State of Colorado
Department of State

ELECTIONS DIVISION

SECRETARY OF STATE
COMPLAINT: SOS-HAVA-01-06-0001
July 10, 2006
Modified July 24, 2006

IN RE:

COMPLAINT OF AL KOLWICZ CONCERNING HART/INTERCIVIC eSLATE VOTING EQUIPMENT

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IN RE:	**}**	
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COMPLAINT OF AL KOLWICZ	**}**	**SECRETARY OF STATE**
	}	**STATE OF COLORADO**
CONCERNING HART/INTERCIVIC	**}**	**SOS-HAVA-01-06-0001**
	}	
eSLATE VOTING EQUIPMENT	**}**	

I. Procedural Background

On April 10, 2006, the Office of the Secretary of State (the "Office") received a written complaint dated April 7, 2006, signed by Al Kolwicz ("Kolwicz"). This complaint alleged that this Office violated the Colorado Uniform Election Code and Title III of the Help America Vote Act of 2002 ("HAVA"), Public Law 107-252, with regard to the certification of the Hart/InterCivic eSlate voting system for use in the state of Colorado (Exhibit 1).

Specifically, Kolwicz alleges the following violations of state and federal law:

1. The Secretary of State wrongfully certified the Hart/InterCivic eSlate voting equipment in violation of 1-5-704(1)(n)(I), (IV), (V), and (VI), C.R.S. (2005) and Title III of the Help America Vote Act of 2002 sections 301(a)(1), (a)(2)(B)(ii), and (a)(3)(A), ("HAVA"), Public Law 107-252, because blind voters cannot verify the votes selected on the voter-verified paper audit trail ("VVPAT"), and therefore cannot detect errors on the printed ballot.

2. The Secretary of State wrongfully certified the Hart/InterCivic eSlate voting equipment in violation of Article VII, Section 8 of the State of Colorado Constitution, because the eSlate equipment does not provide anonymous voting because the VVPAT is printed on a continuous paper roll and that knowing the sequence of voters enables a person to know how each voter votes.

On May 3, 2006, this Office acknowledged receipt of the complaint by letter to Kolwicz and assigned a unique tracking number (SOS-HAVA-01-06-0001) to the complaint reflecting the filing date.

In its letter to Kolwicz, this Office noted that it did not appear that the Kolwicz complaint met the requirements of section 1-1.5-105, C.R.S. (2005); specifically, it did not appear that Kolwicz was "personally aggrieved by" or that Kolwicz "personally witnessed" a violation of Title III of HAVA as required by section 1-1.5-105(2)(b), C.R.S. (2005). Nevertheless, this Office acknowledged in the letter that the Kolwicz complaint presented important questions that merited consideration and therefore the Office accepted jurisdiction of the complaint.

This Office acknowledged that Kolwicz had requested a hearing in an email to the Secretary of State on April 22, 2006. This Office advised Kolwicz of his right to a hearing, and provided notice to Kolwicz in the letter that a public hearing on the complaint was scheduled for

May 24, 2006 at 1:30 p.m., in the Blue Spruce Conference Room of the Secretary of State's Office at 1700 Broadway, 2nd Floor, Denver, Colorado. This Office posted a notice of the public hearing on the Colorado Secretary of State website.

On May 10, 2006, this Office received a request for records under the Colorado Open Records Act (the "CORA") via email from Kolwicz. This Office acknowledged receipt of the request and asked Kolwicz for additional clarification in order to process the request. This Office received an email from Kolwicz dated May 12, 2006, providing clarification of the request under CORA. This Office acknowledged receipt of the requested clarification by email on May 19, 2006 and advised Kolwicz of the availability of the requested records and the procedure for reviewing such records under CORA.

On May 24, 2006, at 1:30 p.m., Secretary of State Gigi Dennis conducted a public hearing on the complaint, which was audio recorded and broadcast over the Internet. This broadcast may be downloaded from the Secretary of State website.[1]

At the beginning of the hearing, John Gardner ("Gardner"), the Voting Systems Specialist for the Secretary of State's Office, provided a brief overview of the voting systems certification process, and his responsibilities in that process. Gardner also discussed the certification process of the Hart/InterCivic eSlate equipment. He noted that a three-day public demonstration of the equipment was held, and that Kolwicz did not attend the demonstration. Gardner then addressed the security measures in place regarding the voter-verified paper audit trail ("VVPAT") component of the eSlate. Finally, Gardner discussed alternative ballot-marking devices such as AutoMARK. He noted that under Colorado law, voting systems must allow the voter to independently operate the system through the final step of casting the ballot. Gardner explained that the AutoMARK system was not certified in Colorado because the device does not allow disabled voters to actually cast their ballot without assistance.

Complainant Kolwicz was then afforded an opportunity to provide oral testimony. Kolwicz began by noting for the record that he is not disabled. Kolwicz submitted a written memorandum (Exhibit 2), which he explained in his oral testimony. Kolwicz asserted that the Hart/InterCivic eSlate equipment had been certified without adequate testing, and that there were alternative systems (specifically VotePAD and AutoMARK) that should have been certified by the Secretary of State. Kolwicz stated the VVPAT compromised voter anonymity because someone observing the election could trace a voter to a particular VVPAT record. He also stated that the VVPAT is not accessible to blind voters, and suggested that text-to-speech devices could be used to read back the voter's selections.

Neil McClure ("McClure") of Hart/InterCivic presented oral testimony and submitted written comments (Exhibit 3). McClure gave a brief overview of the VVPAT unit and described how the unit is secured and transported. He explained that the VVPAT is comparable to a ballot box that remains sealed at the polling location. McClure also described how ballots are verified using the audio ballot function of the eSlate. McClure noted that Hart/InterCivic worked with national and local organizations representing the disabled community in developing the eSlate.

[1] *See* HAVA Complaint SOS-HAVA-01-06-0001 1:30 and HAVA Complaint SOS-HAVA-01-06-0001 3:30 at www.sos.state.co.us/pubs/info_center/archived_conference.htm.

He stated Hart/InterCivic's goal in developing the equipment was to make it accessible for as many people as possible.[2]

The Secretary also received considerable oral and written testimony from the public. Oral and written comments were received from representatives of The Legal Center for People with Disabilities and Older People (Exhibit 4), National Federation of the Blind for Colorado (Exhibit 5), Center for People with Disabilities, American Council of the Blind, Colorado Council of the Blind, National Organization of Guide Dog Users, Rocky Mountain Guide Dog Association, and Colorado Common Cause, all of whom opposed de-certification of the Hart/InterCivic eSlate. Many of these representatives stated that, although they agreed that the VVPAT is not accessible to a visually impaired voter, overall the eSlate is the most accessible system available. Several disabled individuals commented that the eSlate would permit them to vote for the first time in their lives without the assistance of others (Exhibit 14), and remarked that the fact that the VVPAT component is not yet accessible to a blind voter is not sufficient reason to de-certify the entire eSlate system. Indeed, these individuals and representatives of the disabled community voiced deep concern that de-certifying the eSlate and returning to paper ballots would be a step backwards in terms of providing opportunities for accessible and independent voting for the disabled community. These individuals and representatives expressed hope that technology may one day permit the VVPAT to be accessible to visually impaired voters; however, overwhelmingly, the testimony received from these individuals and representatives was that the eSlate is the most accessible system available at this time, and that it should not be decertified simply because some disabled individuals may need assistance to use the VVPAT.[3] Further testimony was received that the text-to-speech option suggested by Kolwicz was not a feasible alternative because the speech produced is difficult to understand and therefore is not helpful.

On balance, the overwhelming weight of the testimony from the disabled community was against de-certification of the eSlate system. Written comment was received, however from members of the disabled community who stated that alternative voting systems should be considered because a blind voter cannot independently verify their ballot on the eSlate VVPAT, and the VVPAT does not preserve voter anonymity (Exhibit 13). Oral and written testimony was also received from non-disabled members of the public who also expressed concern that the VVPAT was not fully accessible, and that it compromised voter anonymity (Exhibits 6-11). The testimony presented, asserted that blind voters cannot independently verify their vote if the machine produces a VVPAT, and that the audio ballot function does not provide dependable confirmation. The Secretary also heard testimony that the use of a continuous paper roll VVPAT would create a threat to voter anonymity because someone watching the election could associate a voter with a record on the VVPAT. Further testimony was presented in favor of alternative voting systems specifically AutoMARK and VotePAD. At the conclusion of the hearing, Kolwicz was afforded an opportunity to make closing and rebuttal statements. The Secretary of

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[2] Written comment was also received by email from Howard Cramer ("Cramer") of Sequoia Voting Systems (Exhibit 15). In his comments, Cramer asserted that the use of a continuous paper roll VVPAT improves security and auditability.

[3] *See* Written comment by email from Glenn Nation (Exhibit 12), a blind voter who submitted comment that the Hart/InterCivic voting equipment should not be de-certified simply because the VVPAT is not fully accessible, and expressed concern that the voters ultimately bear the economic burden of such a decision.

State concluded the hearing and stated that additional public comment would be accepted until June 1, 2006. Additional written comments were received by email after the hearing (Exhibit 16) that expressed concern that all direct record electronic voting systems, including the Hart/InterCivic system are susceptible to fraud, and stated that voting system accessibility should not be put ahead of ensuring the integrity of the voting process.

II. Jurisdiction

Jurisdiction of the Office of the Secretary of State is vested pursuant to section 1-1-107(2)(b), C.R.S. (2005), which specifically authorizes the Secretary of State to review the practices and procedures of election officials within the state of Colorado. These powers have been vested in the Secretary of State pursuant to section 11 of Article VII of the State of Colorado Constitution to secure the purity of elections and to guard against abuses of the elective franchise. *See* section 1-1-107(5), C.R.S. (2005). The Secretary of State is authorized to conduct a public hearing on the record of any HAVA complaint at the request of complainant. *See* section 1-1.5-105(2)(g), C.R.S. (2005), Election Rule 31.1, 8 C.C.R. 1505-1 (2005). Further, this Office is empowered to exercise any other power or perform any other duties that are consistent with section 1-1.5-101 *et. seq.*, C.R.S. (2005) and that are reasonably necessary for the proper administration, implementation, and enforcement of HAVA, and that will improve the conduct of elections in the state in conformity with HAVA. *See* section 1-1.5-104(1)(f), C.R.S. (2005).

This Office determines that pursuant to section 1-1.5-105(2)(b), C.R.S. (2005) and section 403(2)(b) of the Help America Vote Act of 2002 ("HAVA"), Public Law 107-252, Kolwicz does not have standing to bring this complaint. Kolwicz neither was "personally aggrieved" nor "personally witnessed" a violation of Title III of HAVA as required by section 1-1.5-105(2)b), C.R.S. (2005).

This Office further determines that although the complaint does not meet the technical requirements of the law, the issues it has raised are of such importance to the electorate of the state of Colorado, that each issue merits full consideration and final determination to ensure the integrity of the elective franchise.

III. Legal Authority

The Supreme Court of the United States has long held that "the right of qualified voters within a state to cast their ballots and have them counted . . . is a right secured by the Constitution." *United States v. Classic,* 313 U.S. 299, 315 (1941) (citing *Ex parte Yarbrough,* 110 U.S. 651, 664 (1884); *Wiley v. Sinkler,* 179 U.S. 58, 64 (1899); *Swafford v. Templeton,* 185 U.S. 487, 493 (1902); *Unites States v. Mosley,* 238 U.S. 383, 386 (1915); *In re Coy,* 127 U.S. 731 (1888); *Logan v. United States,* 144 U.S. 263 (1892)). The Court in *Reynolds v. Sims* made clear that,"[t]he right to vote freely for the candidate of one's choice is the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." *Reynolds v. Sims,* 377 U.S. 533, 555 (1964). Moreover, the Court held, "the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and

political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." *Id.* at 526.

The Secretary of State is authorized under the Colorado Uniform Election Code:

> To inspect with or without the filing of a complaint by any person, and review the practices and procedures of county clerk and recorders, election commissions, their employees, and other election officials in the conduct of primary, general, and congressional vacancy elections and the registration of electors in this state. Section 1-1-107(2)(b), C.R.S. (2005)

The HAVA complaint procedure is set forth at section 1-1.5-105, C.R.S. (2005):

> (1) Subject to the requirements of this section, in accordance with section 402 of HAVA, the secretary may establish by rule a uniform administrative complaint procedure to remedy grievances brought under title III of HAVA.
>
> (2) Any rules promulgated pursuant to subsection (1) of this section shall provide for, but need not be limited to, the following:
>
> (a) A uniform and nondiscriminatory complaint procedure;
>
> (b) Authorization for any person who has either been personally aggrieved by or has personally witnessed a violation of Title III of HAVA that has occurred, is occurring, or that is about to occur, as applicable, to file a complaint;
>
> (c) A description by the complainant in his or her complaint of the alleged violation with particularity and a reference to the section of HAVA alleged to have been violated;
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> (d) A requirement that the complaint be filed no later than one year from the date of either the occurrence of the alleged violation or of the election giving rise to the complaint, whichever is later;
>
> (e) A requirement that each complaint be in writing and notarized, signed, and sworn by the person filing the complaint;
>
> (f) Authorization for the secretary to consolidate two or more complaints;
>
> (g) At the request of the complainant, a hearing on the record;
>
> (h) Authorization for the secretary to provide an appropriate remedy if the secretary determines that any provision of Title III of HAVA has been violated or to dismiss the complaint and publish the results of his or her review if the secretary determines that no provision of Title III of HAVA has been violated;
>
> (i) A final determination on the complaint by the secretary prior to the expiration of the ninety-day (90) period that begins on the date the complaint is filed, unless the complainant consents to an extension of time for making such determination;
>
> (j) Resolution of the complaint within sixty (60) days under an alternative dispute resolution procedure that the secretary shall establish in accordance with the requirements of this section, if the secretary fails to satisfy the applicable deadline specified in paragraph (i) of this subsection (2), and the availability of the record and any other materials from any proceedings conducted under the

complaint procedures established for use under such alternative dispute resolution procedures;

(k) Authorization for the secretary to conduct a preliminary review of any complaint submitted to him or her and to dismiss any complaint that he or she finds is not supported by credible evidence; and

(l) Recovery by the secretary of the costs of the proceeding against any complainant who files a complaint that, in connection with the final determination by the secretary pursuant to paragraph (i) of this subsection (2), is found, on the basis of clear and convincing evidence, to be frivolous, groundless, or vexatious.

(3) Notwithstanding any other provision of law:

(a) No complaint shall be brought pursuant to the procedure created by this section unless the complaint alleges a violation of Title III of HAVA;

(b) Proceedings for the resolution of a complaint brought pursuant to this section shall not be considered an adjudication under Article 4 of Title 24, C.R.S.; and

(c) The procedures created by this section shall constitute the exclusive administrative remedy for a violation of Title III of HAVA.

(4) Any person aggrieved by a final determination by the secretary acting pursuant to paragraph (i) of subsection (2) of this section may appeal the secretary's determination to the district court in and for the City and County of Denver within thirty (30) days of the date of the determination.

IV. Findings of Fact and Conclusions of Law

1. Voting Equipment Testing and Certification

Section 301 of HAVA establishes minimum standards for voting systems, and sections 304 and 305 make clear that states may adopt stricter standards so long as those standards are consistent with the federal standards.[4]

Section 1-5-608.5, C.R.S. (2005) mandates that voting systems certified for use in Colorado must be tested and certified by an independent testing authority ("ITA") recognized by the EAC. Further, the Colorado Uniform Election Code requires that such voting systems comply with the requirements and standards set forth in sections 1-5-615 and 1-5-616, C.R.S. (2005), and the requirements and standards for certification are further defined in the Colorado Election Rule 45.5.[5] Specifically, Election Rule 45.5.2.8 states that "Specific minimum accessibility requirements include those specified in section 1-5-704 C.R.S., SOS Rule 34, Rule 35." Election Rule 45.5.2.8, 8 C.C.R. 1505-1 (2005).

Consequently, all voting systems vendors that apply for certification in Colorado must, as a threshold matter, show that the equipment for which they seek certification has been tested by an approved ITA and granted federal certification. Applicants who have met the initial requirement of federal certification and have submitted a complete application for certification, then enter the next phase of state certification, during which this Office reviews and evaluates the

[4] *See* Section 304, 305 of the Help America Vote Act of 2002 ("HAVA"), Public Law 107-252.
[5] *See* section 1-5-617(1)(b), C.R.S. (2005).

documentation submitted for compliance with Election Rule 45.4.3, 8-1505-1, C.C.R. (2005). Upon verification of the voting system vendor's documentation, a three-day public demonstration of the voting system is conducted. The public demonstration is followed by a period of functional testing, and if the voting system has successfully completed each step the system is granted state certification. It is also important to note that if the voting system fails at any phase of the certification, their application is rejected, though they may re-submit their application for certification at any time with proper documentation.

The Hart/InterCivic eSlate equipment was tested and certified pursuant to the requirements of Election Rule 45, 8-1505-1, C.C.R. (2005). Hart/InterCivic applied for and received federal certification for the eSlate voting equipment. This Office subsequently received a complete application for certification and after review of the documentation submitted by Hart/InterCivic, deemed it was complete. Further, this office provided notice of, and conducted a public vendor demonstration of the eSlate voting equipment. As was noted at the public hearing on this complaint, the attendee at that demonstration was not complainant Kolwicz. Following the demonstration, the equipment was subject to functional testing as required by Election Rule 45.5.2.1, 8-1505-1, C.C.R. (2005). Finally, having successfully completed each phase of the application process, the Hart/InterCivic eSlate equipment was granted certification for use in Colorado.

2. Accessibility of Voting Systems and the Voter-Verified Paper Audit Trail ("VVPAT")

Kolwicz asks this Office to de-certify the Hart/InterCivic eSlate voting equipment. Kolwicz contends that this equipment violates both federal and state law because it does not allow a blind voter to privately and independently verify their votes using the VVPAT before casting their ballot. Provisions of both HAVA and the Colorado Uniform Election Code require that voting systems certified for use in the state of Colorado meet certain minimum standards, which ensure that voting systems used in the state are both accessible and auditable.

Colorado Uniform Election Code requires that voting systems certified for use in the state of Colorado must meet or exceed the minimum requirements established in HAVA to provide all voters with ". . . the same opportunity for access and participation."[6] Section 301 of HAVA establishes the minimum requirement that voting systems allow for "private and independent" voting and verification of the ballot before a paper record is printed.[7] The minimum standards

[6] Section 1-5-701, C.R.S. (2005); Section 301(a)(3)(A) of the Help America Vote Act of 2002 ("HAVA"), Public Law 107-252.

[7] Section 301 of Help America Vote Act of 2002 ("HAVA"), Public Law 107-252 states in relevant part:

301(a)(1)(A) "the voting system shall"

(i) permit the voter to verify (in a private and independent manner) the votes selected by the voter on the ballot before the ballot is cast and counted;

(ii) provide the voter with the opportunity (in a private and independent manner) to change the ballot or correct any error before the ballot is cast and counted. . ."

301(a)(2)(B)(ii) The voting system shall provide the vote with an opportunity to change the ballot or correct any error before the permanent paper record is produced.

301(a)(3)The voting system shall

(A) be accessible for individuals with disabilities, including nonvisual accessibility for the blind and visually impaired, in a manner that provides the same opportunity for access and participation (including privacy and independence) as for other voters.

for accessible voting systems that will be approved for use in the state of Colorado are set forth in section 1-5-704, C.R.S. (2005). This section requires that with regard to systems using an audio ballot, "[a]fter the initial instructions from an election official, the elector shall be able to independently operate the voter interface device through the final step of casting a ballot without assistance." Section 1-5-704(1)(n)(I), C.R.S. (2005). The standards outlined in section 1-5-704 clearly mandate that voting systems used in Colorado must be accessible to all voters.

The U.S. Department of Justice ("DOJ") has clearly stated that the question here is not "whether the *paper record* is accessible to the sight-impaired, but whether the *entire DRE voting system* is accessible in a manner that provides disabled voters 'the same opportunity' that other voters enjoy."[8] In evaluating the system as a whole, the Hart/InterCivic eSlate allows all voters to vote their ballot privately and independently. The system further allows voters to independently verify the ballot before it is cast by visually reviewing the paper printout of the VVPAT, and/or by listening to an audible review of the voter's selections. This process, while not providing an identical opportunity to a visually impaired voter, nevertheless provides every voter with at least one opportunity to vote and verify their ballot that is "similar in kind, quality, quantity, or degree" to that of every other voter.[9]

The VVPAT requirements set forth in sections 1-5-801 and 1-5-802, C.R.S. (2005), were added to the Colorado Uniform Election Code by the passage of two senate bills, SB05-198 and SB05-206, during the 2005 regular legislative session. In enacting section 1-5-802, C.R.S. (2005), the Colorado General Assembly carefully weighed both the need for voter-verifiable paper records and the considerations of the available technology to make the record accessible to all voters. The General Assembly was aware when the statute was adopted that current technology did not allow for 100% accessibility of the voter-verified paper audit trail (VVPAT). In balancing the tension between the needs of the disabled community and the need to grant additional assurances to the integrity of the electoral process, the General Assembly heard considerable testimony and heavily debated the deadlines for implementation of the VVPAT requirement.[10]

The legislative history of sections 1-5-801 and -802 reflects that the General Assembly concluded that the need for the VVPAT outweighed the inadequacy of the current technology to make the VVPAT 100% accessible to all disabled voters. The General Assembly heard testimony from several representatives from the disabled community who testified in favor of a VVPAT requirement, even though not all disabled voters would be able to use it without assistance.[11]

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[8] U.S. Department of Justice Opinion on Whether Certain Direct Recording Electronic Voting Systems Comply with the Help America Vote Act and the Americans with Disabilities Act, October 10, 2003, citing Section 301(a)(3)(A) of the Help America Vote Act of 2002 "(HAVA"), Public Law 107-252.
[9] *See id.*, (citing American Heritage Dictionary of the English Language 1539 (4th ed. 2000)).
[10] *See* SB05-198 Hearings: Senate Committee on Local Government, March 22, 2005; House Committee on State, Veterans & Military Affairs, April 26, 2005; Conference Committee on SB05-198, May 6, 2005, May 9, 2005. SB05-206 hearings: Senate State, Veterans & Military Affairs, April 11, 2005; Conference Committee on SB05-206, May 9, 2005.
[11] *See id.*

The General Assembly also heard testimony around the timing of the implementation of the VVPAT; some speakers urged implementation as soon as possible, while others urged a later deadline. As set forth in section 1-5-802(1), C.R.S. (2005), the General Assembly ultimately concluded that voting systems must have the capability to provide a VVPAT for state elections after January 1, 2010; however, sub-section (2) requires implementation of the VVPAT in 2008 if the technology is available. In so doing, it appears that the General Assembly allowed time for the VVPAT technology to further develop without impeding the implementation of systems that provide disabled voters with more opportunity for access and participation.

Some individuals who testified before the General Assembly also testified at the public hearing on this complaint. As discussed above, testimony was presented by the disabled community that while they recognized that the VVPAT was not accessible to blind voters, such voters are still able to verify their selections using the audio ballot function.[12] Overwhelmingly, the testimony established that the eSlate system overall, is far better than anything the disabled community has ever had, and that de-certification of the system would be an enormous setback.[13] The testimony both before the General Assembly and at the May 24 hearing before the Secretary, made clear that the disabled community would like the VVPAT to be accessible, but that we should not delay implementation of current systems to wait for the perfect system to be invented.

Some individuals expressed concern at the May 24 hearing before the Secretary, that the technology might not ever catch up completely, so suspending use of an otherwise accessible system until the VVPAT is accessible might mean that the system is never used. There was a strong sentiment from the disabled community that the priority should be on certifying voting systems that allow disabled voters to vote privately and independently, and it was frequently noted that voting cannot be secret and independent if the assistance of another person is required.[14] The testimony suggested that rather than wait for the technology to catch up, that accessible systems should be certified, and then updated as new technology becomes available.

Finally, the U.S. Election Assistance Commission's (the "EAC") 2005 Voluntary Voting System Guidelines (the "VVSG"), which go into effect in December 2007, establish a requirement that VVPAT be accessible for elections held thereafter. These guidelines provide for audibility, font, and language accommodations. This Office recognizes the importance of continuing to develop technology to provide the most accessible voting process possible to all Colorado voters, and pursuant to Election Rule 37.3.2, the 2005 VVSG will be adopted by this Office when the guidelines become effective in 2007.[15] Given that the 2005 VVSG are not yet effective, voting systems must be certified for use in the state of Colorado under the certification requirements currently in effect.

3. Anonymous Voting

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[12] *See* Exhibits 4, 5, and 14.
[13] *See* Exhibits 5 and 14.
[14] *See generally* Exhibits 4, 5, and 14.
[15] "Upon any revision or new release of Voting Systems Standards by the Election Assistance Commission, the Secretary of State hereby automatically adopts such standards as may be promulgated, and any vendor seeking state certification shall follow such adopted voting systems standards and the processes mandated by state law in order to be certified by the Secretary of State." Election Rule 37.3.2, 8 C.C.R. 1505-1 (2005).

The constitutional and statutory right to vote privately and independently is one of the most cherished principles of our democratic process, and protecting the anonymity of voting is crucial to ensuring the integrity of our electoral process. Article VII, Section 8 of the State of Colorado Constitution provides that ". . . no ballot shall be marked in any way whereby the ballot can be identified as the ballot of the person casting it." The Uniform Election Code further provides that all voting systems used in the state of Colorado must ensure the secrecy of voting.[16]

Complainant Kolwicz asks this Office to de-certify the Hart/InterCivic eSlate because the VVPAT is printed on a continuous spool-to-spool paper roll, and therefore does not allow for anonymous voting. Kolwicz contends that the continuous roll would allow individuals watching to determine which person cast which vote. This raises two distinct issues, the security of the VVPAT component and the integrity of the voting process itself.

Addressing first the VVPAT component of the voting system, the Hart/InterCivic eSlate uses a VVPAT device similar to those on all voting systems currently certified for use in the state of Colorado. The system allows for the voter to verify their ballot selections and make any changes, if necessary. Then, once the ballot is cast, the VVPAT rolls forward so that the paper is blank when the next voter enters the booth to vote their ballot. Further, to protect the integrity of the VVPAT, this Office has recently adopted strict guidelines with regard to the handling storage, and transportation of the VVPAT. Pursuant to Election Rule 11.6.1, the VVPAT must be secured, sealed, transported and stored in the same manner as paper ballots. Additionally, the 2005 VVSG, which will become effective December 2007, also include specific requirements for VVPAT. These requirements, while not yet in effect, were developed by the EAC in conjunction with the National Institute of Standards and Technology ("NIST") after considerable public comment. In developing the 2005 VVSG, the EAC clearly anticipated a continuous spool-to-spool paper roll VVPAT; section 7.9.5 identifies this as one of the two acceptable methods of printing and storing a VVPAT that will be acceptable under the new guidelines.[17] So while the 2005 VVSG are not yet effective, the VVPAT system in question will be acceptable under the federal guidelines that will go into effect in December 2007. Given that these guidelines will be adopted by this office pursuant to Election Rule 37.3.2 at that time, the continuous spool-to-spool paper roll VVPAT system will continue to be acceptable under state certification guidelines.[18]

Complainant Kolwicz alleges that someone watching could associate a voter with a particular vote on the VVPAT. This allegation assumes a conspiracy to commit voting fraud that

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[16] Section 1-5-615(1), C.R.S. (2005) provides in relevant part:

(1) No electronic or electromechanical voting system shall be certified by the secretary of state unless such system:

(a) Provides for voting in secrecy.

[17] 2005 Voluntary Voting Systems Guidelines section 7.9.5 – Preserving Voter Privacy provides in relevant part:

VVPAT records can be printed and stored by two different methods:

• Printed and stored on a continuous spool-to-spool paper roll where the voter views the paper record in a window

• Printed on separate pieces of paper, which are deposited in a secure receptacle.

[18] *See* Election Rule 37.3.2, 8 C.C.R. 1505-1 (2005), Supra note 15.

would entail an elaborate sequence of events and involvement by a number of people, including those sworn to uphold the integrity of the election. To achieve the violation of privacy that the complaint suggests, a watcher would first necessarily violate Colorado Election Rules by noting identifying information about electors. While watchers may observe the voting and track the names of electors who have cast ballots, they may not write down ballot numbers or other identifying information about the electors.[19] In large polling location this effort would be virtually impossible given the sheer quantity voting booths and electors. In addition, procedures are established in Election Rules directing pollworkers to take steps to protect the anonymity of voters.[20] Further, even if watchers were able to accurately track which elector entered which booth, the conspirators would need to gain access to the VVPAT, which is sealed and transported in the same manner as a ballot box to ensure its integrity.

Kolwicz further alleges in his complaint that there is a threat that an election official might discover a how a specific voter marked his or her ballot. This unsubstantiated allegation presumes that an election official, having affirmed that they will not do so, will attempt to learn how a particular person voted and subsequently disclose that information.[21] Such an allegation calls into question not only the integrity of the individuals conducting the election, but of the entire voting process. Thus, we can reasonably assume that an election conducted with the equipment in question would be no more susceptible to fraud than elections conducted using paper ballots.

4. Testing and Certification of Alternate Voting Equipment

This Office has chosen to address a collateral issue raised by Kolwicz during the public hearing and in the memorandum he submitted at that hearing, namely, that other alternative accessible programs (specifically, AutoMARK and VotePAD) were improperly denied certification. First, VotePAD has not submitted an application for certification of its voting system in Colorado. If this Office had received such an application, however, it would have

---

[19] "Watchers may track the names of electors who have cast ballots by utilizing their previously obtained lists, but may not write down any ballot numbers or any other identifying information about the electors." Election Rule 8.8, 8 C.C.R. 1505-1 (2005)

[20] Election Rule 11.6.2, 8 C.C.R. 1505-1 provides in relevant part:

11.6.2 Anonymity

11.6.2.1 The Election Official shall put measures in place to protect the anonymity of voters choosing to vote on DREs during the voting periods. These measures shall include:

(a) Encouraging poll workers to personally vote on DREs when possible to ensure more than one vote will be cast on the device.

(b) Appropriate marking in Poll Book or other voting list indicating voters choice to vote on DRE with the words: "Voted DRE", or similar in place of paper ballot information. No record shall be kept indicating the order in which people voted on the DRE, or which V-VPAT record is associated with the voter.

(c) When more than one DRE is available at a voting location, the voter shall be given the choice as to which DRE they would like to vote on, to the extent practical.

(d) Encouraging or allowing any and all voters the opportunity to vote on a DRE if desired.

[21] Section 1-6-114, C.R.S. (2005) provides in relevant part:

Oath of Judges. (1) Before beginning the duties of an election judge, each person appointed as an election judge shall take a self-affirming oath or affirmation…

"I, ……. Do solemnly swear (or affirm) . . that I will studiously strive to prevent fraud, deceit, and abuse. . . that I will not try to determine how any elector voted, nor will I disclose how any elector voted if in the discharge of my duties as judge such knowledge shall come to me. . .

been denied because it would fail to meet the threshold requirement of federal certification. The VotePAD requires such certification under section 1-5-608.5(1), C.R.S. (2005), which requires federal testing and certification of "electronic and electromechanical voting systems" that are to be used in Colorado. The VotePAD voting system utilizes an audio ballot function as well as a "light-sensing wand" that provides "vibrational feedback indicating whether or not the location is marked."[22]

AutoMARK submitted an application for certification of the AutoMARK voting equipment as the HAVA required accessible solution for each polling place. Although this equipment has been granted federal certification, the AutoMARK failed to meet Colorado standards for accessibility under section 1-5-704, C.R.S. (2005). Specifically, the AutoMARK equipment fails to provide disabled voters the same opportunity to "independently operate the voter interface device through the final step of casting a ballot without assistance" that is required under state law. Section 1-5-704(1)(n)(I), C.R.S. (2005). As has been established, HAVA mandates that there be an accessible voting system that provides all voters "the same opportunity" to privately and independently vote and cast their ballot.[23] The AutoMARK voting equipment uses a paper ballot that is inserted into the voting machine, thus, voters with visual or dexterity impairments will need assistance removing their marked ballot from the voting equipment and actually "casting" the ballot in the ballot box. Consequently, because the vendor submitted the application to acquire state certification as the HAVA voting equipment system for Colorado, the application was denied because all voters cannot complete the process of voting and casting their ballot unaided. The vendor may, however, re-submit an application at any time for certification as a non-HAVA voting system.

V. Conclusion

Summary of Final Determination

1. Voting Equipment Testing and Certification

Kolwicz has asked this Office to de-certify the Hart/InterCivic eSlate voting equipment because it was subject to inadequate testing. The Hart/InterCivic eSlate voting equipment was tested and certified federally pursuant to the requirements of the Colorado Uniform Election Code. Following federal certification Hart/InterCivic submitted a complete application for certification for use in Colorado. This office conducted a review and testing of the equipment pursuant to the requirements set forth in statute and rules, and subsequently granted certification.

Thus, it is the determination of this Office that the Hart/InterCivic eSlate equipment was properly granted certification for use in Colorado. The equipment satisfactorily passed the review and testing required by statute and rule for certification in Colorado.

2. Accessibility of Voting Systems and the Voter-Verified Paper Audit Trail ("VVPAT)

[22] *See* Vote-PAD website at www.Vote-PAD.us.
[23] *See* DOJ Opinion Supra at Note 5.

The complainant, Kolwicz asks this Office to de-certify the Hart/InterCivic eSlate voting equipment because a discrete component does not provide an identical opportunity for every voter to verify their vote. This Office has heard compelling testimony from electors who will be directly impacted by such a decision. Overwhelmingly, the testimony presented to this Office by electors with disabilities has been that the voting equipment approved for use in the State of Colorado provides them with the greatest opportunity they have ever had to vote privately and independently. This Office has heard substantial testimony that de-certifying the equipment in question would, in fact, negate the ability of many voters to vote privately and independently. Indeed, independence and privacy in the voting process go hand in glove, as a vote can never be truly anonymous unless it is independently cast.

Thus, it is the determination of this Office that the Hart/InterCivic eSlate voting equipment shall not be decertified on the basis that the VVPAT component is not yet fully accessible. We must, in the interest of enfranchising all qualified voters, continue to move forward. The technology is currently available to allow voters with even the most severe disabilities the ability to vote, verify, and cast their ballot privately and independently. Thus we must make that technology available to the voters of Colorado now. When the technology is such that the VVPAT will also be fully accessible, then it too shall be made available; and all voting systems must have this capability for elections held after January 1, 2010, pursuant to section 1-5-802(1), C.R.S. (2005).

3. Anonymous Voting

The complainant, Kolwicz asks this Office to de-certify the Hart/InterCivic eSlate voting equipment because the continuous spool-to-spool paper roll VVPAT does not allow for anonymous voting. First, there are strict guidelines that require that the VVPAT provide the same security as paper ballots. Also, because the VVPAT rolls forward after each ballot is cast, no voter can see the previous voter's selections. Further, the continuous spool-to-spool paper roll format is one of the two formats anticipated and approved by the EAC in their 2005 VVSG. There are strict statutory guidelines and rules governing the conduct of elections that protect the integrity of the process. These statutes and rules dictate the conduct of election officials and watchers, and establish clear procedures for protecting the anonymity of all voters. Moreover, the scheme contemplated by Kolwicz is both purely conjectural, and unjustifiably calls into question the integrity of the officials conducting the election by suggesting that they would act contrary to their affirmation "to prevent fraud, deceit, and abuse" by carrying out such a conspiracy.

Thus, it is the determination of this Office that the Hart/InterCivic eSlate voting equipment shall not be decertified on the basis that the continuous spool-to-spool paper roll VVPAT does not allow for anonymous voting. There are substantial measures in place to ensure the security of the VVPAT itself, as well as guarantee the integrity of the entire voting process.

4. Testing and Certification of Alternate Voting Equipment

The alternative voting systems suggested by Kolwicz simply do not provide all voters with the "same opportunity" to privately and independently cast their ballot as contemplated

under HAVA. For that reason, the AutoMARK equipment was not granted certification for use in Colorado as the HAVA solution. Further, VotePAD has not applied for certification for use in Colorado, nor has it been granted federal certification as required under the Colorado Uniform Election Code.

/s/ Ginette Dennis
Ginette Dennis, Secretary of State

Dated at Denver, Colorado, this 10th day of July, 2006.

RECEIVED
APR 10 2006
ELECTIONS
SECRETARY OF STATE

Al Kolwicz
2867 Tincup Circle
Boulder, CO 80305
303-494-1540
AlKolwicz@qwest.net
www.users.qwest.net/~alkolwicz
www.coloradovoter.blogspot.com

April 7, 2006

Ms. Gigi Dennis
Colorado Secretary of State
1700 Broadway, Suite 270
Denver, CO 80290

Dear Ms. Dennis:

Enclosed please find a formal complaint against the HART eSlate.

Please forward to me a copy of the procedures that will be used to rule on this complaint. As you may know, we have previous experience with the HAVA complaint process and have not been happy with the lack of due process and the fact that the Secretary of State serves as defendant, judge and jury.

Al Kolwicz

RECEIVED

APR 10 2006

ELECTIONS
SECRETARY OF STATE

COMPLAINT

COLORADO SECRETARY OF STATE
1700 BROADWAY, SUITE 270
DENVER, COLORADO 80290
303-894-2200, OPTION 3
FAX 303-869-4861

FOR CLERICAL USE ONLY

COMPLAINT ID: SOS-OL-06-0001

DATE OF FILING: April 10, 2006

PERSON ALLEGING COMPLAINT

Name AL Kolwicz Home Phone 3034998527 Work Phone 303 494 1540

Address 2867 Tincup Circle

City BOULDER State CO Zip Code 80305 County BOULDER

PERSON OR ENTITY AGAINST WHOM ALLEGED COMPLAINT IS BROUGHT (LIMIT ONE PERSON/ENTITY PER FORM)

Name COLORADO SECRETARY OF State Home Phone Work Phone 303 894 2200

Address 1700 BROADWAY, SUITE 270

City DENVER State CO Zip Code 80290 County DENVER

STATE LAW VIOLATIONS [NOTE: ALLEGED VIOLATIONS OF STATE ELECTION LAW DO NOT NEED TO BE NOTARIZED]

Pursuant to Section 1-1-107(2)(b), Colorado Revised Statutes (2004), the Secretary of State is granted independent authority to inspect and review the practices and procedures of county clerk and recorders, election commissions, their employees, and other election officials in the conduct of primary, general, and congressional vacancy elections and the registration of electors in this state, with or without the filing of a complaint by any person.

- ☐ I was not allowed to vote in secret.
- ☐ I was not allowed to turn in my absentee ballot.
- ☐ I was not allowed to ask questions or ask for assistance.
- ☐ I was not allowed to vote, even though I was standing in line before the polls closed.
- ☐ I was not able to vote because I wasn't given assistance to accommodate my disability.
- ☐ I was not able to vote because I wasn't given assistance in my own language.
- ☐ I was not provided election materials in my own language.
- ☐ My voter registration information was altered.
- ☐ I observed the casting of a fraudulent vote.
- ☐ My polling place was not open (either on time or at all).
- ☐ I observed pollworkers acting or saying something inappropriate.
- ☐ I observed inappropriate electioneering or campaigning too close to the polls.
- ☐ I was not allowed to re-vote after I made a mistake.
- ☐ Officials neglected to perform their duties.
- ☐ Other state law violation: (1) Article VII section 8 Colo Constitution (2) CRS 1-5-704(1)(N) I, IV, V, VI

FEDERAL LAW VIOLATIONS [NOTE: ALL ALLEGED VIOLATIONS OF THE HELP AMERICA VOTE ACT MUST BE NOTARIZED]

Pursuant to section 1-1.5-105, Colorado Revised Statutes, the Secretary of State has sole jurisdiction to adjudicate alleged violations of Title III of the Help America Vote Act of 2002 (HAVA). Any person who believes that a violation of Title III of HAVA has occurred, is occurring, or is about to occur may file a complaint. In order to initiate the complaint process, a sworn, written, signed and notarized complaint must be filed with the Secretary of State no later than one year from the date of either the occurrence of the alleged violation or of the election giving rise to the complaint, whichever is later. The complaint must allege the violation with particularity, contain a reference to the section of HAVA alleged to have been violated, and the person or entity responsible for the violation.

- ☐ I was not allowed to vote using a provisional ballot.
- ☐ Required voting information was not publicly posted in a polling place on Election Day.
- ☐ Applications for voter registration were not properly processed, e.g. appropriate identification from the registrant were not required.
- ☐ I was not able to determine whether my provisional ballot was counted.
- ☐ Other federal law violation: TITLE III SEC 301(a)(1); (a)(2)(B)(ii); (a)(3)(A)

DETAILS OF THE COMPLAINT

STATE IN YOUR OWN WORDS THE DETAILED FACTS AND CIRCUMSTANCES THAT FORM THE BASIS OF YOUR COMPLAINT, INCLUDING ANY RELEVANT PERSON(S). IN YOUR NARRATIVE EXPLANATION, PLEASE INCLUDE RELEVANT DATES AND TIMES AND THE NAMES AND ADDRESSES OF OTHER PERSONS WHOM YOU BELIEVE HAVE KNOWLEDGE OF THE FACTS. ALSO, GIVE ANY REASONS THAT YOU FEEL THE ALLEGED VIOLATION WAS COMMITTED BY THE PERSON AND/OR ENTITY AGAINST WHOM THIS COMPLAINT IS BROUGHT.

IF YOU BELIEVE THAT A VIOLATION OF TITLE III OF THE HELP AMERICA VOTE ACT OF 2002 HAS OCCURRED, IS OCCURRING OR IS ABOUT TO OCCUR, PLEASE STATE THE SPECIFIC ACTS COMMITTED BY THE PERSON OR ENTITY NAMED IN THIS COMPLAINT ALONG WITH A REFERENCE TO THE SECTION OF HAVA ALLEGED TO HAVE BEEN VIOLATED:

the HART eSlate has been wrongfully certified for use in Colorado.

1. eSlate does not provide anonymous voting because the V-VPAT is a continuous roll of paper. Knowing the sequence of voters enables one to know each voter's votes.

2. Blind voters cannot verify the votes selected by the voter on the V-VPAT so they cannot detect errors on the printed ballot

Check here if additional pages are attached ☐

IF YOUR COMPLAINT IS AN ALLEGED VIOLATION OF STATE LAW, YOU MUST SIGN THE FOLLOWING:

I declare under penalty of perjury under the laws of the State of Colorado that the foregoing is true and correct.

Executed on 4/7/2006 (date), at BOULDER (city), CO (state)

Signature of Person Filing Complaint _____

IF YOUR COMPLAINT IS AN ALLEGED VIOLATION OF THE HELP AMERICA VOTE ACT, A NOTARY PUBLIC MUST COMPLETE THE FOLLOWING:

CERTIFICATE OF ATTESTATION

STATE OF COLORADO
COUNTY OF BOULDER

I, the undersigned, under penalty of perjury, do swear or affirm that the information contained in this complaint is true and correct to the best of my knowledge.

_____
Signature of Complainant

Sworn to and subscribed before me this 7TH day of APRIL, 2006

Mary Susan McLean
Signature of Officer Authorized to Administer Oaths or Notary Public

MARY SUSAN MCLEAN
(Print, Type, or Stamp Commissioned Name of Notary Public)

NOTARY PUBLIC
MARY SUSAN MCLEAN
NOTARY SEAL
STATE OF COLORADO

☐ Personally known **or** ☒ Produced Identification

Type of Identification Produced CODL

NOTICE: This Complaint is not confidential and, once filed with the Department of State, will be treated as a public record.

Colorado Secretary of State Public Hearing, May 24, 2006

Al Kolwicz
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AlKolwicz@qwest.net
www.users.qwest.net/~alkolwicz
www.coloradovoter.blogspot.com

Plaintiff

vs.

Colorado Secretary of State
1700 Broadway
Denver, CO 80290
(303) 894-2200
gigi.dennis@sos.state.co.us
www.sos.state.co.us

Defendant

Case No.: SOS-HAVA 01-06-0001

Wrongful certification of HART InterCivic eSlate Direct Recording Electronic (DRE) voting equipment

Dated this May 24, 2006

Al Kolwicz
2867 Tincup Circle
Boulder, CO 80305

SUMMARY

The Colorado Secretary of State has the authority and duty to certify voting equipment for use in Colorado elections. Included is the authority and duty to certify that voting equipment complies with:

1. Colorado Constitution, Article VII, Section 8
2. C.R.S. 1-5-704(1)(n) I, IV, V, and VI
3. HAVA, TITLE III Sec 301(a)(1)
4. HAVA, TITLE III Sec 301(a)(2)(B)(ii)
5. HAVA, TITLE III Sec 301(a)(3)(A)
6. Colorado Election Rule 45

The Colorado Secretary of State has wrongfully certified the HART InterCivic eSlate Direct Recording Electronic (DRE) voting equipment. As will be detailed below,

1. The eSlate does not provide for anonymous voting.
2. The eSlate does not permit blind voters to verify that their votes are correctly printed before they are cast.
3. Testing of the eSlate was inadequate and failed to report these two defects.
4. Unfair, preferential treatment was given to eSlate <u>multiple ballots per voter</u> voting equipment over alternative federally certified voting systems that use a <u>single paper ballot per voter</u>.

When certified voting equipment is found to be non-compliant, the Secretary of State is required to decertify the equipment.

Every voter is disenfranchised when their vote is overridden by an ineligible vote. We ask the Secretary of State to stipulate items 1, 2, and 3 above; we ask the Secretary of State to decertify the eSlate voting equipment; we ask the Secretary of State to repair the damage that has resulted from the wrongful certification of the eSlate voting equipment.

ANONYMOUS VOTING

The eSlate does not provide for anonymous voting. Anonymous voting is protected by the Colorado Constitution[1].

> "All elections by the people shall be by ballot, and in case paper ballots are required to be used, no ballots shall be marked in any way whereby the ballot can be identified as the ballot of the person casting it."

The language of the Constitution has been tested and decided by the Colorado Supreme Court in Taylor v. Pile[2].

> The district attorney of Arapahoe county was granted leave to file a brief in this action and he has limited his presentation to two propositions, to-wit:
>
> "I. An election wherein ballots are numbered in such a manner that the vote of any person thereafter may be determined by comparison with the number on the ballot and the poll registration book is contrary to the state of Colorado's constitutional and statutory guarantee of a secret ballot and, therefore, void ab initio." and
>
> "II. A voter who has cast his ballot in good faith cannot be compelled, under the existing law of the State of Colorado, to disclose how he voted, particularly [***10] when the voter's name appeared on the registration books and when the voter was not challenged by the election judges."
>
> We agree with each of these statements and will not lengthen this opinion with citations of authorities, which are plentiful, on propositions so fundamental to our system of government. The use of "marked ballots" by which the vote of every elector could be ascertained resulted in a void election.

Anonymous voting is also protected by the Colorado Statutes which prohibit the Secretary of State from certifying any electronic or electromechanical voting system unless the system "provides for voting in secrecy[3]"

Colorado election rules also protect anonymous voting:

> 45.5.2.9.11 The V-VPAT system shall be designed in conjunction with State Law to ensure the secrecy of votes so that it is not possible to determine which voter cast which paper record.

There are strong reasons for anonymous voting. Voter intimidation and vote selling are made possible when anything or anybody, including the voters themselves or election officials, marks ballots "in any way whereby the ballot can be identified as the ballot of the person casting it".

The constitutional requirement for anonymous voting is not permissive. It prohibits ballots from being identifiable even if election officials promise to try to keep secret the vote of any particular voter.

The eSlate violates the requirement for anonymous voting. (1) The eSlate prints each voted ballot, sequentially by voter, on a continuous roll of paper. The

second voted ballot follows the first voted ballot, etc. (2) Poll watchers, election officials, and others may compile a sequential list of the names of people who voted at a particular eSlate. The second voter's name is listed after the first voter's name, etc. Compilation of voter lists is explicitly authorized under the Colorado Statutes which describe the compilation of a list of voters as one of the functions performed by a poll watcher[4]. Also, based on the HART Secure and Auditable brochure[5] it is possible that a programmer, using "time-stamped transaction logs", "activation code assignment data", and "audit logs" could construct a sequential list of voters for each eSlate machine. The HART brochure says:

> "The eSlate System includes both physical and electronic intrusion detection controls, such as standard election seals and time-stamped transaction logs that record every system action related to the voting process."
>
> "Each eSlate is activated by the voter using a randomly generated four-number code;"
>
> "All components of the eSlate System create an audit record anytime they are accessed or information is changed. All audit records can be extracted and printed in hard copy."

(3) By combining a sequential list of voter names with the sequential printout of voted ballots, it is trivial to learn each individual voter's choices. The first name voted the first ballot; the second name voted the second ballot, etc.

Election officials say that they will attempt to prevent this from happening. This is not good enough. Bad things happen despite the best of intentions; therefore, the voter's votes can potentially be learned. Just yesterday, for example, it was reported that a disk containing 26 million identities was stolen from the home of an analyst who had taken it home without authorization. The law prohibits creating the opportunity for associating a voter and their votes.

Even the threat that an election official or other insider or outsider could discover a specific voter's votes would be sufficient to persuade some voters to succumb to the demands of an intimidator or temptations of a vote trader. Some voters would vote differently than they wish out of self-imposed fear of retribution or embarrassment.

HART clearly understands the requirement for anonymous voting. See University of Maryland Study[6] posted on the HART website which says, "The Help America Vote Act

(HAVA) requires that every voter be entitled to vote a ballot in secret, without assistance."

The eSlate's sequential recording of voted ballots is a direct and clear violation of the Colorado Constitution and Statutes. According to election rule 45.9.1, the eSlate must be immediately decertified.

VOTER-VERIFIED VOTING

The eSlate does not permit blind voters to verify that their votes are correctly printed before they are cast. Voter-verified voting is protected by the Federal Help America Vote Act (HAVA):

1. TITLE III Sec 301(a)(1) requires that a direct recording electronic system shall "permit the voter to verify (in a private and independent manner) the votes selected by the voter on the ballot before the ballot is cast and counted;"

2. TITLE III Sec 301(a)(2)(B)(ii) requires that "The voting system shall provide the voter with an opportunity to change the ballot or correct any error before the permanent paper record is produced."

3. TITLE III Sec 301(a)(3)(A) requires that the voting system shall "be accessible for individuals with disabilities, including nonvisual accessibility for the blind and visually impaired, in a manner that provides the same opportunity for access and participation (including privacy and independence) as for other voters;"

Voter-verified voting is also protected by the Colorado Statutes:

4. C.R.S. 1-5-704(1)(n) requires that when audio ballots are used:

   (IV) The elector shall have the ability to verify that the physical or vocal inputs given to the voting system have selected the candidates that the elector intended to select.

   (V) The elector shall be able to review the candidate selections that the elector has made.

   (VI) Before casting the ballot, the elector shall have the opportunity to change any selections previously made and confirm a new selection.

Colorado statutes require that "On and after June 6, 2005, a political subdivision shall not acquire a voting system unless the voting system is capable of producing a voter-verified paper record of each elector's vote[7].

C.R.S. 1-1-104 (50.6) describes a "voter-verified paper record" as an auditable paper record that is available for the elector to inspect and verify before the vote is cast, and is suitable for a manual audit or recount.

The definition of "cast" is not included in 1-1-104, however the requirements are specified in C.R.S. 1-5-704(1)(n) as follows:

> (XI) The voting system shall require a clear, identifiable action from the elector to cast the ballot. The voting system shall explain to the elector how to take this action so that the elector has minimal risk of taking the action accidentally, but when the elector intends to cast the ballot, the action can be easily performed.
>
> (XII) After the ballot is cast, the voting system shall confirm to the elector that the ballot has been cast and the elector's process of voting is complete.
>
> (XIII) After the ballot is cast, the voting system shall prevent the elector from modifying the ballot cast or voting another ballot.

Election rule 45.5.2.9 requires that every electronic voting record shall have a corresponding paper record; the paper record shall be considered an official record of the election available for recounts; the V-VPAT device shall be designed to allow every voter to review, and accept or reject his/her paper record in as private and independent manner as possible for both disabled and non-disabled voters; the V-VPAT system shall be designed to allow each voter to verify his or her vote on a paper record in the same language they voted in on the DRE.

There are strong reasons for voter-verified voting. (1) Nobody other than the voter can ever verify that the votes recorded on their ballot are the votes intended by the voter, and then only before the ballot is cast by the voter, because votes must be anonymous and secret. No other person can detect incorrect votes, or votes not printed at all. (2) The paper ballots printed by the eSlate may be used to decide the outcome of an election. Therefore, it is imperative that every voter be given the opportunity to verify the votes recorded on their paper ballot. (3) Votes recorded on the digital records are not verifiable. Machines and software make errors. Electronic media may be accidentally or intentionally changed after the voter has cast their ballot. The paper ballot is the only record of votes that is verifiable, indelible, and trustworthy.

The eSlate violates the Federal and Colorado requirements for voter-verified voting. (1) It does not permit a [blind] voter to verify (in a private and independent manner) the votes selected by the voter on the ballot before the ballot is cast and counted. (2) It does not give a blind voter an opportunity to change the

ballot or correct any error before the permanent paper record is produced. (3) It is not accessible for individuals with disabilities, including non-visual accessibility for the blind and visually impaired, in a manner that provides the same opportunity for access and participation (including privacy and independence) as for other voters. (4) It does not give a blind voter the ability to verify that the physical or vocal inputs given to the voting system have selected the candidates that the elector intended to select, since the paper record is not accessible to a blind voter. (5) It does not enable a blind voter to review the candidate selections that the elector has made on the paper ballot. (6) It does not give a blind voter the opportunity, before casting the paper ballot, to change any selections previously made and confirm a new selection.

Alternatives to the eSlate exist - systems that are fully accessible to blind voters, federally certified, and that are being deployed by many states across the nation.

HART has published documents that show that the company understands the requirement for voter-verified voting. In its brochure, HART Voter Verifiable Paper Audit Trail[8], HART states that the eSlate:

- Provides voters with disabilities, including blind and visually impaired voters, the same opportunity to verify their ballots as any other voter.
- Produces the paper equivalent of the voter's choices so the voter can view it via a method that is completely independent of the voting system.

However, HART failed to implement these required capabilities.

The lack of a means for blind voters to verify their votes on the paper ballot is a clear violation of HAVA and Colorado requirements. According to election rule 45.9.1, the eSlate must be immediately decertified.

INADEQUATE TESTING

Testing of the eSlate was inadequate; it failed to report that: (1) the eSlate does not provide the required anonymous ballot, and (2) the eSlate does not provide the required means for blind voters to verify their votes on the printed ballot. Election rule 45 requires:

> 45.3.2 For a voting system to pass certification the voting system provider shall successfully complete all phases of the certification process that shall include: submitting a complete application, successful review of the

> documentation to evaluate if the system meets the requirements of this rule, successful demonstration of the system, followed by successful completion of items determined mandatory in the functional testing section of this rule

In response to a request for test documents, the Secretary of State on May 19 replied:

> "However, if you are requesting just those records of the Secretary of State relating specifically to testing "to verify that a blind voter can verify the votes recorded on the paper record of votes (the audit trail in the case of the eSlate voting equipment), and to verify that the eSlate provides anonymous voting" (the phrase used in your original request), then you are advised that there are no such records."

The Secretary of State's procedures[9] for certification say that it is mandatory that the V-VPAT "allow verification on paper before the ballot is cast" and documentation must show "how the V-VPAT device allows the voter to review, accept or reject his or her paper record privately and independently". The procedure must verify whether a voter has "a chance to verify privately and independently and allow correcting the ballot before the ballot was cast". The procedure must verify that "the V-VPAT process is as close to the normal voting process as technically feasible for both able and disabled voters of all types".

The Secretary of State has written[10] that there are no records indicating that these tests were performed, and that there is no record indicating that these tests were not performed. The lack of "anonymous and verifiable voting" test documents can mean only that no such tests were performed. If true, this would suggest negligence on the part of the Secretary of State; negligence that can result in the disenfranchisement of voters. Election rule 45.6.3 requires that voting systems shall successfully complete all of the requirements in this rule [45], and any additional testing that is deemed necessary by the SOS. If no testing was conducted, then it is not surprising that no defects were discovered, and that testing was inadequate.

Efforts to gain access to the "anonymous and verifiable voting" test documents of the Independent Testing Authorities (ITA's) were not successful. The Secretary of State claims no knowledge about these tests, has never reviewed these tests or test results, and is therefore negligent in its duty to verify that voting equipment certified by ITA's for use in Colorado does in fact meet Colorado's laws.

The testing of the anonymous and verifiable voting features of the eSlate was inadequate. An independent investigation into this dereliction of duty is called for. The eSlate does not permit anonymous voting, and does not permit blind voters to

verify votes on their paper ballot. It should not have been certified, and according to election rule 45.9.1, the eSlate must be immediately decertified.

UNFAIR PREFERENTIAL TREATMENT

Unfair, preferential treatment was given to eSlate multiple ballots per voter voting equipment over alternative federally certified voting systems that use a single paper ballot per voter. A competitor to the eSlate, the AutoMark was awarded federal certification on May 9, 2005[11], but was denied Colorado certification on January 10, 2006[12]. Colorado's reason for denial of certification was:

> "This letter is to inform you that the Colorado Department of State has received your application for certification of the ES&S Voting System for AutoMARK and AIMS. Unfortunately at this time we are unable to certify the AutoMARK and AIMS ballot marking devices for use in the State of Colorado as to our knowledge, this type of device does not meet the requirement of Colorado Revised Statutes Title 1, Article 5 Section 704, specifically paragraph (1)(n)(I)."

C.R.S. 1-5-704(1)(n)(I) requires, "After the initial instruction from an election official, the elector shall be able to independently operate the voter interface device through the final step of casting a ballot without assistance."

The eSlate uses multiple ballots per voter: (1) one or more digital cast vote records that cannot be verified by a voter, (2) a printed paper text record that can be verified by a voter, (3) a printed bar code that is not verifiable by a voter, and (4) possibly additional backup and audit trail copies that could be used to resolve disputed ballots. When these different recordings disagree, the printed paper text record is the final authority.

The AutoMark uses a single pre-printed paper ballot - the same ballot as used for absentee voting. The un-voted ballot must be inserted into a voting machine before the voter makes selections. Once the voter has made and verified their selections, using appropriate voter interface devices, the equipment prints the votes onto the ballot. To verify the votes printed on the paper, the marked ballot may be visually inspected, or the marked ballot can be re-inserted into the voting equipment and the equipment will scan the document. It will then use the user interface features to tell the voter what choices have been made. Once the voter approves the ballot, the voter casts the ballot by placing it into a secure ballot box.

The Secretary of State's denial of AutoMark certification was based on a single disability type. The AutoMark does not provide a way for a voter with a certain disability to complete all voting functions without assistance -- a voter who can physically not insert the paper ballot into the scanner/printer/ballot box. A blind voter can do this; a paraplegic voter might not be able to accomplish this task without assistance.

The Secretary of State did certify the eSlate despite the fact that it too does not provide a way for a voter with certain disabilities to complete all voting functions without assistance -- a blind voter cannot independently verify the votes on the paper record. (It is not obvious that all paraplegic voters can verify the votes on the eSlate V-VPAT without assistance.)

There is no defensible explanation for why the Secretary of State denied certification to the AutoMark while it did certify the eSlate. Efforts to obtain such an explanation using the Colorado Open Records Act failed, because the Secretary of State says there are no relevant records.

Why is this important?

A significant number of Colorado electors are working hard to have accessible, anonymous, verifiable paper ballot voting systems adopted in their home county. The Secretary of State has improperly used its office to block paper ballot voting systems. The Secretary of State has wrongfully denied certification to paper ballot voting systems.

Some Colorado counties, including Boulder County, would almost surely evaluate and perhaps adopt the AutoMark or VotePAD voting systems if they were certified for use in Colorado.

The Secretary of State has an obligation to repair the damage it has done to Boulder County electors through its wrongful denial of certification to the AutoMark.

The Secretary of State should immediately decertify the eSlate. Under election rule 45.7, the AutoMark and VotePAD voting systems should be immediately certified on a temporary use basis. The Secretary of State should plead with the AutoMark and VotePAD vendors to agree to supply voting equipment for the 2006 elections. The Secretary of State should rescind approvals for purchase and void contracts for eSlate voting equipment.

REQUIRED DECERTIFICATION

When certified voting equipment is found to be non-compliant, the Secretary of State is required to decertify the equipment. Election rule 45.9 says:

> 45.9 Decertification
>
> 45.9.1 If after any time the SOS has certified a voting system, it is determined that the voting system fails to meet the standards set forth in this rule, the SOS shall notify any end users in the State of Colorado and the voting system provider of that particular voting system that the certification of that system for future use and sale in Colorado is to be withdrawn.
>
> 45.9.3 Any use of a decertified or uncertified voting system for any jurisdiction in the State of Colorado shall result in possible loss of future and other existing certifications within the state, at the discretion of the SOS.

Although it has been certified by the Colorado Secretary of State, the eSlate "fails to meet the standards set forth" in election rule 45. (1) The eSlate does not provide for anonymous voting. (2) The eSlate does not permit blind voters to verify that their votes are correctly printed before they are cast.

The Secretary of State is obliged and authorized to "notify any end users in the State of Colorado and the voting system provider of that particular voting system that the certification of that system for future use and sale in Colorado is to be withdrawn."

[1] Colorado Constitution, Article VII, Section 8.

[2] Taylor v. Pile, 154 Colo. 516; 391 P.2d 670; 1964 Colo. LEXIS 468; April 27, 1964, Decided

[3] C.R.S. 1-5-615(a)

[4] C.R.S. 1-7-108(3)

[5] HART Secure and Auditable brochure, 2005, http://www.hartintercivic.com/files/secure.pdf

[6] University of Maryland Study http://www.hartintercivic.com/innerpage.php?pageid=100

[7] C.R.S. 1-5-801 Acquisition of voting systems - voter-verified paper record.

[8] HART Voter Verifiable Paper Audit Trail brochure, 2005, http://www.hartintercivic.com/files/Voter Verifiable Paper Audit Tr.pdf

[9] Procedures for Certification of Voting Systems, November 15, 2005 http://www.elections.colorado.gov/DDefault.aspx?tid=501

[10] Williams to Kolwicz, May 19, 2006, by e-mail.

[11] SysTest Labs to ES&S, May 9, 2005.

[12] Colorado Secretary of State to ES&S, January 10, 2006.

HAVA/Elections Complaint
Docket No. SOS-HAVA 01-06-001
May 23, 2006

Written Testimony submitted by:

Neil McClure
Vice President
Hart InterCivic, Inc.
1650 Coal Creek Drive, Suite E
Lafayette, CO 80026

This written testimony is provided in response to a complaint received by the Colorado Secretary of State's Elections Department on April 10, 2006 alleging wrongful certification in Colorado of the Hart Voting System, specifically the eSlate voting unit. This testimony supports the Colorado Election Department's certification of the eSlate.

The specifics of the complaint are related to Voter Verified Paper Audit Trail (VVPAT), which is a new requirement for Colorado elections when using Direct Recording Electronic (DRE) voting devices to record votes. The VVPAT presents the voter's ballot selections to enable the voter to verify that the DRE correctly recorded the voter's intent. The voter is permitted to accept or reject the presented information following review. If the voter rejects the presented information, he or she is allowed to make changes to the ballot selections, and the review cycle repeats. Presentation of the information is accomplished through the simultaneous output of print and audio data streams.

The complaint alleges the eSlate violates applicable election law in two respects. The first allegation is that the eSlate VVPAT does not permit a secret and private vote to be cast because the printed presentation is recorded on a paper roll and therefore creates a serial record of ballots cast on the device. The complaint alleges that by knowing the order in which voters cast ballots, it is possible determine how a specific individual voted.

To address the privacy and secrecy allegation, the first element to note is that the eSlate VVPAT is a ballot box. When delivered to the polling place, the eSlate VVPAT has a ballot seal installed to prevent tampering. The sealed VVPAT device is never opened at the polling place, if there is any problem with the device, it is simply replaced with another unit. Processing and handling of the eSlate VVPAT paper rolls only occur at a central location and follows all the procedures that are practiced for other types of ballot boxes. The same two-party processes apply. If any tampering or fraud were to be committed, it requires, at a minimum, two people from different political parties to conspire to commit a felony.

The next consideration is that when the polls close, the sealed eSlate VVPAT is removed from the voting booth and transported to the central location along with the electronic

memory device containing the electronic versions of the cast ballots. Separating the VVPAT from the voting booth breaks the observable link that the complaint heavily relies upon. Can the individual VVPAT be traced back to the individual voting booth that was observed in the polling place? Yes, as required for audit purposes. However, if there is intent to discover how an individual voted, the effort delves into the realm of multiple co-conspirators breaking existing laws to discover the information.

As stated above, the complaint relies heavily upon an individual observing the order that voters enter a particular booth and then keeping track of this sequence in a manner that does not attract attention. In smaller jurisdictions, it may be easier to keep track of the sequence but more difficult to go unnoticed. In larger jurisdictions, it may be easier to go unnoticed but more difficult to keep track because the Hart Voting System allows a voter to use any available voting booth. Assuming the improbable event that the observer ***believes*** he or she accurately kept track of the voter sequence, the next task is to gain access to a specific paper roll. To accomplish this step requires either a conspiracy or breaking and entering into the secure area where ballots are stored – either of which involves the commitment of a serious crime. A third possibility exists where the individual is observing a post-election event involving an examination of the paper rolls and is able to keep track of order of ballots on the roll. In the unlikely case where any of these events occur, what is the result? The individual can only ***claim*** to know how somebody voted because there is no proof. This is no different than somebody divulging how they voted – ***there is no proof.***

This scenario of observing the order in which people voted was the cornerstone of a lawsuit filed in Boulder County District Court in 2004. The lawsuit was dismissed as groundless and without merit.

As a final comment related to the privacy and secrecy aspects of the eSlate VVPAT, the Independent Testing Authority (ITA) and several other states have certified the system. Each of the entities requires that secrecy and privacy be maintained for all votes cast on the system in order to gain approval.

The second allegation of the complaint involves the audio presentation of the information provided to the voter for review. Voters who are visually impaired or have limited vision typically use the audio presentation. The complaint states in its allegation that: "Blind voters cannot verify the votes selected by the voter on the VVPAT so they cannot detect errors on the printed ballot."

The Hart Voting System allows voters who are blind to verify their votes in the same manner that they made ballot selections. As stated earlier, the eSlate VVPAT presents information for voter to review, accept or reject. The eSlate VVPAT presents the information in two formats ***simultaneously***, as a printed paper record and as an audio data stream. Simultaneous production of these information streams requires them to be produced from the same data source.

A voter with visual impairments marks the ballot while listening to audio information that includes contest and navigational instructions. The same audio information is used by the VVPAT for the voter to review and verify the ballot selections and accept or reject the selections. Since the print and audio streams are produced simultaneously, the selections are printed at the same time. Navigational audio cues are provided to the voter allowing him or her to accept or reject the selections. The user interface for accepting or rejecting ballot selections on the eSlate VVPAT is the same regardless of whether the voter is taking action based on reviewing the paper or the audio presentation. The fact that persons with disabilities and persons who are temporarily able-bodied use the same user interface is one of the most desirable attributes of the Hart Voting System, according to disabled community advocates.

The complaint is correct in stating that voters who are blind cannot detect errors on the paper but they can't detect errors on the electronic screen either. This is why the voters with visual impairments or blindness verify their ballots in the same manner they made their ballot selections, through the audio feature of the system.

It is unclear what aspect of a law this allegation claims is violated. Voters with visual impairments or blindness are allowed to make ballot selections, verify the selections and accept or reject the selections – the same as sighted voters as required by law.

The same complainant has made these same privacy and secrecy allegations over the years, as the State is aware. Whether it involves vote-by-mail, sequence numbers on paper ballots, or VVPAT devices, these complaints rely on improbable events and the commission of crimes to violate a constitutional right. Laws are in place to protect our rights and cannot be ignored. Our election practitioners have withstood microscopic scrutiny under election challenges. Hart InterCivic's electronic voting system provides a secure, reliable, secret and private means to cast and tabulate votes. This complaint, as with the previous one, should be dismissed as groundless and without merit.

The Legal Center for People with Disabilities and Older People

Colorado's Protection & Advocacy System

Faith Gross, representing The Legal Center for People with Disabilities and Older People. I coordinate Colorado's Protection and Advocacy for Voting Access program, authorized under HAVA.

We agree with the complainant that the VVPAT is not accessible for voters who are blind. We also note that the VVPAT is not accessible for other voters with disabilities, for example, some learning disabilities. In fact, we raised this very concern, along with the former HAVA Director, Drew Durham, during the 2004 and 2005 legislative sessions.

For the VVPAT to be accessible, the voting system must scan the paper ballot and using an audio interface, read this to the voter. Currently, the VVPAT systems' audio interface, reads what is being sent to the printer, not what is printed on the paper. This becomes a serious problem when the VVPAT is considered to be the official ballot of record as it does not provide equal access.

We note that the 2002 FEC standards, currently in effect, do not address accessibility of the VVPAT. I believe that this was a concern expressed by the former Secretary of State during the 2004 legislative session. The EAC's 2005 Voluntary Voting System Guidelines does address accessibility of the VVPAT in section 7.9.7 (VVPAT Accessibility) which requires that all accessibility requirements apply to the VVPAT.
"If the normal procedure includes VVPAT, the accessible voting equipment should provide features that enable voters who are visually impaired and voters with an unwritten language to perform this verification. If state statute designates the paper record produced by the VVPAT to be the official ballot or the determinative record on a recount, then the accessible voting equipment shall provide features that enable visually impaired voters and voters with an unwritten language to review the paper record."

Section 7.9.7 goes on to provide the example of an automated reader that converts the paper record contents into audio output.

455 Sherman Street ~ Suite 130 ~ Denver, Colorado 80203-4403 ~ 303-722-0300 ~ FAX 303-722-0720
Toll Free 1-800-288-1376/Voice/TTY ~ 303-722-3619/Direct TTY
322 North 8th Street ~ Grand Junction, Colorado 81501-3406 ~ 970-241-6371 ~ FAX 970-241-5324
Toll Free 1-800-531-2105/Voice/TTY
www.thelegalcenter.org

Not withstanding our concern about the accessibility of the VVPAT, our more pressing concern lies with decertification of the Hart eSlate system. Decertification would result in approximately 2/3 of Colorado counties being without an accessible voting system in place for the upcoming elections. **At this time, providing the opportunity for voters with disabilities to cast their ballots privately and without assistance is our first priority.** We fully expect that when the 2005 VVSG is adopted by Colorado in 2007, the existing VVPAT systems will be updated to meet the new certification requirements. This will ensure that voters with disabilities are provided the same opportunity for access and participation, including privacy and independence, as for other voters.

NATIONAL FEDERATION OF THE BLIND OF COLORADO

2233 West Sheppard Avenue • Littleton, Colorado 80120- 2038
(303) 778-1130 • 1-800-401-4632 • FAX (303) 778-1598 • Email: nfbco@nfbco.org

May 24, 2006

The Honorable Secretary of State Ginette Dennis
State of Colorado
1700 Broadway
Suite 270
Denver, Colorado 80290

Re: Position of National Federation of the Blind of Colorado

Dear Secretary Dennis:

This letter is for official inclusion into the record of the public hearing being held of today's date regarding the complaint to decertify the Hart InterCivic-eSlate 3000 voting machine. In short, the NFB of Colorado opposes the complaint and requests that the Secretary deny same.

As you know, the National Federation of the Blind of Colorado is the oldest and largest organization of blind persons in Colorado and in our nation. Our membership represents a broad cross-section of the blind and visually impaired community as well as those interested in the affairs of the blind.

After the 2000 election, the National Federation of the Blind worked vigorously to insure that any election reform include a mandate that the blind and visually impaired be able to vote independently and secretly with the use of accessible voting machines. As you know, that work resulted in the current standards that mandate that every polling place in the U.S. have at least one accessible DRE.

Since the original passage of HAVA, a great deal of concern has been raised about the ability to produce a voter verifiable paper ballot so that a voter can double-check the machine. The blind agree that verifiability is a legitimate concern and further agree that any function of verifiability must ultimately be accessible to the blind and visually impaired.

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However, it is customary that technology, which is accessible for the blind, usually lags behind that commonly used in society. This is the case for voting machine technology.

As a result, our organization does not insist that all machines used in this year's election be accessible with respect to the paper verifiability. As long as the original voting process and ballot are accessible in a non-visual manner, that is an acceptable short-term solution for the blind. Our fear is that if the Hart InterCivic-eSlate 3000 is decertified for the upcoming election, the blind will be facing a vast number of inaccessible polling places in Colorado. This would negate the hard work we did to get accessible, non-visual standards into HAVA.

Let me also make it clear that by the 2008 elections, we will insist that all voter verifiable paper ballots are accessible through scanning technology so that the blind and visually impaired can verify their vote in the same manner as the sighted. We are willing to wait a short while for the technology to catch up. Meanwhile, we do not want the Hart InterCivic-eSlate 3000 decertified because doing so will put us back to the same level of inaccessibility in the pre-HAVA days.

We request that the Complaint currently before the Secretary be denied. We thank you for your attention to our position. Please feel free to contact us to discuss this further.

Very truly yours,

Scott C. LaBarre, Esq.
President
National Federation of the Blind of Colorado

Date: Wed, 24 May 2006 03:54:55 -0600
To: hbranscomb@eagledems.org
From: Harvie Branscomb hbranscomb@eagledems.org
Subject: comments for HAVA complaint, May 24 2006

Why are citizens like me coming to testify in public hearings about voting machines?

Why not just trust the County Clerks and the Secretary of State? Here is a quick description of the reasons I feel the need to appear at the Secretary of State office to protect my fellow citizens from undesirable new voting technologies and inadequately thought out and executed procedures for certifying voting machines.

1) when citizens like me ask for proof that the voting machines I depend on in Eagle County are accurate I learn that ITA test procedures and results are unavailable, that State certification test specifications are unconvincing, the actual test data unavailable and that too few ballots are used for almost every test. For example only 25 test ballots per political party once through the machine in the Logic and Accuracy test, and 100 ballots in the so-called "random audit" test. Further, the County Clerk may not cooperate with a well reasoned argument to test with additional ballots on behalf of my political party and the public.

When I asked my County Clerk and then the Colorado Secretary of State (SOS) for certification process and results for the Hart eSlate machine in question at this hearing I was recommended to download an image of a wall certificate rather than the actual specifications and results of the functional tests which I asked for. I have yet to see any test results from either Eagle County's older Diebold optical scanner machines or the new Hart eSlate machines recently purchased without public comment or review which are the topic of this hearing but which have been requested in some cases several times.

2) County Clerks and the Secretary of State's office are naturally and understandably much interested in saving money and simplifying the election process and avoiding hand counts but this is not favorable to the public interest in the accuracy of elections. This desire for efficiency leads to less than generous response to the public when it wants to understand and get proof about how accurate our voting process is and to try to improve it by participating in the process. I sincerely hope for and request that the SOS will serve the public interest better.

3) As a designer of machines and software myself I know that eligible voters are the most difficult group to serve of all. Every human variation is included within the group and no single technology could be capable of addressing all variations; machines should not ever be trusted to be the most accurate form of recognition of human expression- they only add complexity to voting which is a naturally human expression.

4) Within the SOS rules for elections there are multiple dysfunctional phrases and rules which do less than what is needed to protect the public.

5) There is no oversight for the SOS office, a partisan elected office; bi-partisan canvass boards of the counties are legally not authorized to make sure the vote is either fair or accurate or even that rules are followed. They are limited to making sure that number of votes do not exceed the number of eligible voters.

6) in my experience county clerks may try to prevent public discussion of the voting system in public spaces by calling it illegal;

7) there are many outstanding experts on voting among the public most or all of whom are systematically disqualified from participation in the process (e.g. rule 45.9.2 aopted by emergency process in November 2005 "Certification of a voting system may be revoked and/or suspended at the discretion of the SOS based on information that may be provided after the completion of the initial certification. This information may come from any of the following sources:").

8) There are special interest groups who have extra influence over the process in respect to their constituencies- in this case the community of disabled voters whose interests are represented by the HAVA legislation, which have forced a rush to purchase voting machines before the needs of voters as a whole is adequately provided for. It is the HAVA legislation which is forcing Eagle County to purchase new voting machines without sufficient consideration, due process and public comment.

9) There is as far as I know no mechanism for collecting and keeping records of election problems, and actual election problems therefore may not remembered when rules such as the rules under which the Hart eSlate machine was certified are created;

10) In Eagle County the 2005 election random audit was not an audit, not random, checked insufficient ballots to be a good measure of accuracy, and reported a normal election after employing an unusual procedure in a machine recount to cause the machine count to equal the hand count. This leads me to doubt that our process of election checks and balances is working properly.

All of these above observations are fully non partisan in nature-

Since the process here is focused on one single machine, which is the machine selected for purchase recently by the Eagle County Board of County Commissioners- the Hart eSlate with paper trail option, my salient comments today are limited to the defects of this type of machine and this machine in particular.

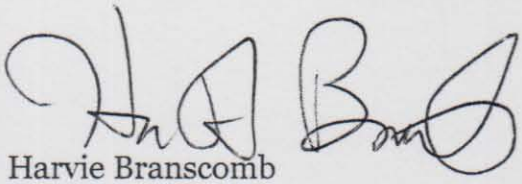
The Hart machine is a touch screen device which like other DRE machines arbitrarily isolates the human hand from the record, intercepting the voting process with a considerable number of physical constraints while it offers some flexibility (and variability from voter to voter) at the same time. While the DRE may allow the blind voter to hear the choices on the ballot, this is not the same choice that the fully sighted voter has, and hence real equal treatment is not provided for and never will be. On the other hand, the fully able bodied voter will endure an interface which requires special skills including special kinds of hand eye coordination, etc. in order to be able to vote on the DRE.

The Hart machine like all machines in Colorado is required to provide a voter verified paper audit trail. To be effective, this paper audit trail must be easily auditable by all voters, must have longevity for archival purposes and must provide voter privacy and anonymity.

It is my understanding that the Hart eSlate machine in question, as purchased recently by Eagle County, fails to provide voter verified paper audit trail by failing to serve a significant part of the disabled community which it's rushed purchase is intended to serve: namely the blind, who can not privately verify the accuracy of their vote, hence their vote is entirely at the mercy of the proper treatment of the electronic record. The lack of ability of these blind voters to verify their paper ballot record suggests that the paper record will never be able to be used as a full record of the vote of the election, and future election officials will argue that only the electronic records can accurately be used for a recount, the paper records having been incompletely verified. If these blind voters must have a helper to read and verify their vote, then their privacy is invaded to a similar extent to what would happen if they were to vote with help on a not disabled friendly voting machine. Therefore, perceived either by law or by common sense, the Hart eSlate machine design does not provide a cure for the needs of the blind voters. Whether or not the Hart eSlate helps or hurts the needs of non disabled voters in terms of election accuracy and fairness and accountability is also subject to question, but not at this hearing.

Second and perhaps more importantly, the anonymity of voting and the voting record which is at the cornerstone of our rights and freedoms as citizens is compromised by the physical attachment of the paper records in a sequence which necessarily matches the order of use of the DRE machine, which usage itself can not be hidden from view or prevented from being observed. In comparison to the use of individual paper ballots whose order is easily changed, this is a substantial deficiency.

I am also concerned about the longevity of the paper record of the Hart eSlate machine, but this concern is minor in consideration that this paper record would probably never be possible to be used for a hand count of the vote, and thus also prevent a random audit, as called for by Colorado Law (if the blind voter's ballot is randomly chosen, the audit is not complete).



Harvie Branscomb
May 24, 2006
Chair, Eagle County Democrats

Wayne Munster

From: Mary Eberle [m.eberle@wordrite.com]
Sent: Tuesday, May 23, 2006 8:36 AM
To: Wayne Munster
Cc: AlKolwicz@qwest.net
Subject: Please DECERTIFY Hart DREs at SoS hearing on May 24

Dear Mr. Munster,

Please decertify the Hart DREs at the SoS hearing on May 24. The eSlate system that Boulder County and other Colorado counties proposes to use for disabled and other voters does not meet the most basic requirement for certification for "assistive" voting. The blind voter cannot verify the "voter-verified" paper audit trail (VVPAT) and must rely on computer-generated audio output that could be erroneous by accident or malicious design. This is a clear violation of the blind voter's rights.

Other systems do not have this flaw. For example, the VotePAD system (which I have no financial or other interest in) allows the blind voter to mark a normal paper ballot (the same type of ballot used by all the other voters) and then verify the choices through a hand-held device like a pen that vibrates when placed over the square that has been blackened in. You may see an impressive demonstration at the following Web site: http://www.vote-pad.us/videos.asp. The VotePAD system is also suitable for voters whose dexterity makes unassisted marking of a paper ballot difficult.

Furthermore, the Hart DREs record the VVPATs on a continuous paper roll.
That approach maintains the order in which the voters used the machine, and unscrupulous people could then use the VVPATs to determine how voters voted. For many reasons, Colorado voters are guaranteed a secret ballot. Therefore the Hart eSlate system should be decertified on the basis that this guarantee is potentially compromised.

If the Colorado Secretary of State applied for a federal extension of the HAVA requirement that is driving counties toward the Hart system and other DRE systems with similar fatal flaws, by the next election cycle an assistive voting system that is more trustworthy will be available.

I ask you to decertify the Hart eSlate for Colorado.

Sincerely,
Mary

Mary Eberle
1520 Cress Court
Boulder, CO 80304
(303) 442-2164

Wayne Munster

From: wre [wre@hcscar.com]
Sent: Tuesday, May 23, 2006 1:56 PM
To: Wayne Munster
Cc: AlKolwicz@qwest.net
Subject: Hart DRE

Dear Mr. Munster,

As a concerned Colorado voter, I am asking you to decertify the Hart DREs at the SoS hearing on May 24. The eSlate system has two fatal flaws: 1) the VVPAT is recorded on a continuous roll of paper, making it possible for someone to match voters to their votes by noting the order in which voters use the machine, this violates the secret ballot requirement. 2) a visually impaired voter cannot, INDEPENDENTLY of the machine, verify what is recorded on the "VVPAT".

Please decertify the eSlate system.

Sincerely,
William R. Eberle

Wayne Munster

From: William.Atkinson@colorado.edu
Sent: Tuesday, May 23, 2006 1:27 PM
To: Wayne Munster
Cc: AlKolwicz@qwest.net

Dear Mr. Munster,

In Colorado, we are having some difficulty in coming up with a reliable and trustworthy computer voting system.

Please decertify the Hart DREs at the SoS hearing on May 24. The eSlate system that Boulder County and other Colorado counties proposes to use for disabled and other voters does not meet the most basic requirement for certification for "assistive" voting. The blind voter cannot verify the "voter-verified" paper audit trail (VVPAT) and must rely on computer-generated audio output that could be erroneous by accident or malicious design. This is a clear violation of the blind voter's rights.

Other systems do not have this flaw. For example, the VotePAD system (which I have no financial or other interest in) allows the blind voter to mark a normal paper ballot (the same type of ballot used by all the other voters) and then verify the choices through a hand-held device like a pen that vibrates when placed over the square that has been blackened in. You may see an impressive demonstration at the following Web site: http://www.vote-pad.us/videos.asp. The VotePAD system is also suitable for voters whose dexterity makes unassisted marking of a paper ballot difficult.

Furthermore, the Hart DREs record the VVPATs on a continuous paper roll.
That approach maintains the order in which the voters used the machine, and unscrupulous people could then use the VVPATs to determine how voters voted. For many reasons, Colorado voters are guaranteed a secret ballot. Therefore the Hart eSlate system should be decertified on the basis that this guarantee is potentially compromised.

If the Colorado Secretary of State applied for a federal extension of the HAVA requirement that is driving counties toward the Hart system and other DRE systems with similar fatal flaws, by the next election cycle an assistive voting system that is more trustworthy will be available.

I ask you to decertify the Hart eSlate for Colorado.

Sincerely, W.W. Atkinson, Jr.

Wayne Munster

From: Evan Daniel Ravitz [evan@vote.org]
Sent: Tuesday, May 23, 2006 5:07 PM
To: Wayne Munster
Subject: STOP forcing dreaded DREs on hapless clerks!!!!!!!

Mr. Munster:

Hart Intercivic DREs do NOT permit blind voters to verify the VVPAT.

Hart Intercivic DREs do NOT maintain a secret ballot! The continuous spooled VVPAT are in the order of the voters who used them.

You know well that Colorado law allows NON-DREs to be used by disabled voters; yet, your office misinformed the Boulder County Clerk and Commissioners.

You work for US, not Hart -or the Republican Party. IF, like Florida and Ohio officials, you ALSO work for the Republican Party,

RESIGN NOW!!!!!!!

Wayne Munster

From: Donna Chen Ellinger [dchene@comcast.net]
Sent: Tuesday, May 23, 2006 8:54 PM
To: Wayne Munster
Subject: HART eSlate

Mr. Munster,

I am emailing you to voice my thoughts regarding the HART eSlate. I understand that there will be a hearing at your office tomorrow regarding its use in our state.

I am an optometrist who practices low vision; that is, I work with visually impaired patients as part of my daily work. I have worked and cared for thousands of visually impaired individuals over the course of my career.

One of the recurring themes of frustration that I have seen in people who have lost their sight is the fact that although there are often alternative ways to do things for low vision and blind individuals, the alternatives are often second-best to the options available to normally sighted individuals.

The HART eSlate is a perfect example of this problem. Although it does assist visually impaired and blind voters, it does not provide the same checks and balances to a blind person that is afforded to a normally sighted person. Specifically, it does not provide for final accuracy verification because a blind individual cannot read a paper printout.

Of all things, shouldn't a blind person's vote be as accurate and verifiable as a sighted person's? Aren't their votes equally important?

I understand that there are alternatives to this technology. I urge you to reconsider them for our state.

Thank you,

Donna M. Ellinger, O.D.
Optometrist
Wheat Ridge, CO
303-421-5074

Wayne Munster

From: Kathryn Mikeworth
Sent: Wednesday, May 24, 2006 8:18 AM
To: Wayne Munster
Subject: FW: HAVA

From: Cathy Hill **On Behalf Of** Public Elections
Sent: Wednesday, May 24, 2006 7:50 AM
To: Kathryn Mikeworth
Subject: FW: HAVA

Who should this go to? Please let me know. Thank you.

Cathy

From: glennnation@comcast.net [mailto:glennnation@comcast.net]
Sent: Tuesday, May 23, 2006 3:58 PM
To: Public Elections
Subject: HAVA

To: Colorado Secretary of State
From: Glenn Nation
RE: HAVA issue

Dear Secretary Dennis:

I am unable to attend the hearing on the HAVA issue on Wednesday May 24, 2006 but I do want to be heard through this email.

I have been visually impaired (legally blind) for more than twenty years. I believe that it is my right and privilege to vote for the candidate of my choice. It was very difficult to vote in the old voting machines but I found that I could vote by mail and have done so for many years. Being part of a community that has had to adapt to changes in our lives, I find it most frustrating when others decide what is best for me. I believe having a machine that would produce a written ballot in brail or in words, would not help me at all since I have not ever been proficient in brail and have limited eyesight.

I think that the system we have today is the best for us all. Spending more tax dollars, of which I will have to pay, really does not make sense. I believe that if we are concerned with our privacy in how we vote, we should vote by mail. This way we can seek help from those that we trust. I do not believe that spending more money or changing the

system that has just been replaced will help any of us, unless of course you are the maker of the new voting machine. Don't fix it, it is not broken.

Thank you for hearing me.

Sincerely,

/s/ Glenn L. Nation

6056 Jay Street
Arvada, Colorado 80003

Wayne Munster

From: Jim Rebman [seamus@indra.com]
Sent: Wednesday, May 24, 2006 10:11 AM
To: Wayne Munster
Subject: Blind voters and certification of Hart system for Boulder County

Dear Mr. Munster,

I am a totally blind resident of Boulder County and am quite concerned about the pending certification of the Hart eSlate system as there appears no way for the system to allow me to independently verify my votes. I understand that there alternatives that do allow for both independent verification by the voter and preserve the anonymity of the vote for all voters and believe these should be considered as an alternative in lieu of certification of the Hart eSlate system.

Sincerely,

James Rebman
4730 16th St.
Boulder, CO 80304

It is my understanding that the HART e-slate Voting System is the most accessible to those of us who do not have the ability to use paper ballots independently. As a person with poor dexterity, I have always required assistance at the polls. For example, my husband has marked my ballot in the in the past. On one occasion, at least, he tried to persuade me to vote for a candidate other than the one I intended to vote for. Though I didn't listen to his persuasion, it was an annoyance that if I could have voted privately and without assistance, I would not have been subject to.

It is my constitutional right as an U.S. citizen to vote privately at the polls. Historically, I have not been guaranteed this right. I believe it's time for this to change. I assert it's time for people with disabilities be free to vote privately, easily, and independently; equally with other U.S. citizens.

Julie Redenbaugh Aird
4579 Beachcomber Ct.
Boulder, CO 80301

Wayne Munster

From: John Gardner
Sent: Tuesday, May 16, 2006 4:36 PM
To: Wayne Munster
Subject: FW: VVPAT discussion for the upcoming hearing

Who is collecting public comment for the 5/24 hearing?

Thanks,
John G.

From: Cramer, Howard [mailto:hcramer@sequoiavote.com]
Sent: Sunday, May 14, 2006 5:26 PM
To: John Gardner
Cc: KWorks8866@aol.com; Bennett, Steven
Subject: VVPAT discussion for the upcoming hearing

A few thoughts on the advantages of continuous roll VVPAT records:

Methods of Securely Storing Voter Verifiable Paper Audit Trails

In general, records must be secure and must protect the secrecy of the ballot. The manner by which secrecy and security requirements are achieved should be at least as secure as the existing procedures in place to protect absentee and provisional ballot secrecy.

Secure continuous roll storage improves security, improves auditablity, improves the speed and accuracy of manual recounts, reduces responsibility and complexity for poll workers and provides an even greater level of voter confidentiality than currently exists with mail ballots.

Benefits of Audit Trail Recorded on a Secure Continuous Roll

- Ballot images cannot be traced to voters because poll workers will not have any access to view the voted paper records stored in the VVPAT printer.

- Access to the paper is prevented by locks or tamper-evident seals that protect both the integrity and the secrecy of the audit records.

- The collection of all audit records on a continuous roll of paper will **eliminate** the improper introduction or removal of audit records. With a single continuous form document, election observers can be guaranteed that the paper audit trail is 100% complete and has not been corrupted in transit.

- When processing hundreds of thousands of paper records, including multiple ballots types voted during early voting, it may be desired that the records be processed through an independent high-speed automated counter – a continuous roll is the best method of achieving a high-speed recount – especially when attempting to locate records from a machine that accommodates multiple ballot types (early voting).

- A greater degree of ballot secrecy is achieved through the use of a secure all-in-one printer/storage unit than is currently achieved with the processing of mail ballots which are often returned in signed envelopes. With mail ballots, security is assured through procedure, with continuous roll vvpat, security is assured through both procedure and hardware design.

- With a secured roll of paper, the audit records are not susceptible to damage, loss or counterfeit because from election set-up to the post-election recount, only election officials in a secure warehouse will have access to the paper and will not have access to the names of individuals who voted on each machine or the order in which those votes were cast.

Thanks,

Howard Cramer

Vice President of Sales

Sequoia Voting Systems

1800 Glenarm, 5th Floor

Denver, CO 80202

(888) 421-7260

Rita Thaemert

From: Bill Hobbs
Sent: Wednesday, May 31, 2006 7:53 AM
To: Rita Thaemert
Subject: FW: ACLU; To really foul things up

Attachments: ACLU-Voting-BOCoLtrReRFP1-06.doc

ACLU-Voting-BOCoL
trReRFP1-06.d...

Rita,
Please place a copy of this email and the attachment in the official file for the Complaint.
Thanks,
-Bill

-----Original Message-----
From: Gigi Dennis
Sent: Tuesday, May 30, 2006 6:34 PM
To: Bill Hobbs; Wayne Munster; John Gardner
Subject: FW: ACLU; To really foul things up

FYI

Gigi Dennis
Secretary of State
Colorado

303-860-6900
1700 Broadway, Suite 250
Denver, CO 80290

-----Original Message-----
From: Ralph Shnelvar [mailto:ralphs@dos32.com]
Sent: Tuesday, May 30, 2006 6:32 PM
To: Gigi Dennis
Subject: ACLU; To really foul things up

Dear Ms. Dennis:

It is, by now, an old expression: To err is human but to really foul things up requires a computer.

I am one of many (quite knowledgable) people concerned about how easily corrupted computers can be when it comes to the counting of votes. As a computer professional myself (I write disaster recovery software that restores computer systems after a bad crash) I know how easy it is to bury code that can do nefarious things.

As such, I am pleading with you to take the lead and make the ACCUMULATION and COUNTING of ballots be a low-tech operation. The Hart DREs are just too vulnerable to be trustworthy. All computers are too vulnerable to be trustworthy when it comes to the counting of ballots.

I also plead with you that both my letter and the attached ACLU document are to be added to the April 7, 2006 HAVA complaint documents, Tracking Number SOS-HAVA-01-06-0001.

I am forwarding to you a "public document" sent by the ACLU of Boulder to the Boulder County Clerk. The document -- more formally -- reiterates my position about the sanctity of voting and the unsuitability of the Hart machinery for use in Colorado elections.

The ACLU of Boulder County wrote the attached letter in early January 2006 to protest the contemplated use of Hart eSlates in Boulder County.
The ACLU states in this letter that "A fundamental principle of our democracy is that all voters have a constitutionally protected right to cast a ballot and the right to have each voter's vote counted at full value, without dilution or discount."

In addition, the Colorado constitution guarantees the right of a secret ballot which the Hart DRE's most emphatically do not generate. Article VII Section 8 says "The election officers shall be sworn or affirmed not to inquire or disclose how any elector shall have voted ... Nothing in this section, however, shall be construed to prevent the use of any machine or mechanical contrivance for the purpose of receiving and registering the votes cast at any election, provided that secrecy in voting is preserved."
Are you, as chief elections officer of Colorado, comfortable swearing to secrecy especially when the secrecy of the ballot by the Hart DRE machine is so easily circumvented by matching the order in which voters voted with the printout on the thermal paper?

In the ACLU letter under the heading Accessibility, I especially draw your attention to the following statement: "However, providing accessibility must not occasion compromising other values that affect all voters and the integrity of the voting process."

Finally, in the spirit of openness, I wish for you to know that I am not a member of nor do I represent the ACLU in any way.

Sincerely,

Ralph Shnelvar
385 Fox Drive
Boulder, CO 80303
303-546-6125

Boulder County ACLU

AMERICAN CIVIL LIBERTIES UNION of COLORADO
Boulder County Chapter

January 4, 2006

Linda Salas
Boulder County Clerk and Recorder
1750 33rd St.
Boulder, CO 80301
lsalas@co.boulder.co.us

Will Toor, Ben Pearlman and Tom Mayer
Boulder County Commissioners
Boulder County Courthouse, 3rd Floor
1325 Pearl Street
Boulder, CO 80306
commissioners@co.boulder.co.us

By email delivery

Boulder County ACLU comments to
Request for Proposals (RFP) for Boulder County's voting system

Dear Ms. Salas and Commissioners,

A fundamental principle of our democracy is that all voters have a constitutionally protected right to cast a ballot and the right to have each voter's vote counted at full value, without dilution or discount. In 1965, Congress passed the Voting Rights Act, one of the most effective civil rights laws ever enacted. The Act immediately outlawed the worst Jim Crow laws in the South, such as literacy tests and other devices and established a tradition of broad enfranchisement of the public.

The soundness and integrity of the voting system is fundamental to the operation of democracy. Today, however, the hard-won gains of the civil rights movement and the Voting Rights Act are in danger. The federal mandates of the Help America Vote Act (HAVA) unfortunately have resulted in many governmental entities seeking technological solutions that raise serious questions about voter privacy, accuracy and reliability that impair voter confidence.

With these principles in mind that we detail below, the Boulder County Chapter of the ACLU of Colorado discourages any future purchases of voting systems and equipment that may impair the voting rights of Boulder County citizens. **No purchase of direct record electronic devices should be made at this time as virtually all existing electronic voting systems are associated with unacceptably high malfunction and error rates.** *See*, e.g. *http://www.votersunite.org/info/previousmessups.asp*

In addition, **the ACLU encourages Boulder County to seek a different method than the non-detachable, serialized bar code that can be traced to an individual voter.** This system infringes upon the right of citizens to cast a secret ballot.

The ACLU also believes that the timeframe established for the public process for this RFP was woefully short. We recommend that the county establish a better framework for this and future requests of this nature. Our clerk and county should avoid the appearance that requests for public comments are disingenuous by allowing a realistic amount of time for thorough review and comment.

The ACLU requests that Boulder County be certain that the following fundamental voting rights are protected in any voting system purchased:

Accuracy: Within an acceptable range of error, voting systems must accurately count each and every vote cast. Voting systems must be operationally sound and have a clear methodology for tabulating ballots.

Reliability: Every voting system should have a means of auditing and manually recounting the vote. Any recount system must be independent of the initial count, so any problems in the first count are not duplicated in a recount.

Accessibility: Voting systems should as fully as possible be accessible to every eligible voter. Voting systems should not unnecessarily disenfranchise any class of voter. Accommodations must be made to include voters such as those with disabilities, language barriers, or low literacy levels, allowing them to vote privately and independently. Likewise, voting systems must not be either complicated, confusing or time-consuming to use so as to deter or intimidate any voter. However, providing accessibility must not occasion compromising other values that affect all voters and the integrity of the voting process.

Confidence: Voters must have confidence in the operation and integrity of the system in recording and counting of ballots. To achieve this, any voting system must have adequate safeguards against fraud, error, corruption, manipulation, or bias. Full public disclosure of the workings of any voting system increases confidence. Again, the system must have the ability to audit the vote after the election and to allow for a full recount if the integrity of the vote is questioned.

On behalf of our more than 2,300 Boulder County ACLU members, we thank you for considering our views. Please contact us with any questions.

Sincerely,

/s/ Judd Golden

Boulder County ACLU
by Judd Golden, Chapter Chair
303-442-6355
juddgolden@hotmail.com

Copy to:
Boulder County ACLU Board of Directors
Cathy Hazouri, Director, ACLU of Colorado

Ms. Dennis.

Thank you very much for conducting yesterday's public hearing in a way that gave participants a fair opportunity to submit their oral testimony.

- It was very helpful to have a time-allotted agenda. It would have been better to have posted the agenda in advance of the meeting, so that speakers would have had time to prepare.
- It was very helpful to have a full 45 minutes to make our case, and especially helpful to have an opportunity to speak last so that I could respond to oral testimony and summarize our argument.
- Publishing the audio record on the Internet is very helpful, and I hope that you will publish all written materials on the Internet as soon as you receive them.
- I also hope that you will provide me with copies of your draft findings so that I may participate in the final determination.

In the future, I believe that it would further improve the hearing quality if a way can be found to entertain two-way communication. This might be done by the public exchange of written briefs posted on the web, and by moderated oral debate during the hearing.

A few areas where this would have helped to improve the record:

1. **Anonymous voting -** The SOS did not declare whether or not it considers the eSlate to be anonymous. If SOS agrees that it is not anonymous, we could have spent less time on this point. On the other hand, if SOS believes that the eSlate is anonymous, we need to debate this issue. At a minimum, we deserve to hear or read SOS reasoning. This must not be a surprise disclosure that first appears in the SOS final determination. As you know, we believe that the constitutional protection is absolute.

2. **Voter-verified voting -** The SOS did not declare whether or not it considers that blind voters can verify their votes on the paper ballot. As above, the process would be significantly improved by two-way communication and more complete disclosure. For example (I hope that this is a fair paraphrasing) testimony by some of the blind speakers was: (a) they trust the computer and don't need to verify what is printed, and (b) a system that is accessible is good enough – even if it is not verifiable. A thorough discussion would have concluded, I expect, that the law does not agree with this position.

3. **Inadequate testing -** A two-way exchange would have answered whether the SOS did or did not test the eSlate for the two functions under dispute. For example, SOS "Procedure for Certification of Voting Systems, November 15, 2005" page 19 (45.5.2.9.3 and 45.5.2.9.9), page 36 (9.3.4.8), page 47 (9.3.7.7), and page 49 (9.3.8.6) and page 51 (9.3.8.22) require, in plain language that is not subject to ambiguous interpretation, that these tests be conducted. Yet SOS writes on May 19th, "you are advised that there are no such records".

   Adequacy of testing is one of the critical elements of this complaint. If the required tests were performed and failed to detect the defects, then a flaw in the test procedures requires executive attention. If the required tests were not performed, then there is a different type

of flaw that requires executive attention. We sit here not knowing a knowable fact. Two-way communication would likely have produced this fact. Were the eSlate tests performed or not? If performed, did they detect the defects or not? Were the same tests performed on the AutoMark?

4. **Unfair, preferential treatment -** It appears that a bureaucrat was permitted to make a public policy decision that has far-reaching implications. It appears that the eSlate was "rubber-stamped" and that the AutoMark was "targeted" for rejection. The only way to learn what happened and why is to conduct a two-way conversation. The hearing format used yesterday cannot get at these facts.

   We believe that the decision to deny certification to AutoMark and to award certification to eSlate was uneven and gave preferential treatment to eSlate. The consequences of this single decision are far-reaching. It prevented Colorado counties from considering the AutoMark vote marking equipment. It blocked ES&S from educating Colorado voters about the AutoMark. It forced the Boulder County Commissioners to choose voting equipment that they do not prefer, because the AutoMark was not an available option. It was used by officials to silence the voices of those members of the public who prefer accessible, paper ballot vote marking systems.

   I cannot help but believe that the decision to not certify AutoMark was prompted by a bias on the part of staff against paper ballots. This was an executive level, public policy decision that should have been publicly debated. It has resulted in vendors taking unnatural actions in order to stay on the right side of the SOS. At a minimum, this deserves an internal inquiry.

5. In my closing remarks, I described a virtual picture of where we go from here. I have attached a drawing of this virtual picture for your use. I believe that the sequence is the correct sequence for your decision-making. If I were in your position I would:

   a. Examine test results showing whether or not the eSlate meets the requirements for anonymous and verifiable-voting. This needs to be reduced to PASS or FAIL.

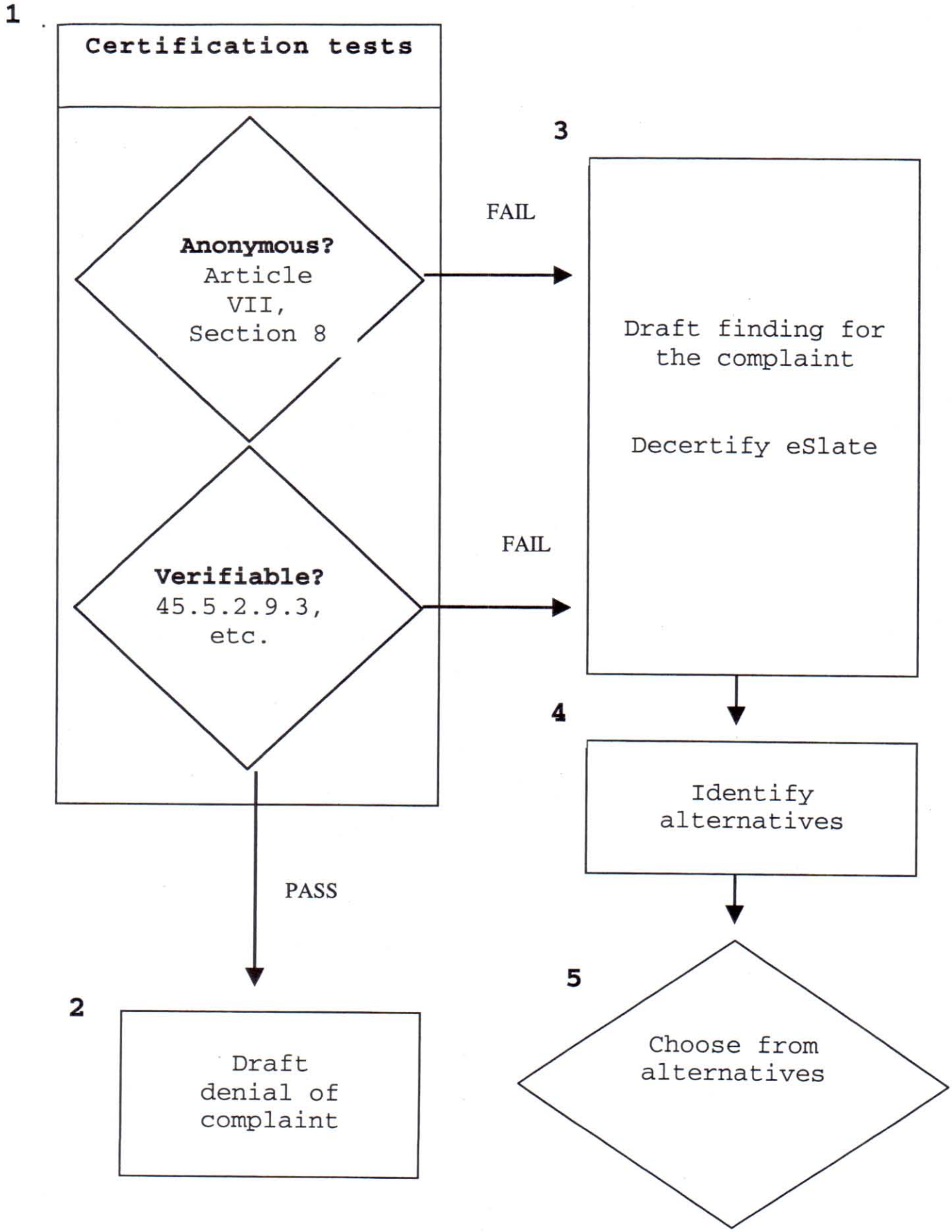
   b. If either fail:

      i. Draft a report that finds for the complaint.
      ii. Decertify the eSlate voting equipment.
      iii. Prepare a list of alternatives (where do we go from here?)
      iv. Select from the list of alternatives.

   c. If both pass, draft a report that finds against the complaint.

During the hearing you asked me to suggest alternatives available to you in the event that you decide to decertify the eSlate. I offered to work with you to develop a list of alternatives. I again extend my offer to assist.

Al Kolwicz 5/25/2006


1
Certification tests
Anonymous?
Article
VII,
Section 8
Verifiable?
45.5.2.9.3,
etc.
FAIL
FAIL
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Draft finding for
the complaint
Decertify eSlate
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Identify
alternatives
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