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**PRESS RELEASE**

For Immediate Release

**Tentative Ruling Finds that County Officials Destroyed Voting Records from Election Conducted on Diebold Electronic Voting Machines**

*Election Results May Be Nullified and County Ordered to Conduct Re-Vote on Ballot Measure at Next General Election; Hearing on the Tentative Ruling Tomorrow*

OAKLAND, CA – Superior Court Judge Winifred Y. Smith issued a tentative ruling that the Alameda County Registrar of Voters and Alameda County “have engaged in a pattern of withholding relevant evidence and failure to preserve evidence” necessary to conduct a recount of a hotly contested Berkeley ballot measure. As a result, the Court has signaled its intention to void the election and order the County to place Measure R back on the ballot for a re-vote at the next general election.

Judge Smith will issue a final ruling after the Court hears oral arguments tomorrow (Friday, July 13, at 9:30 a.m. at the Wiley Manuel Courthouse, Department 114, 661 Washington Street, Oakland).

“Judge Smith’s tentative ruling confirms our contention that Alameda County violated its duty to preserve the critical voting machine data that was the focus of this recount lawsuit and election contest,” said Gregory Luke of Strumwasser & Woocher LLP, attorney for the plaintiffs who sought the recount of the vote on Measure R.

The lawsuit, filed on behalf of three Berkeley voters who had sponsored the measure and the advocacy organization Americans for Safe Access, challenged the County’s refusal to allow the public to examine copies of the electronic votes and system audit logs during the recount of a close race conducted on electronic voting machines made by Diebold Election Systems, Inc.

Judge Smith wrote, “The evidence necessary to determine whether Petitioners’ election contest is meritorious has been lost or destroyed due to Respondents’ failure to fulfill its obligation to preserve the information that was reasonable available to them at the time of the recount, and at the time of the filing of this litigation. Therefore, sanctions ... are appropriate.” *[Complete text below.]*

“A re-vote is the only fair option for the people of Berkeley,” said Rebecca Saltzman, Chief of Staff for Americans for Safe Access, a medical marijuana advocacy group. “By destroying the electronic copies of the votes, the County made it impossible to check that the election was properly run and the votes correctly tallied. We couldn’t get to the bottom of the numerous machine malfunctions reported in the scant records the County did produce. We couldn’t follow up on the massive holes in the chain of custody over those electronic votes. With a re-vote, we can finally exercise our right to confirm how the people of Berkeley feel about Measure R.”

Last April, Judge Smith ruled that Alameda County and its Registrar of Voters violated both the Elections Code and three separate provisions of the California Constitution by denying voters their right to examine these election records during the recount of the 2004 election. At a hearing on the voters' Motion for Sanctions in May, Judge Smith criticized County officials for having returned the voting machines to Diebold, without first preserving the data they contained, while the ongoing legal battle over the recount was pending. She held off ruling on the sanctions motion to allow elections officials time to fulfill their promise to locate the missing election data.

While this case began in Berkeley, the search for the electronic voting records led to a warehouse in Plano, Texas where only 20 of the 482 Diebold computer voting machines used in that election still held any of the election data being sought. Copies of the votes from 96% of the machines used in the election had been destroyed. No audit logs from any individual machine were found. The County now acknowledges in its Court filings that these election records may have been overwritten and destroyed when they failed to copy those records before using the voting machines and data disks in subsequent elections.

“When a citizen files a lawsuit to contest an election result, it’s Election Administration 101 — and Law School 101 — to collect all the records from that election and store them safely until the election dispute is resolved,” said attorney Gregory Luke. “Here, the County allowed critical election records — the only records available on their voting system that verify whether the vote tally was correct — to be destroyed while a lawsuit and election contest were still pending. Alameda County voters should be appalled.”

Review of the redundant copies of the electronic votes, audit logs, and chain of custody materials is essential to this election recount and contest, because the scant records the County did produce revealed reports of machine malfunction at numerous precincts across the City of Berkeley.

“Without examining the redundant data, audit logs, and chain-of-custody records, no one can confirm whether any of the reported malfunctions were ever resolved or whether vote data was manipulated or lost. As a result, no one can ever confirm whether the vote result announced by the County was correct,” noted Matt Zimmerman, Staff Attorney for the Electronic Frontier Foundation, which assisted the voters in analyzing the scant data produced by the County.

Measure R, a citizens' initiative, would have regulated the operation of medical marijuana dispensaries in Berkeley. Election officials originally announced that the measure lost by fewer than 200 votes.

**What:        Americans for Safe Access vs. County of Alameda et al.**

**When:        Friday, July 13, 2007 at 9:30 a.m.**

**Where:       Wiley Manuel Courthouse, Department 114, 661 Washington Street, Oakland**

## CONTACTS:

Gregory G. Luke, Attorney  
STRUMWASSER & WOOCHER LLP  
(310) 576-1233 office  
(818) 486-4233 cell  
[gluke@strumwooch.com](mailto:gluke@strumwooch.com)

Matt Zimmerman, Staff Attorney  
ELECTRONIC FRONTIER FOUNDATION  
(415) 436-9333 x127 office  
[mattz@eff.org](mailto:mattz@eff.org)

Rebecca Saltzman, Chief of Staff  
AMERICANS FOR SAFE ACCESS  
(510) 251-1856 x308  
[rebecca@safeaccessnow.org](mailto:rebecca@safeaccessnow.org)

Caleb Dardick, Media Relations  
CDA Strategies  
(510) 704-0130  
[caleb@cdastrategies.com](mailto:caleb@cdastrategies.com)

*The Court's decision and the parties pleadings are available on the Court's website at <<http://www.alameda.courts.ca.gov/courts>> by following the Domain Web links to the "Case Summary" page and entering "RG04192053" when prompted for a Case Number.*

## **Tentative Ruling issued by Judge Winifred Y. Smith:**

*The Motion of Petitioners Americans for Safe Access, James Blair, Michael L. Goodbar, and Donald O. Tolbert for Sanctions is GRANTED. Sanctions are appropriate under CCP §§2023.010, 2023.030. The Court finds that Respondents County of Alameda and Dave MacDonald ("Respondents") have engaged in a pattern of withholding relevant evidence and failure to preserve evidence central to the allegations of this case. That evidence has now been determined to be irretrievable. The evidence necessary to determine whether Petitioners' election contest is meritorious has been lost or destroyed due to Respondents' failure to fulfill its obligation to preserve the information that was reasonable available to them at the time of the recount, and at the time of the filing of this litigation. Therefore, sanctions the equivalent of issue or terminating sanctions are appropriate. (See *Vallbona v Spring* (1996) 43 Cal.App.4th 1525, 1541-49; *Do-it-Urself Moving & Storage v. Brown, Liefer, et al.* (1992) 7 Cal.App.4th 27, 34-37; *RS Creative, Inc. v. Creative Cotton, Ltd.* (1999) 75 Cal.App.4th 486 ; *Electronic Funds Solutions v. Murphy* 134 Cal.App.4th 1161; *In re Marriage of Chakko* 115 Cal.App.4th 104, 108-110.) The Court finds that it is reasonable to award sanctions as follows: Petitioners are entitled to recover the costs of the recount in this matter, \$22,604.00. Petitioners are entitled to recover the reasonable costs of the trip to Texas to attempt to recover the data from the Diebold voting machines, which were returned to Diebold by Respondents after the initiation of this litigation.*

*Petitioners are also entitled to reasonable attorneys' fees expended in connection with this motion. The evidence submitted by Petitioners on these two points is insufficient for the Court to determine the amount of reasonable attorneys' fees and other expenses sought by Petitioners. Petitioners are directed to submit a supplemental declaration breaking down the hours spent (i.e., task-oriented billing records) and costs sought. Such supplemental declaration shall be filed and served within 10 days of receipt of this order. A further order specifying the amount of fees and costs awarded will be issued thereafter. Petitioners are entitled to an issue sanction establishing that the data lost would have been unfavorable to allowing the election results to stand. The Court finds, as a result, that the election results for the November 2, 2004 election concerning Measure R are nullified. Defendants are further ordered to place Measure R on the ballot in the next general election.*

**FACT SHEET: Americans for Safe Access v. County of Alameda et al., RG 04-192053**

**Why Election Data Was Sought in the Initial Recount Request**

On December 3, 2004, Berkeley voters requested a recount of the election for citizens' initiative Measure R, which had been conducted on a direct recorded electronic ("DRE") touchscreen voting system made by Diebold Elections Systems, Inc. The California Elections Code, in section 15630, provides that a voter may examine "all ballots . . . and any other relevant material as part of any recount." The Berkeley voters asked to examine the very vote verification tools that Diebold and the County of Alameda had touted as reasons to trust the DRE voting system, namely the back-up copies of the votes ("redundant data") that are stored on the touchscreen units for the precise purpose of providing a cross-check against the official vote tallies, and the "audit logs" generated by the DRE system that show whether the system functioned properly. The voters also asked to examine chain-of-custody records for the system — to make sure that no unauthorized persons had an opportunity to alter the votes during the vote tabulating process — as well as the results of "Logic & Accuracy" testing that had been performed on the machines before and after the election. The Registrar of Voters refused all of these requests, claiming that the law did not require him to show voters anything other than the voted ballots during a recount.

**A Lawsuit Was Necessary to Compel the County to Follow the Law**

On December 30, 2004, three Berkeley voters and the advocacy organization who had helped sponsor Measure R filed suit to compel the County to follow the law and produce materials that are necessary tools to confirm the accuracy of votes, and to detect potential fraud or error, in elections conducted on all manner of electronic voting systems. The voters also filed a formal contest of the results of the election. The voters provided testimony from three of the country's leading voting system security experts explaining that, without examination of redundant vote data, audit logs, and chain-of-custody records, it is impossible to form a meaningful opinion about the accuracy of the vote tallies generated by the Diebold voting system employed by Alameda County. California Secretary of State Debra Bowen filed a friend-of-the-court letter in the case to support the Berkeley voters.

**The Eventual Ruling on the Merits In Favor of the Voters**

The Superior Court determined that the Registrar's refusal to produce the materials requested by the voters violated the Elections Code as well as three separate provisions of the California

Constitution that guarantee equal protection, due process, and the right to have one's vote counted. The Court also denied the County's requests to seal such election records from the public.

"Judge Smith's decision in the recount suit vindicates a fundamental right reserved long ago by the People of California to ferret out possible fraud or error in election results," noted counsel for the voters Gregory Luke. "The County's refusal to follow the law threatened *all* future elections in California – no matter what technology is used. The Registrar took a position in this case that, if allowed to stand, would have permitted elections to be conducted behind closed doors. The decision is a firm rebuke to the culture of secrecy that has taken hold in too many election offices around the country."

### **The Plaintiffs Discover that Election Data Was Destroyed While the Lawsuit Was Pending**

While litigating the merits of their recount suit, the Berkeley voters learned that the County Registrar had returned the DRE voting machines used in the Measure R election to Diebold Election Systems, Inc., without having first copied the voting data from those units. They accordingly filed a motion to sanction the County for the spoliation of the central evidence in their lawsuit and contest. The County first responded by claiming that it "did not understand" and "was unaware" that the disputed election data sought by the voters even existed. Then, they claimed they could recover the missing data from the machines they had surrendered to Diebold. The Court granted the County and the Registrar additional time to make good on their promise that they could obtain the missing electronic data from Diebold.

### **The Search for Electronic Vote Records Fails**

The search for the missing data proved futile. On the County's assurance that the election data still resided on the machines that had been surrendered to Diebold, the Court ordered the County to conduct a public "download" at the Diebold facilities in Plano, Texas. Of the 482 Diebold machines used in the November 2004 election in the City of Berkeley, only 20 machines — 4 percent of the total — still contain any copies of the votes sought by voters in the lawsuit and contest. In addition, the County failed to find any of the audit logs from the individual voting units used in that election. These election records were apparently overwritten and destroyed when the County used the Voting machines and data storage diskettes in subsequent elections.

### **The Sanctions Hearing**

This Friday, the Court will determine whether and how the County should be sanctioned for its conduct. The facts now show that the County allowed the critical election records to be destroyed. The voters have also drawn the Court's attention to numerous false statements of material fact by the County and the Registrar in their legal pleadings regarding the availability of the disputed election materials during the 2004 recount, the preservation of the disputed election evidence, and the contents of documents they tried to file under seal to exonerate themselves from the spoliation charge.

"Unfortunately, the County's spoliation of the election records while the lawsuit was pending has deprived my clients of the tools necessary to assess the validity of the 2004 Measure R election results," said Luke. "The County must be held to account."