOGNIZED**  
**FAILURE TO SATISFY STATE LAW.**

25 129. Despite the acknowledged deficiencies in the AV-TSx, and without waiting for  
26 the ITA’s report or approval, the Secretary of State nonetheless “conditionally certified” the  
27 AV-TSx on February 17, 2006. A true and correct copy of the certification is included in the  
28 Appendix as Exhibit 22.

1           **A. The Certification Addresses Security Issues By Mandating The “Short**  
2           **Term” Mitigation Measures From The VSTAAB Report Without Any**  
3           **Public Discussion Of The Efficacy Or Feasibility Of Those Measures, Or The**  
4           **Need For More Substantial Fixes.**

5           130. The terms and conditions set forth in the certification included the adoption of  
6 many of the stop-gap “short term” procedural and physical safeguards recommended in the  
7 VSTAAB Report, including: resetting the encryption key on the AV-TSx machines;  
8 assigning each memory card used with the AV-OS or AV-TSx machines a permanent serial  
9 number; programming the memory cards in a secured facility, inserting them immediately  
10 into their assigned voting machines and sealing them with tamper-evident seals, verification  
11 of the integrity of the seals at the start of election day; maintenance of a written log showing  
12 the chain of custody for each memory card and unit; and tight control over the GEMS server.  
13 Ex. 22 at 3-4. The terms and conditions did not adopt a recommendation in the VSTAAB  
14 Report that the memory cards be returned intact in the TSx units to the county facility at the  
15 end of election day.

16           131. In mandating these security measures, the Secretary of State apparently has not  
17 considered whether they would prevent manipulation of the AV-TSx memory cards through  
18 means other than those identified in the VSTAAB Report. On information and belief, the  
19 code on the AV-TSx memory cards can be manipulated even when they are inserted and  
20 sealed into AV-TSx terminals because those terminals have several access points.

21           132. The required safeguards were also written without regard for the reality of  
22 elections in California. For example, voting machines are often minimally secured and  
23 unsupervised for long periods prior to an election. Poll workers also lack the time and  
24 training to perform security functions as well as their traditional functions. Moreover, there  
25 is no indication that the VSTAAB panel, who are computer scientists, have any expertise is  
26 devising physical and procedural security measures, or any experience of poll worker  
27 behavior in actual election conditions.

28           133. In the past, even relatively simple safeguards have not been followed, with the  
result that voters have been disenfranchised. For example, in 2004 San Diego was required

1 to print extra paper ballots as a back-up for its conditionally certified Diebold systems. San  
2 Diego ignored this requirement. When the machines broke down, countless voters were  
3 disenfranchised. *See* Ex. 2 at 5.

4 134. By requiring that counties implement new security procedures, the certification  
5 created rules which apply to all Diebold AV-TSx counties and which are designed to enforce  
6 the provisions of the Elections Code. These rules are mandatory in light of Diebold's  
7 acknowledgement that it cannot make the long-term changes in the VSTAAB Report in time  
8 for this year's California election cycle (described in Paragraph 137 *infra*).

9 135. The Secretary of State has not called for or scheduled any additional public  
10 hearings on the topic of the certification of the Diebold systems, or the use procedures set  
11 forth in his statement of certification.

12  
13 **B. The Secretary Of State's Certification Order Does Not Require Diebold To**  
14 **Remove Forbidden Interpreted Code From Its Memory Cards.**

15 136. The certification also does not require Diebold to remove interpreted code from  
16 its machines even though the VSTAAB examiners noted it was explicitly forbidden by  
17 federal voluntary standards (which California law makes mandatory). The certification  
18 order also sets no schedule for when in the future these changes need to be made.

19 137. In a February 21, 2006 letter to the Secretary of State, Diebold promised to make  
20 some of the short-term changes recommended by the VSTAAB report, but acknowledged  
21 that complying with the VSTAAB Report's longer-term recommendations would require  
22 significant changes to several different systems, including but not limited to the AV-TSx. A  
23 true and correct copy of the February 21, 2006 letter is included in the Appendix as Exhibit  
24 23. Even if Diebold in fact makes the short-term changes recommended by the VSTAAB  
25 Report, that would fail to address both the System's identified security vulnerabilities and its  
26 failure to satisfy state law.

1           **C. The Secretary Of State's Certification Order Improperly Delegates**  
2           **Responsibility For Ensuring That The Diebold System Complies With State**  
3           **And Federal Law To Diebold And County Elections Officials.**

4           138. The Secretary of State's certification acknowledges that all voting systems  
5           certified for use in California must comply with all applicable state and federal statutes, rules  
6           and requirements. However, the Secretary of State's "conditional certification" improperly  
7           delegates to Diebold and to County Elections Officials responsibility for the legality of the  
8           Diebold Voting System. This is especially problematic given the evidence generated by the  
9           Secretary of State's own office and expert panel that the Diebold Voting System does not in  
10          fact comply with these requirements.

11          139. With respect to Diebold, the certification states that voting system manufacturers  
12          "shall assume full responsibility for any representation that a voting system complies with  
13          all applicable state and federal requirements." In the event that such a representation is false  
14          or misleading, the Secretary's "conditional certification" directs that the manufacturer "shall  
15          be responsible for the cost of any upgrade, retrofit or replacement, of any voting system or  
16          its component parts, found to be necessary for certification or to otherwise be in  
17          compliance." Ex. 22 at 5.

18          140. The attempt to delegate responsibility (and *liability*) to County Elections Officials  
19          in the Secretary's certification is even more egregious. The certification states that "[a]ny  
20          voting system purchased with funds allocated by the Secretary of State's Office shall meet  
21          all applicable state and federal standards, regulations and requirements." *Id.* at 6.

22          141. The Secretary of State is responsible for allocating state voting system  
23          modernization funds and HAVA funds from the federal government. The Secretary of State  
24          is also responsible for guaranteeing that voting systems comply with federal and state law.  
25          The Secretary of State's "conditional certification" abdicates that responsibility by  
26          encouraging County Elections Officials to squander their limited funding on certified, but  
27          nonetheless non-compliant, systems while purporting to shift liability onto those same  
28          county officials for the systems' non-compliance.

1                   **V. SUMMARY OF LEGAL DEFECTS IN THE AV-TSX**  
2                   **CERTIFICATION.**

3           **A.   Certification Of The Diebold AV-TSx And Use Of That System By County**  
4           **Elections Officials Violates Petitioners' Fundamental Constitutional Rights.**

5           142. Petitioners' rights to vote and to have those votes counted correctly are  
6           fundamental rights which are protected by Article II, Section 2 and Article II, Section 2.5 of  
7           the California Constitution. Petitioners' right to vote includes the rights to have access to  
8           voting systems used by their respective local polling places and the right to have access to an  
9           auditable paper record of their respective votes. Petitioners' rights to vote and to have their  
10          votes counted also includes the right to have all votes, including their own, recorded and  
11          counted correctly such that Petitioners' own votes are properly weighed.

12          143. Use of the Diebold AV-TSx and its AccuView Printer Module by the  
13          Defendants/Respondents County Elections Officials in future California elections will  
14          violate Petitioners' constitutional rights to vote and to have those votes counted correctly.  
15          The Diebold AV-TSx and the thermal paper roll "record" of votes are not accessible to many  
16          voters with disabilities. In addition to the inability of many disabled voters to use the AV-  
17          TSx itself, vision-impaired voters cannot access the thermal paper roll "record" to verify that  
18          the "record" of their vote that is to be used for auditing and/or recount purposes has recorded  
19          their vote correctly.

20          144. Petitioners' rights to vote and to have those votes counted also includes the right  
21          to vote in the manner prescribed by the legislature. Consequently, if DRE voting machines  
22          are used to record their votes, Petitioners, like all Californians, have the right to vote on  
23          machines which satisfy state law minimum standards for reliability, security, accessibility  
24          and auditability.

25          145. The Diebold AV-TSx does not satisfy the requirements of state law. Allowing  
26          counties to force Petitioners or any other Californians to use this defective equipment  
27          therefore deprives Petitioners and all other Californians of their fundamental rights to vote  
28          and to have those votes counted correctly.

          146. The Secretary of State's conditional certification of the Diebold AV-TSx for use

1 in California elections denies Petitioners' rights under Article I, Section 7 of the California  
2 Constitution to equal protection of the laws. By delegating to County Elections Officials the  
3 power to choose to use the Diebold AV-TSx, the Secretary of State has uniquely burdened  
4 the fundamental rights of Petitioners, and other voters who vote in those California counties  
5 who use the Diebold Voting System, to vote and to have their votes counted correctly.

6 147. Use of the Diebold AV-TSx by Defendants/Respondents County Elections  
7 Officials also denies Petitioners' rights under Article I, Section 7 of the California  
8 Constitution to equal protection of the laws. Use of the AV-TSx uniquely burdens the  
9 fundamental rights of Petitioners, and other voters who vote in those California counties who  
10 use the Diebold Voting Systems, to vote and to have their votes counted correctly.

11  
12 **B. Certification Of The Diebold AV-TSx And Any Use Of That System By**  
13 **County Elections Officials Violates The "Federal Qualification"**  
14 **Requirement Under Elections Code Sections 19250(a-b) And 19251(d).**

15 148. Elections Code Section 19251(d) defines "federal qualification" to mean that a  
16 voting system (1) has been certified by means of qualification testing by a Nationally  
17 Recognized Test Laboratory *and* (2) has met or exceeded the minimum requirements set  
18 forth in the federal voluntary standards.

19 149. Section 4.2.2 of the 2002 Standards addresses software integrity and strictly  
20 limits the use of interpreted code. It reads in part: "Self-modifying, dynamically loaded, or  
21 interpreted code is prohibited, except under the security provisions outlined in section 6.4.e.  
22 *This prohibition is to ensure that the software tested and approved during the qualification*  
23 *process remains unchanged and retains integrity.* External modification of code during  
24 execution shall be prohibited." Ex. 1 at 4-4 (emphasis added). It is generally understood  
25 that the reference to section 6.4.e is actually a reference to section 6.4.1.e, because there is  
26 no section 6.4.e. Under section 6.4.1.e of the 2002, "[a]fter initiation of Election Day  
27 testing, no source code or compilers or assemblers shall be resident or accessible." *Id.* at 6-  
28 7. The interpreted code used in the Diebold Voting System's memory card does not qualify  
for section 6.4.1.e exemption, because its compiler and interpreter are resident and

1 accessible after initiation of Election Day testing. Thus, as the VSTAAB Report recognized,  
2 the presence of interpreted code in the Diebold Voting System's memory card violates the  
3 2002 Standards. Ex. 16 at 35 ("To be in compliance [with federal rules restricting interpreted  
4 code] it would seem that AccuBasic would have to be eliminated, or the standard would  
5 have to be changed").

6 150. In other words, the AV-TSx is not "federally qualified" within the meaning of  
7 Elections Code Section 19251(d) because it contains interpreted code in violation of the  
8 2002 Standards.

9 151. Moreover, the federal qualification process itself is suspect. As described in  
10 paragraphs 84 through 86 above, the AV-TSx system with firmware version 4.6.3 was  
11 qualified by the ITA and the NASED but was later found to be unstable and plagued by  
12 printing problems. Later, the federal ITA that qualified the AV-TSx system failed to test for  
13 the presence of interpreted code and failed to identify the other serious security issues noted  
14 in the VSTAAB Report.

15  
16 **C. Certification Of The Diebold AV-TSx Violates The Help America Vote Act.**

17 152. HAVA created several new requirements for voting systems. For example,  
18 HAVA provides that voting systems shall

19 (a) notify a voter of any "overvotes"—i.e. votes for more than one candidate  
20 for a single office (HAVA §301(a)(1)(A)(iii));

21 (b) produce a record with a "manual audit capacity" (HAVA §301(a)(2)(B));

22 (c) be accessible for individuals with disabilities, including visual, mobility,  
23 dexterity and hearing disabilities, in a manner that provides the same opportunity for access  
24 and participation (including privacy and independence) as for other voters (HAVA  
25 §301(a)(3)(A));

26 (d) provide at least one system at each polling place which satisfies the  
27 accessibility requirements in HAVA Section 301(a)(3)(A); and

28 (e) allow "provisional voting" when an individual declares that he is eligible to

1 vote but the official list of voters does not list his name (*e.g.* because the voter is attempting  
2 to vote at the wrong polling place). HAVA §302.

3 153. The Secretary of State's November 11, 2005, consultant's report noted that the  
4 AV-TSx "does not provide a blind voter with the opportunity to verify the vote using the  
5 paper audit record." Ex. 13 at 8. The report noted that this problem, among others, made it  
6 impossible to determine if the AV-TSx complied with HAVA. *Id.*

7 154. The California Association of Clerks and Election Officials has also questioned  
8 whether the HAVA's required provisional balloting is compatible with the paper records  
9 generated by DREs. In its September 1, 2005, letter to the governor, the association noted  
10 that provisional ballots by eligible voters would be "indistinguishable from the ineligible  
11 ballots due to the inability to identify which records represent the eligible and/or ineligible  
12 images." Ex. 20.

13 155. The November 11, 2005, consultant's report on the AV-TSx acknowledges that it  
14 "does not provide support for assistive devices for the physically disabled such as sip and  
15 puff or jelly buttons." Ex. 13 at 12. The inaccessibility of the AV-TSx for voters with  
16 dexterity disabilities also violates HAVA. Accommodation of such voters is mandated by  
17 HAVA §301(a)(3) and its implementing regulations.

18  
19 **D. Certification Of The Diebold AV-TSx And Any Use Of That System By**  
20 **County Elections Officials Violates The "Accessible Voter Verified Paper**  
**Audit Trail" Requirements Of The California Elections Code.**

21 156. The Elections Code requires that DRE systems produce an "accessible voter  
22 verified paper audit trail." Elec. Code §19250(a-b).

23 157. "Voter verified paper audit trail" is defined as "a component of a direct recording  
24 electronic voting system that prints a contemporaneous paper record copy of each electronic  
25 ballot and allows each voter to confirm his or her selections before the voter casts his or her  
26 ballot." Elec. Code §19251(c).

27 158. "Accessible" means "the information provided on the paper record copy from the  
28 voter verified paper audit trail mechanism is provided or conveyed to voters via both a visual



1 and a nonvisual method, such as through an audio component.” Elec. Code §19251(b).

2 159. The voter verified paper audit trail is the “official paper audit record and shall be  
3 used for the required 1-percent manual tally described in Section 15360 and any full  
4 recount.” Elec. Code §19253(b)(1). “During the official canvass of every election in which  
5 a voting system is used, the official conducting the election shall conduct a public manual  
6 tally of the ballots tabulated by those devices cast in 1 percent of the precincts chosen at  
7 random by the elections official.” Elec. Code §19253(b)(1).

8 160. The voter verified paper audit trail is the official record of the vote; it “shall  
9 govern if there is any difference between it and the electronic record during a 1-percent  
10 manual tally or full recount.”

11 161. The AV-TSx’s paper audit trail fails to meet the accessibility standards of  
12 Elections Code Section 19251 because it does not have a non-visual method for conveying  
13 to a voter the contents of the contemporaneous paper record of his vote.

14 162. There are also substantial doubts as to whether the AV-TSx’s paper audit trail  
15 could be used to meet the audit requirements of Elections Code Section 19253. Because the  
16 auditability of the AV-TSx has never been proven in actual, or even simulated, election  
17 conditions, and because of the substantial evidence of failures both of the AV-TSx’s printer  
18 mechanism and of the paper rolls used by the AV-TSx, the Secretary of State’s certification  
19 of the AV-TSx without additional testing is a violation of the Elections Code.

20 163. As was shown after a Diebold memory card malfunctioned during the 2000  
21 presidential election, resulting in thousands of miscounted votes, manual recounts are vital  
22 for protecting the accuracy and legitimacy of elections.

23  
24 **E. The Secretary Of State’s “Conditional” Certification Of The Diebold AV-**  
25 **TSx Violates The California Elections Code And Administrative Procedures**  
26 **Act By Imposing New Regulations On Voting Without Public Hearing Or**  
**Comment.**

27 164. Elections Code Section 19204 requires the Secretary of State to “hold a public  
28 hearing to give persons interested an opportunity to express their views for or against the

1 machine or device” before “giving its decision approving or withholding approval of any  
2 voting machine, voting device, or vote tabulating device.”

3 165. The Administrative Practices Act (“APA”), Government Code Section 11340 *et*  
4 *seq.*, also requires that public agencies and officers satisfy certain requirements, including  
5 filing a notice of the proposed regulation (Gov’t Code §11346.2(a)), analyzing possible  
6 alternatives and providing reasons for rejecting those alternatives (Gov’t Code  
7 §11346.2(b)(3)(A)), and holding a public hearing if any “interested person” requests it  
8 (Gov’t Code §11346.8). A regulation that is subject to the APA is void if it fails to satisfy  
9 the APA’s requirements. *See* Gov. Code §11340.5(a).

10 166. The Secretary of State’s new rules for use of the AV-TSx did not satisfy the  
11 public notice and alternatives analysis requirements of the APA. The Secretary did not file a  
12 notice of the proposed regulations (Gov’t Code §11346.2(a)), analyze possible alternatives,  
13 or provide reasons for rejecting those alternatives (Gov’t Code §11346.2(b)(3)(A)).

14 167. The Secretary of State’s decision to impose untested conditions of use in order to  
15 address known security problems with the Voting System, violates the public notice  
16 requirement of Elections Code Section 19204 and the California Administrative Procedures  
17 Act, Government Code Section 11340 *et seq.* In particular, the Secretary of State’s  
18 certification of the Voting System only on condition that its users implement untested  
19 security recommendations from the VSTAAB Report is not valid because it was not publicly  
20 debated, especially given that there is no indication that the VSTAAB panel, made of  
21 computer scientists with no demonstrated experience with the actual behavior of poll  
22 workers during elections, was qualified to make recommendations on physical and  
23 procedural, as opposed to programming, elections safeguards. Moreover, even if the  
24 VSTAAB was qualified, the Secretary of State’s failure to have a debate on its  
25 recommendations violates the Elections Code because his choice of which VSTAAB  
26 recommendations to mandate was both highly selective and arguably inconsistent with the  
27 VSTAAB examiners’ intentions.

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

3           168. Elections Code Section 19205 provides that the Secretary of State's voting  
4 system specifications and regulations "shall include" the following: (a) the machine or  
5 device and its software shall be suitable for the purpose for which it is intended, (b) the  
6 system shall preserve the secrecy of the ballot, and (c) the system shall be safe from fraud or  
7 manipulation.

8           169. The Secretary of State's certification of the Voting System despite the VSTAAB  
9 Report's identification of a large number of security flaws in the Voting System's memory  
10 card software and the Report's suggestion that there were additional flaws in other  
11 components of the Voting System that it had not examined violates Elections Code Section  
12 19205.

13           170. The Secretary of State's decision to impose conditions of use on the Voting  
14 System for statewide elections drawn primarily from the VSTAAB Report's  
15 recommendations for short-term security solutions suitable for local elections, while failing  
16 to require the bug fixes and other modifications the VSTAAB Report recommended as long-  
17 term security solutions for statewide and/or for high-stakes elections, violates Elections  
18 Code Section 19205.

19           171. The Secretary of State's imposition of conditions of use drawn from the  
20 VSTAAB Report also violates Elections Code Section 19205 because there is no evidence  
21 that the authors of that report had any special expertise in the areas of physical and  
22 procedural, as opposed to programming, safeguards on voting or that they, or the Secretary  
23 of State, made any effort to test the feasibility or efficacy of the recommended safeguards.

24           172. The Secretary of State's certification of the AV-TSx also violates Elections Code  
25 Section 19205 because the AV-TSx memory cards may be accessible and programmable  
26 even when they are inserted and sealed into AV-TSx terminals, nullifying any benefit from  
27 the short-term security measures.

28           173. The Secretary of State's certification of the AV-TSx also violates Elections Code

1 Section 19205 because there has been no testing to determine if the paper audit trail created  
2 by the AV-TSx's attached printer will be suitable for use in California's mandatory one  
3 percent recount or, more importantly, a full manual recount in the event of a disputed  
4 election.

5  
6 **G. The Secretary Of State's "Conditional" Certification Is An Improper**  
7 **Delegation Of Authority.**

8 174. The Elections Code mandates that the Secretary of State "shall not approve any  
9 voting system, or part of a voting system, unless it fulfills the requirements of this code and  
10 the regulations of the Secretary of State." Elec. Code §19200. The Secretary of State's own  
11 staff and experts have already confirmed the AV-TSx does not satisfy the FEC's 2002  
12 Standards, made mandatory by the Elections Code, or the Help America Vote Act.

13 175. When the Secretary of State certified the AV-TSx, it was "conditional" on several  
14 points. One of the conditions, contained in paragraph "j" of the Certification, was that  
15 "[p]ursuant to this certification and by order of the Secretary of State, voting systems  
16 certified for use in California shall comply with all applicable state and federal statutes,  
17 regulations, rules and requirements." Ex. 22 at 5. The paragraph provided that applicable  
18 regulations include the Help America Vote Act and the FEC's 2002 Voting System  
19 Standards/Guidelines. *Id.* Paragraph "k" of the Certification also provided that "[v]oting  
20 system manufacturers and/or their agents shall assume full responsibility for any  
21 representation that a voting system complies with all applicable state and federal  
22 requirements as referenced above." *Id.*

23 176. By approving the system nonetheless, but simultaneously proclaiming that  
24 certified systems must meet federal and state law and that vendors are liable for "any  
25 representation that a voting system complies with all applicable state and federal  
26 requirements," the Secretary of State has improperly delegated his authority to enforce the  
27 voting standards contained in the Elections Code.

28 177. In fact, the Secretary of State's Certification assumes that the AV-TSx, despite

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 Officials.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

1 216. An actual controversy exists whether the Secretary of State's certification of the  
2 AV-TSx was contrary to the requirements of state law, including, *inter alia*, Elections Code  
3 Sections 19200, 19205, 19222, 19227, and 19250. The Secretary of State's certification also  
4 improperly delegates his responsibilities under California law.

5 217. An actual controversy also exists as to whether Defendants/Respondents County  
6 Elections Officials will violate Petitioners' rights under state law if they use the AV-TSx in  
7 future California elections.

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

11  
12 **SIXTH CAUSE OF ACTION**  
13 **(Declaratory Relief Pursuant To Gov't Code §11350 & Code Civ. Proc. §1060)**

14 219. Paragraphs 1 through 180 are incorporated herein by reference.

15 220. As described above, the Secretary of State's conditional certification of the AV-  
16 TSx imposes new regulations on County Elections Officials and voting systems generally.

17 221. The Secretary of State did not disclose these new regulations prior to imposing  
18 them, and he held no public hearing prior to their adoption.

19 222. An actual controversy exists whether the Secretary of State's "conditional  
20 certification" of the AV-TSx is invalid because it adopted new regulations without  
21 complying with the Administrative Procedures Act, Government Code Section 11340 *et seq.*  
22 (the "APA").

23 223. An actual controversy exists whether the Secretary of State's "conditional  
24 certification" of the AV-TSx is invalid because it adopted new regulations without holding a  
25 public hearing under Elections Code Section 19204.

26 224. An actual controversy exists over whether Defendants/Respondents County  
27 Elections Officials may purchase and/or use the AV-TSx in future California elections given  
28 the fact that the Secretary of State's "conditional certification" imposed new regulations on

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

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

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

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

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

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

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

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

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

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

1 Secretary of State.

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

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

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

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

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

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

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

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

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

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

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

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

8       243. Petitioners have no plain, speedy or adequate alternative remedy at law.  
9

10                                   **RELIEF REQUESTED**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 state law.

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

3  
4 DATED: March 20, 2006.

5 JOHN EICHHORST  
6 MICHAEL L. GALLO  
7 JASON S. TAKENOUCHI  
8 D'LONRA C. ELLIS  
9 HOWARD RICE NEMEROVSKI CANADY  
10 FALK & RABKIN  
11 A Professional Corporation

12 LAW OFFICES OF LOWELL FINLEY

13 By: 

14 JOHN EICHHORST

15 Attorneys for Plaintiffs/Petitioners


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HOWARD RICE  
NEMEROVSKI  
CANADY  
FALK  
& RABKIN  
A PROFESSIONAL CORPORATION

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

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

ncisco, California.

  
\_\_\_\_\_  
JOHN EICHHORST

HOWARD  
RICE  
JEMEROVSKI  
CANADY  
FALK  
& RABKIN  
*Professional Corporation*