

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT, DIVISION ONE

KATHY PETERSON, individually and on
behalf of the Public,

Petitioner,

vs.

MIKEL HAAS, Registrar of Voters,

Respondent.

Court of Appeal No.

(Super. Ct. No. (N/A))

PETITION FOR PEREMPTORY WRIT IN THE FIRST INSTANCE
MEMORANDUM OF POINTS AND AUTHORITIES
DECLARATION OF KEN SIMPKINS IN SUPPORT

– IMMEDIATE RELIEF REQUESTED –

RELIEF CONCERNS THE CONDUCT OF THE GENERAL ELECTION SET FOR
NOVEMBER 7, 2006, AND SEEKS TO COMPEL COUNTING OF THE VOTES, TO
COMPEL THE PRODUCTION OF AN APPROPRIATE SUPPLY OF REGULAR
PAPER BALLOTS, AND TO COMPEL COMPLIANCE WITH REQUIRED
SECURITY PROCEDURES CONCERNING THE DISTRIBUTION OF ELECTRONIC
VOTING MACHINES
(CRC § 49.5.)

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Petitioner alleges:

1. Petitioner, Kathy Peterson, is a resident of San Diego County and registered to vote in the November 7, 2006, general election (hereinafter, the “Election.”)
2. This petition is for peremptory writ in the first instance to compel election officials to conduct the Election in a manner that will treat all voters fairly, equally, and consistently under California election law and the constitutional right of California’s citizens to participate fully in the election process and to have their votes counted properly in each and every respect under California Constitution, art II, § 2.5, and other relevant law cited herein, and to provide the required security for electronic voting machines.
3. This petition **requires immediate action** because the Election is only days away. The right to vote and the method of conducting elections are of great public importance. The controversy must be resolved promptly before the Election renders it moot. Thus, the writ should issue originally from the appellate court.
4. Granting this petition will generally result in the following:
 - a. Regular paper ballots will be counted on the day of the Election and including in any reported returns.
 - b. An appropriate supply of regular paper ballots will be available at each precinct.
 - c. The practice of releasing electronic voting machines into the homes of poll workers who are unfairly required to provide security for the machines that are highly susceptible to tampering will stop.
5. Petitioner brings this petition to vindicate her own rights and the

rights of the voting public at large.

6. Petitioner intends to vote on November 7, 2006, in the Election on a regular paper ballot.
7. The Election will choose public office holders and decide tax measures affecting all citizens in California.
8. Respondent Mikel Haas is the Registrar of Voters for San Diego County, appointed by the Board of Supervisors.
9. Respondent Haas has a clear, present and ministerial duty to comply with the U.S. and California Constitutions, the Help America Vote Act, the California Elections Code and mandates from the Secretary of State's office to protect the integrity of elections by conducting elections that are transparent, fair, and honest with the highest level of professional election standards, accountability, and security in order to maintain public confidence in the electoral process as discussed more fully in the attached memorandum of points and authorities in support of this petition.
10. Respondent Haas has a duty to provide equal protection of the law to each ballot and vote cast.
11. Respondent Haas intends to discriminate in the counting of ballots by creating a suspect class of ballots which will result in paper ballots not being included in the semifinal official canvass.
12. Respondent Haas has abused his discretion by, among other things, failing to provide adequate voting supplies for use by voters on the day of the Election.
13. Respondent Haas has, and continues to, violate the provisions for certification of the Diebold electronic election machines by breaking the chain of custody required for certification.

Counting Ballots

14. Respondent Haas intends to count the votes cast on virtual ballots stored on computer memory cards on the day of the Election, but will not count all regular paper ballots until two days after the Election. By treating the ballots differently, Respondent Haas is discriminating against a class of votes on the basis of how the votes are cast.
15. Respondent Haas intends to use Diebold electronic voting machines to cast and count the votes in the Election.
16. Many studies, including studies by the California Secretary of State's office and Princeton University, have demonstrated that serious security vulnerabilities exist in the Diebold voting machines that could affect Petitioner's constitutional right to have her vote counted, and could alter the true outcome of the Election.
17. The use of Diebold voting machines will undermine the confidence that the people must have in their elections in order for a democracy to function.
18. In order to ensure that concerned voters have confidence in the outcome of their elections, the Secretary of State's office issued an order to the Registrar of Voters (hereinafter the Order) in the various counties in California, including Respondent Haas, that each county have an adequate supply of regular paper ballots on hand for those voters who want them.
19. Attached as Exhibit 1 is a true and correct copy of the October 3, 2006, Order. Petitioner request that the Court take judicial notice of the exhibit pursuant to Evidence Code section 452, subdivisions (a)-(c).
20. The Order also requires that the regular paper ballots be treated the

same as other regular ballots cast on the day of the Election.

21. Discrimination against a class of voters, votes, or ballots is unconstitutional and a violation of the Due Process and Equal Protection clauses of the U.S. and California Constitutions, the Help America Vote Act, and the Elections Code as discussed more fully in the attached memorandum of points and authorities in support of this petition.
22. Allowing discrimination of a class of votes, in this case votes cast on regular paper ballots, could effect the outcome of the Election.
23. Publication of the returns of an election on election day creates the illusion that an election is over before all the votes are counted. Candidates often concede an election on the basis of incomplete reports of the canvass as reported in the media depriving voters of an accurate picture of the actual results of the Election.
24. Voters in the Election, including Petitioner, face the risk that Congress will terminate the canvass prematurely by swearing in a candidate before all the votes are cast and before the Election is certified in an attempt to deprive voters in California of the right to have their votes counted.
25. Provisional ballots are not subject to discrimination by Respondent Haas' counting policy because, by law, provisional ballots are not included in the semifinal official canvass.
26. The Order from the Secretary of State's office is ambiguous and inadequate in other respects in order to accomplish the intent of the Order to protect the constitutional right of voters to have their votes counted, as discussed more fully in the attached memorandum of points and authorities in support of this petition.

Supply of Paper Ballots

27. San Diego County has some 1,600 polling places in its jurisdiction and more than 1.3 million registered voters.
28. Respondent Haas is abusing his discretion by only providing 300,000 regular paper ballots throughout the county.
29. Respondent Haas' policy will result in, on average, only 188 voters at each precinct being provided with a paper ballot.
30. Should the supply of regular paper ballots be exhausted before the polls close, Respondent Haas may attempt to offer substitute ballots to voters requesting a regular paper ballot.
31. Providing ballots not in strict compliance with the required form of ballots could lead to challenges to the ballots and lawsuits to prohibit including substitute ballots in the canvass of votes thereby disenfranchising thousands of voters.
32. On information and belief, Respondent Haas is instructing staff and poll workers to dissuade voters from using regular paper ballots by, among other things, pressuring voters to ignore the public evidence of insecure voting machines and accept Respondent Haas' assurances that electronic voting machines present no risk of election fraud.
33. Respondent Haas is not qualified to assure voters that electronic voting machines do not present a risk of election fraud because he does not, and cannot, know how the machines are recording and counting votes.
34. On information and belief, Respondent Haas is promoting the paper trail created by the same suspect election machines as an equal substitute to regular paper ballots that are marked by hand and

provide a reliable record of the intent of the voter.

35. On information and belief, Respondent Haas is instructing staff and poll workers to suppress information about the availability of regular paper ballots.

Sleepovers

36. Pursuant to federal and state law, all voting systems must be certified by the National Association of State Election Directors (NASED).
37. The NASED certification requires that election officials maintain control of all memory cards and keep a perpetual chain of custody record for all of the memory cards used with the system.
38. The NASED certification also requires that programmed memory cards be stored securely at all times with logged accesses and transfers.
39. Attached as Exhibit 2 is a true and correct copy of the NASED document entitled Voting System Memory Card Issues dated March 22, 2006. Petitioner request that the Court take judicial notice of the exhibit pursuant to Evidence Code section 452, subdivisions (a)-(c).
40. The California Secretary of State certified the Diebold system on the condition that specific security measures were adhered to.
41. Attached as Exhibit 3 is a true and correct copy of the Secretary of State's conditional certification. Petitioner request that the Court take judicial notice of the exhibit pursuant to Evidence Code section 452, subdivisions (a)-(c).
42. As a condition for use of the Diebold voting machine in California, the county must maintain a written log that accurately records the chain of custody of each memory card and unit throughout the election cycle. (Ex. 3, para. 4(f).)

43. Any breach of control of the memory cards requires that the machine in which the card is found be taken out of service until the memory card is zeroed. (Ex. 3, para. 4(f).)
44. Respondent has a policy of allowing poll workers to store the Diebold voting machines in their homes, including their garages, for weeks prior to the Election. This policy is known by the public as “sleepovers.”
45. On information and belief, Respondent Haas does not determine the level of security available in the homes of poll workers or the level of access by unauthorized personnel to the areas in which the voting machines are stored.
46. Respondent Haas has violated the chain of custody requirements of the certification for use of the Diebold voting machines by requiring poll workers to provide security for the voting machines in their homes.
47. At no time does Petitioner concede that stopping the practice of requiring poll workers to store the machines in their homes makes the system suitable for elections. Stopping sleepovers ends a poorly considered policy that increases the risk of tampering.
48. At all times herein mentioned, Respondent Haas has been able to publicize the availability of paper ballots and provide an adequate supply of those ballots.
49. On the day of the Election, Respondent Haas will have the ability to count regular paper ballots. Notwithstanding such ability Respondent Haas continues to fail to make available an adequate supply of regular paper ballots, and refuses to modify his policy with regard to publicizing the availability of the ballots and counting those ballots

on the day of the Election.

50. Petitioner has no plain, speedy, and adequate remedy in the ordinary course of law because the Election is only days away and any remedy available in the ordinary course would require that the Election be postponed. No order or judgment by a court exists on which Petitioner could otherwise seek an immediate and direct review by appeal. The controversy is a matter of public importance. The controversy presents a significant constitutional issue. A multiplicity of similar actions may be avoided by granting of the writ. A delay in adjudicating the controversy will have an adverse impact on the public welfare.

WHEREFORE, Petitioner prays:

1. That the Court issue a peremptory writ in the first instance commanding Respondent to count on the day of the Election all votes cast on regular paper ballots in lieu of voting on an electronic voting machine without regard to whether the regular paper ballot is cast on a facsimile of a sample ballot, an absentee ballot, or a provisional ballot provided as a regular paper ballot.
2. That the Court issue a peremptory writ in the first instance commanding Respondent to count regular paper ballots on the day of the Election in sufficient number to truly represent the will of the People in early returns published by the Registrar of Voters.
3. That the Court issue a peremptory writ in the first instance prohibiting Respondent or any election official, including the Secretary of State's office and staff, from publishing any returns of the votes unless the votes are counted as provided herein.
4. That the order not prevent the official recordation of the vote of the

people and the reporting of the vote to the Secretary of State.

5. That the Court issue a peremptory writ in the first instance prohibiting Respondent from substituting the paper trail created by any electronic voting machines for the regular hand-marked paper ballots required by the Secretary of State to be available at each precinct.
6. That the Court issue a peremptory writ in the first instance commanding Respondents to publicly state that regular hand-marked paper ballots are available at each precinct in sufficient number.
7. That the Court issue a peremptory writ in the first instance commanding Respondent to provide prominent written notice at each precinct in the manner prescribe for other notices posted at precincts that regular hand-marked paper ballots are available as an alternative to voting on electronic voting machines.
8. That the Court issue a peremptory writ in the first instance commanding Respondent Haas to procure and disburse to each precinct in San Diego County a supply of regular paper ballots equal to the number of registered voters in each precinct.
9. That the Court issue a peremptory writ in the first instance commanding Respondent Haas to cease and desist the practice of allowing the Diebold voting machines to be stored at poll workers' homes as a breach of the chain of custody requirements for certification of the voting machines and an unlawful burden on poll workers to provide the security for the machines.

MEMORANDUM OF POINTS AND AUTHORITIES

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I.

INTRODUCTION

Every voter has a fundamental and equal right to have his or her ballot fairly and accurately counted. (Cal. Const., art II, § 2.5.) This action seeks to protect that fundamental right by requiring that consistent county- and state-wide standards and procedures are in place for the November 7, 2006, general election (hereinafter the Election). The requested relief will ensure that all lawful votes are counted, that consistent standards are applied, and that all voters are treated fairly, equally, and consistently under California election law and the constitutional right of California's citizens to participate fully in the election process and to have their votes counted properly in each and every respect

In particular, Respondent Haas intends to treat paper ballots disparately from electronic ballots by counting paper ballots days after the Election and count electronic ballots the day of the Election. Petitioner seeks a court order compelling Respondent Haas to treat all ballots subject to counting on the day of the Election equally, thereby requiring paper ballots to be counted on the day of the Election.

Respondent Haas has a duty to provide paper ballots in sufficient number that any voter who wants to vote on a paper ballot instead on electronic voting machines may do so. Respondent Haas has abused his discretion in anticipating the number of paper ballots to have available for voters at the polls. Petitioner seeks a court order compelling Respondent Haas to make available regular paper ballots in a number equal to the number of registered voters in each precinct.

Respondent Haas has a duty to provide security for voting machines and supplies. In violation of that duty, and in violation of the conditions on

which the required certification of the voting machines is based, Respondent Haas has allowed electronic voting machines with proven security vulnerabilities to be stored in the homes of citizens for weeks without proper safeguards to protect the integrity of the machines and the Election. This policy is known as “sleepovers.” Petitioner seeks a court order compelling Respondent Haas to stop the practice of sleepovers and comply with the requirements of the certification of the machines.

II.

THE NATURE OF THE RELIEF REQUESTED COMPELS PETITIONER TO SEEK RELIEF IN THE COURT OF APPEAL IN THE FIRST INSTANCE

This petition for peremptory writ concerns the conduct of a general election only days away. Respondent Haas is an election official whose policies violate the rights of Petitioner and the voting public as discussed herein. Original jurisdiction in the Court of Appeal is proper.

a. Original Jurisdiction

The Court of Appeal has original jurisdiction to hear writs of mandate as follows:

The Supreme Court, courts of appeal, superior courts, and their judges have original jurisdiction in habeas corpus proceedings. Those courts also have original jurisdiction in proceedings for extraordinary relief in the nature of mandamus, certiorari, and prohibition. . . .

(Cal. Const. art. VI, sec. 10.)

A writ of mandate may be issued by any court to any inferior tribunal, corporation, board, or person, to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station, . . .

(Code Civ. Proc. § 1085, subd. (a).)

The court of appeal may exercise its original jurisdiction in cases in which the issues presented are of great public importance and must be resolved promptly. (*County of Sacramento v. Hickman* (1967) 66 Cal.2d 841, 845.) Cases affecting the right to vote and the method of conducting elections are of great public importance. (*Jolicoeur v. Mihaly* (1971) 5 Cal.3d 565, 570, fn. 1.) The necessity of adjudicating a controversy concerning an election before a election renders it moot usually warrants accepting a case on original jurisdiction even if the case could have been brought in an inferior tribunal. (*Id.*)

b. A Writ of Mandate is Proper

A writ of mandate is the proper remedy for compelling an election official to conduct an election according to law. (*Miller v. Greiner*, (1964) 60 Cal.2d 827, 830.) A writ of mandate is also appropriate for challenging the constitutionality or validity of statutes or official acts. (*Metropolitan Water Dist. of Southern California v. Marquardt* (1963) 59 Cal.2d 159, 176; *Zeilenga v. Nelson* (1971) 4 Cal.3d 716; *San Francisco Unified School Dist. v. Johnson* (1971) 3 Cal.3d 937.) The purpose of a writ of mandate is to enforce clear legal right of a particular petitioner against one having a legal duty to perform an act necessary to ensure the petitioner's enjoyment of such right. (*Farrington v. Fairfield* (App. 2 Dist. 1961) 194 Cal.App.2d 237.) Mandamus may issue to compel performance of a ministerial duty or to correct an abuse of discretion. (*A. B. C. Federation of Teachers v. A. B. C. Unified School Dist.* (App. 2 Dist. 1977) 75 Cal.App.3d 332.)

c. Relief Is Proper Without Regard to How the Writ Is Labeled

A petitioner need not couch the petition in terms of a specific writ if it is unclear whether one remedy or the other is appropriate, or if more than

one remedy combined will afford complete relief. (See *Peck's Liquors, Inc. v. Superior Court* (1963) 221 Cal. App. 2d 772, 775.) If the petitioner seeks the wrong writ by name, the Court may treat the petition as one for the proper writ. (See, e.g., *Owens v. Superior Court* (1959) 52 Cal. 2d 822; see also *Peck's Liquors, supra*, 221 Cal. App. 2d at 775 (neither mislabeling nor a defective prayer will bar relief justified by proper allegations and proof).)

III.

THE RELIEF REQUESTED BENEFITS PETITIONER AND THE PUBLIC AT LARGE

Petitioner is a registered voter whose right to have her vote counted in the same manner as other voters will be vindicated by the relief sought. The Secretary of State has ordered that regular paper ballots be available for voters who decline to use electronic voting machines to cast their ballots or in the case of election machine failure. Petitioner intends to exercise her option to vote on a regular paper ballot. Petitioner Haas intends to give virtual ballots cast on electronic voting machines priority in the semifinal official canvass of all the ballots cast in the election and exclude regular paper ballots. As a member of the class of voters casting paper ballots, Petitioner seeks the equal protection of the law.

To the extent that the relief sought does not directly affect Petitioner's beneficial interest, this petition is a citizen's action. A citizen's action is an exception to the personal beneficial interest required to pursue an action in mandamus. (*Marshall v. Pasadena Unified School Dist.* (App. 2 Dist. 2004) 119 Cal.App.4th 1241, modified on denial of rehearing.) The exception applies where the question to be answered is one of public right and the object of the action is to enforce a public duty. (*Id.*) In that case, it is

sufficient that the petitioner be interested as a citizen in having the laws executed and the public duty enforced. (*Id.*; *Hogar Dulce Hogar v. Community Development Com'n of City of Escondido* (App. 4 Dist. 2003) 110 Cal.App.4th 1288, rehearing denied, review denied; *Waste Management of Alameda County, Inc. v. County of Alameda* (App. 3 Dist. 2000) 79 Cal.App.4th 1223.) Therefore, any relief sought that vindicates a public right is proper.

IV.

NO PLAIN, SPEEDY, AND ADEQUATE REMEDY IS AVAILABLE UNDER THE CIRCUMSTANCES

A writ must be issued in all cases where there is not a plain, speedy, and adequate remedy, in the ordinary course of law. (Code Civ. Proc. § 1086.) No order or judgment by a court exists on which Petitioner could otherwise seek an immediate and direct review by appeal. Petitioner is likely to suffer irreparable harm or prejudice that cannot be corrected in the ordinary course of law or appeal of a decision below. (*Roberts v. Superior Court* (1973) 9 Cal. 3d 330, 335.)

The Court may consider the public importance of the matter in determination concerning the adequacy of alternative legal remedies. (See, e.g., *Brandt v. Superior Court* (1985) 37 Cal. 3d 813, 816.) Other considerations for this determination include whether the case presents a significant and novel constitutional issue (See, e.g., *Britt v. Superior Court* (1978) 20 Cal. 3d 844, 851.); whether a multiplicity of similar actions would be avoided by granting of the writ (See, e.g., *County of Los Angeles v. Superior Court* (1998) 68 Cal. App. 4th 1166, 1170.); and whether a delay in adjudicating an issue would have an adverse impact on the public

welfare. (See, e.g., *Brown v. Superior Court* (1971) 5 Cal. 3d 509, 515.)

V.

RESPONDENT HAAS MAY NOT DISCRIMINATE IN DETERMINING
WHEN TO COUNT A VOTE ON THE BASIS OF HOW THE VOTE IS
CAST

Free and honest elections are the very foundation of our republican form of government. (*Enterprise Residents etc. Committee v. Brennan*, (1978) 22 Cal.3d 767, 774.) Respondent Haas intends to discriminate between equal votes on the basis of how the vote is cast. Regular paper ballots and virtual ballots are equal. Any attempt to defile the sanctity of the ballot cannot be viewed with equanimity. (*United States v. Classic* (1941) 313 U.S. 299, 329 (dis. opn.).)

California Constitution states:

A voter who casts a vote in an election in accordance with the laws of this state shall have that vote counted.

(Cal. Const., art. I, § 2.5) A “vote” is defined as follows:

For purposes of Section 2.5 of Article II of the California Constitution, “vote” includes all action necessary to make a vote effective in any primary, special, or general election, including, but not limited to, voter registration, any other act prerequisite to voting, casting a ballot, and having the ballot counted properly and included in the appropriate totals of votes cast with respect to candidates for public office and ballot measures.

(Elec. Code § 15702; see also HAVA, 42 USC 15481(a)(6) (requiring each state to adopt uniform and nondiscriminatory standards that define what constitutes a vote and what will be counted as a vote for each category of voting system used in the state).) Thus, casting a paper ballot in California,

having the ballot counted properly, and having the ballot included appropriate totals is a fundamental right.

a. Respondent Haas' Policy to Delay Counting Paper Ballots Violates the Guarantee of Equal Protection Under the Law

The California Constitution states that, "A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws; . . ." (Cal. Const., art I, § 7.) Under equal protection principles, state actions that rely upon suspect classifications must be tested under strict scrutiny to determine whether there is a compelling governmental interest. (*C & C Const., Inc. v. Sacramento Mun. Utility Dist.* (2004) 122 Cal.App.4th 284, 293.) Respondent Haas has created a suspect class by identifying voters who use regular paper ballots as distinct from those who vote on virtual ballots that exist only on computer chips. Having one's vote counted is a fundamental right provided by the California Constitution, article I, section 2.5. No compelling interest can be constructed that would justify delaying the count of one class of ballots over another class of ballots.

Respondent Haas cannot set forth any compelling state interest in delaying the count of one class of votes. As the U.S. Supreme Court stated, "[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." (*Reynolds v. Sims* (1964) 377 U.S. 533, 555.) By delaying the count of the class of paper ballots required to be available to voters, Respondent Haas will dilute the weight of the vote cast on paper ballots.

The right to vote is protected in more than the initial allocation of the franchise, equal protection applies as well to the manner of its exercise.

(*Bush v. Gore* (2000) 531 U.S. 98, 104.) Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another. (*Id.*, at 104-105; See, e.g., *Harper v. Virginia Bd. of Elections* (1966) 383 U.S. 663, 665 (lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment once the franchise is granted to the electorate).) Respondent Haas' decision to arbitrarily and disparately treat the value of a vote cast on a silicon ballot over the value of a vote cast on paper is inconsistent with the guarantees afforded by the Equal Protection Clauses of the U.S. and California Constitutions.

b. Respondent Haas' Policy to Delay Counting Paper Ballots Is a Violation of Due Process

The federal Constitution provides that no state shall "deprive any person of life, liberty, or property, without due process of law." (U.S. Const., 14th Amend.) Due process expresses the requirement of fundamental fairness. Applying the Due Process Clause entails discovering what fundamental fairness consists of in a particular situation by considering relevant precedents and by assessing the interests that are at stake. (*Lassiter v. Department of Social Services of Durham County, North Carolina* (1981) 452 U.S. 18.)

The California Constitution also contains due process guarantees. (Cal. Const., art. I, § 7.) Under the procedural due process required by the California Constitution, the focus is on an individual's liberty interest to be free from arbitrary adjudicative procedures, and it is much more inclusive and protects a broader range of interests than under the federal Constitution. (*Ryan v. California Interscholastic Federation - San Diego Section* (2001) 94 C.A.4th 1048, 1069.) A claimant need only identify a statutorily

conferred benefit or interest of which he or she has been deprived to trigger procedural due process under the California Constitution. (*Id.*, at 1071.) The right to have one's vote counted is a clear benefit conferred on California citizens by article 1, section 2.5 of the California Constitution. Here, Respondent Haas intends to deny the right of voters to have their votes counted in a manner that respects the integrity of the vote. By the time paper ballots are counted under Haas' scheme, misleading election results will have already been publicized. Waiting until days after the Election to count votes cast on paper ballots is a burden on the fundamental right to have one's votes counted and must be reviewed under strict scrutiny. (*Parsons v. Del Norte County* (1984) 728 F.2d 1234, 1237.)

c. The Violations Complained of Have Serious Consequences

The violation of equal protection and due process has practical implications. The real possibility exists that supporters of one candidate or measure, mistrustful of an electronic election system that has been demonstrated to be unreliable, will choose to vote entirely on paper ballots. The resulting early returns that exclude votes on paper ballots will necessarily be skewed against the interests of those casting the paper ballots. Once the early returns are published, a perception is created in the public mind of what the outcome of the election is in spite of the incomplete canvass. Candidates or sponsors of ballot measures that lose in the incomplete and skewed returns are prejudiced by the weight of inertia created by public opinion. Candidates must overcome the negative reaction that often labels them "sore losers" when they refuse to concede before the canvass is complete, or when they challenge the reported returns. That pressure often results in candidates choosing to forego the exercise of the right to question election results. Premature concessions by candidates

undermines the ability of concerned citizens to question the outcome of an election. An incorrect early report of the results of an election also gives the putative winner an advantage because he or she takes on the mantle of an incumbent even before the results are official.

On June 13, 2006, the U.S. House of Representatives swore in the candidate from the 50th Congressional District only seven days after the special election, and before all the votes were counted and before the election was certified. The candidate then argued that the votes could not be counted because no court had jurisdiction to order a count as the result of the swearing-in. Voters in this Election, face the risk that Congress will terminate the canvass prematurely by swearing in a candidate before all the votes are cast and before the Election is certified in an attempt to deprive voters in California of the right to have their votes counted.

While the best interests of a democracy are served by releasing the results of an election only after all the votes have been counted, pressure on election officials by the media and other interested parties does not permit the deliberative process vote counting deserves. So, the semifinal official canvass must include all legal ballots cast as provided by law.

VI.

RESPONDENT HAAS HAS A DUTY TO COUNT ALL THE BALLOTS DURING THE SEMIFINAL OFFICIAL CANVASS

For every election, a semifinal official canvass must be conducted which requires tabulating absentee and precinct ballots and compiling the results. (Elec. Code § 15150.) Precinct ballots are ballots cast at a precinct, including paper ballots. Write-in votes are also counted during the semifinal official canvass. (Elec. Code § 15153.) The Elections Code requires that the

semifinal official canvass commence immediately upon the close of the polls and not before. (Elec. Code §§ 15150 and 15152.) After that time, the ballots must be counted and the results of the balloting made public. (Elec. Code § 15152.) The canvass must continue without adjournment until all precincts are accounted for. (Elec. Code § 15150.) The Elections Code sets forth a procedure in which *all* ballots are counted commencing with the close of the polls. No fair reading of the Elections Code can conclude that one class of valid ballots may be set aside to be counted at some arbitrary later date. The provisions for an official canvass supports this reading.

An official canvass must commence no later than the Thursday following the election. (Elec. Code § 15301.) Elections Code section 15302 sets forth the tasks to be completed during the official canvass. The official canvass is the time for validating the records from the semifinal official canvass. (Elec. Code § 15302, subds. (a)-(d).) Counting of ballots is limited to absentee and provisional ballots not included in the semifinal official canvass and valid write-in ballots. (Elec. Code § 15302, subds. (e) and (f).) Respondent Haas has arbitrarily set aside regular paper ballots to be counted during the official canvass in violation of the provisions of the Elections Code that require all precinct ballots to be counted during the semifinal official canvass.

VII.

RESPONDENT HAAS ABUSED HIS DISCRETION BY UNREASONABLY LIMITING THE NUMBER OF PAPER BALLOTS AVAILABLE TO VOTERS

Respondent Haas has arbitrarily set the number of regular paper ballots to be available to voters at 300,000. San Diego County has over 1.3

million registered voters. Limiting the number of paper ballots for voters is an abuse of discretion.

Respondent Haas places an emphasis on electronic voting over paper voting that is not justified. Not all voters want their votes cast on electronic voting machines given the wide-spread public knowledge that voting machines are responsible for entire elections collapsing into chaos. The Diebold system to be used in San Diego has never been used here in a general election. When the same systems were used in a Maryland primary election for the first time on September 12, 2006, the election was plagued by human error and technical glitches that resulted in a meltdown of the process. Election officials also reported candidate selections missing from review screens, machine crashes requiring multiple re-boots, precincts running out of the paper ballot back-ups, and battery problems causing the machines to be unavailable. Maryland voters unable to vote on inoperable voting machines were offered provisional ballots until they prematurely ran out. As a result of the problems, Maryland's governor, Robert L. Ehrlich Jr., called for the state to scrap its electronic voting apparatus and revert to a paper ballot system for the November election.

Respondent Haas' focus on electronic voting machines places the form of the election over its function. Whether votes are cast on paper or stored on memory cards, elections must be protected from breakdown. The evidence from poll worker training is that Respondent Haas intends to ask voters to wait if voting machines are not available. If the precinct runs out of paper ballots, voters will either be forced to use electronic voting machines against their wishes or wait until additional paper ballots are provided. Voters faced with numerous pressures on their time, and with the inconvenience of appearing at the polling place, often choose to forego the

exercise of the precious right to vote. Reducing or eliminating the burdens and inconvenience of voting and thereby increasing voter participation is fundamental to the maintenance of our representative government.

(Peterson v. City of San Diego (1983) 34 Cal.3d 225, 230.) Respondent Haas' policy of limiting the right to vote on paper ballots does nothing to support the maintenance of our representative government.

An abuse of discretion is not an exercise of discretion but is an action beyond the limits of discretion, and hence a writ of mandamus will issue to correct such abuse if the facts otherwise justify its issuance. *(Hays v. Superior Court (1940) 16 Cal.2d 260.)* The duty of the registrar of voters in a county to provide ballots is a ministerial duty. A writ of mandate will lie to compel performance of a clear, present and ministerial duty in cases where a petitioner has a clear, present and beneficial right to performance of that duty. *(Jenkins v. City of Corona (App. 4 Dist. 2006) 44 Cal.Rptr.3d 366.)*

VIII.

THE ORDER ISSUED BY THE SECRETARY OF STATE NEEDS CLARIFICATION

The Secretary of State's order requiring paper ballots leaves open the possibility that the intent of the order could be violated. The order reiterates the provisions of Elections Code section 14299 that where the elections official has not provided a sufficient number of ballots to a precinct, and a voter demands one, the elections official shall obtain the ballot to ensure that a voter is able to cast the ballot by 10:00 p.m. But, section 14299 does not require paper ballots. Should Respondent Haas fail to provide sufficient paper ballots at the precincts and a voter demands one after the insufficient

supply is gone, section 14299 will not compel Respondent Haas to provide additional *paper* ballots. Instead, voters face the risk that Respondent Haas will point to section 14299 and the invisible, virtual ballots in the election machines as compliance with any requirement that “ballots” be provided. Furthermore, asking a voter to wait until 10:00 p.m. to cast a vote is unreasonable.

The order also suggests that “it is possible” for Respondent to use “reasonable facsimiles” of sample ballots at polling places “to function as absentee ballots pursuant to Elections Code sections 13316 and 13317, . . .” (Ex. 1.) Those sections only give discretion to Respondent Haas to use sample ballots as “absentee ballots,” and do not address the need to provide regular paper ballots to every voter who wants one. Petitioner requests that the Court order Respondent to treat any reasonable facsimile of a sample ballot, any absentee ballot, or any provisional ballot given to a qualified voter who asks for a regular paper ballot and casts her or his votes on such facsimile of a sample ballot, absentee ballot, or provisional ballot be treated as a regular paper ballot and counted on election day.

IX.

RESPONDENT HAAS’ POLICY TO SEND VOTING MACHINES HOME WITH POLL WORKERS VIOLATES THE REQUIREMENTS FOR CERTIFICATION OF THE MACHINES

The Help America Vote Act of 2002 (HAVA) sets forth standards for voting systems used by states in federal elections. (42 USCA 15301.) HAVA does not set standards for state elections. HAVA does not require states to purchase electronic voting systems. HAVA does require that whatever voting system is used, whether paper ballots, lever voting systems,

optical scanning voting systems, or direct recording electronic systems, certain requirements must be met, such as access for the disabled. (42 USCA 15481, et seq.)

HAVA establishes that the Election Assistance Commission will certify voting systems. (42 USCA 15371.) Pursuant to the terms of transition, the National Association of State Election Directors (NASED) sets forth the standards and procedures for certification. (42 USCA 15371(d).) State law requires that voting systems be approved by the Secretary of State. (Elec. Code § 19201.) The law also requires that voting systems be federally certified before being approved by the Secretary of State. (Elec. Code § 19250.)

In order to address the controversy surrounding the security of Diebold memory cards, the NASED conditioned its certification of Diebold voting systems on election officials maintaining a perpetual chain of custody record for all memory cards. (Ex. 2.) The NASED certification also requires that programmed memory cards be stored securely at all times with logged accesses and transfers. The California Secretary of State certified the Diebold system on conditions similar to the NASED conditions. (Ex. 3.)

In violation of the certification requirements, Respondent Haas has given custody of the machines to poll workers for weeks prior to the Election. Most poll workers are seniors who, out of a sense of patriotism and community, offer to help the Registrar of Voters conduct elections. But, poll workers' homes do not provide the kind of security required to prevent tampering of the machines. It is likely that poll workers live in homes with others who have access to all parts of the residence and invite friends and family into their homes. Given the unfettered access to the machines by persons not part of the election process, the chain of custody record is

meaningless. Furthermore, no standards are in place to determine where the safest place in a person's home is. Poll workers are not trained to provide security for the technical vulnerabilities of the machines. Asking poll workers to assume the responsibility for providing security for voting machines that are expensive and subject to tampering is unfair when the responsibility is squarely on Respondent Haas. Because the sleepovers violate the certification of the voting machines and subjects them to tampering, Petitioner requests that the Court compel Respondent Haas to cease and desist from the practice.

Notwithstanding the request, Petitioner does not concede that stopping the practice of requiring poll workers to provide security for the machines in their homes makes the system suitable for elections. Petitioner alleges that deploying voting systems that are vulnerable to tampering into the hands of untrained persons and into storage facilities unsuitable to protect the machines is a violation of the certification and subjects the system to unwarranted risks. Stopping sleepovers ends a poorly considered policy that increases the risk of tampering.

X.

A PEREMPTORY WRIT SHOULD BE ISSUED IN THE FIRST INSTANCE IN THIS CASE

The court may issue a peremptory writ in the first instance for truly exceptional cases, primarily those in which a compelling temporal urgency requires an immediate decision. (*Lewis v. Superior Court* (1999) 19 Cal. 4th 1232, 1261.) Due to the usually exigent circumstances under a which a court considers issuing a peremptory writ in the first instance, the Court need not give the opposition an opportunity to present oral argument. (*Id.*, at

DECLARATION

I, Kenneth L. Simpkins, declare the following:

1. I have personal knowledge of the following and am competent to testify thereto except for those matters known on information and belief and as to those matters I believe them to be true.
2. I am a registered voter in San Diego County.
3. I audited the poll worker training provided to poll workers for the November 7, 2006, election.
4. An instructor of the training told me that only 300,000 paper ballots are available to voters in San Diego County for those who decline to vote on electronic voting machines.
5. During the training, the instructors stated that the voting machines, memory cards, keys, and other supplies would be issued to precinct inspectors to be taken home that same day.
6. The instructors asked the precinct inspectors to put the machines and supplies in the “safest place” in the persons’ homes. The suggestion was offered, by way of example and in a way meant to be humorous, that the precinct inspectors being required to secure the machines should take the machines to bed with them if that was the safest place in their homes. No other guidance or instructions were provided in regard to securing the machines.
7. Poll workers received no training on what is required to provide adequate security for the machines.
8. Poll workers received no training about the vulnerabilities of the machines that needed to be secured.
9. No information was obtained about the conditions in the homes of the precinct inspectors that would make those location suitable for

securing election machines.

10. I witnessed the machines being loaded into the cars of the precinct workers.
11. The instructors taught the poll workers to ask voters to wait if the machines were not available instead of informing voters that paper ballots were available.
12. When I asked why paper ballots were not offered, I was told that there was no reason to because the machines would necessarily be available within five minutes. Experience across the nation has shown that such an optimistic expectation of how electronic voting will fair is unrealistic and borders on negligence.
13. In order to ensure that concerned voters have confidence in the outcome of their elections, the Secretary of State's office issued an order to the Registrar of Voters (hereinafter the Order) in the various counties in California, including Respondent Haas, that each county have an adequate supply of regular paper ballots on hand for those voters who want them.
14. I personally obtained a copy of the Order from the Secretary of State's office.
15. Attached as Exhibit 1 is a true and correct copy of the October 3, 2006, Order.
16. I have had communications with the staff of the Registrar of Voters on a number of days.
17. On October 25, 2006, I was told by the assistant to Respondent Haas that Respondent intends to count the votes cast on virtual ballots stored on computer memory cards on the day of the Election, but will not count any regular paper ballots until two days after the Election.

18. At the same time, I was told by the assistant to Respondent Haas that the reason the paper ballots will not be counted on the day of the Election is that the “form of the election is electronic voting.”
19. On the same and other occasions, I was told by the assistant to Respondent Haas that no official written or oral notice of the availability of paper ballots and the right to cast them will be given at the precincts.
20. When asked if the Registrar of Voters would object to citizens posting notice at the precincts of the availability of paper ballots and the right to cast them I was informed that such an act would be considered electioneering and prohibited.
21. “Electioneering” means “To work actively for a candidate or political party.” Informing voters of their right to vote on paper is not electioneering.
22. My experience with the training and contact with the Registrar of Voters’ Office supports my belief that an important goal of the Registrar of Voters is to promote electronic voting over paper voting, to discourage the use of paper ballots, and to suppress information about the availability of paper ballots.

