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9 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**

10 **IN AND FOR THE COUNTY OF PIMA**

11 **Pima County Committee of The Arizona  
Libertarian Party, Inc.,**

12 Counter-claimant,

13 -vs-

14 **Pima County, a political subdivision of the  
State of Arizona, by and through its Board  
of Supervisors and County Administrator,  
15 and Beth Ford, in her official capacity as  
16 Pima County Treasurer,**

17 Counter-defendants,  
18

**NO. C20085016**

**PIMA COUNTY COMMITTEE OF  
THE ARIZONA LIBERTARIAN  
PARTY INC.'S INITIAL DISCLOSURE  
STATEMENT  
(RULE 26.1)**

Assigned to: Hon. Kyle Bryson

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20 In this Initial Statement the Pima County Libertarian Party Committee discloses the  
21 facts, legal theories, and evidence as known at the present time, pursuant to Rule 26.1 of the  
22 Arizona Rules of Civil Procedure. Rule 26.1 requires each party in a lawsuit to disclose to  
23 every other party the factual basis of their claim, the legal theory on which the claims are based,  
24 and the names of known or potential witnesses. The parties additionally need to disclose  
25 documents and statements in their possession.  
26

The Pima County Committee of the Libertarian Party, Incorporated is the counter-

1 claimant in this lawsuit. Discovery has not begun because the parties agreed in a Joint Pretrial  
 2 Memorandum dated November 6, 2008 to delay discovery until a jurisdictional defense by Pima  
 3 County was resolved. Pima County claimed that Arizona courts had no jurisdiction to hear  
 4 evidence that the RTA election was fraudulent for the purpose of seeking an order to prevent  
 5 fraud in the future. Judge Charles Harrington ruled that his court could not consider allegations  
 6 of past cheating or prevent future cheating.  
 7

8 The Arizona Court of Appeals agreed with the Libertarian Party that Arizona’s courts  
 9 possessed the jurisdiction to consider the claims in this lawsuit. Following the Court of  
 10 Appeals’ ruling, Pima County petitioned the Arizona Supreme Court to review the opinion  
 11 claiming that fraudulently rigging a two billion dollar election was simply “a discrete incident of  
 12 past wrong doing” and that the Libertarian Party had not sufficiently alleged that they would  
 13 cheat again in the future. The Supreme Court declined to review the Court of Appeals’ opinion.  
 14

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4 **I. Summary of This Lawsuit.**

5 The Libertarian Party alleges that Pima County, through the direction and control of its  
6 county administrator C.H. “Chuck” Huckelberry, has systematically subverted critical controls  
7 required to protect the purity of elections. The elimination of those controls has permitted  
8 county management to take advantage of the ability to cheat presented by defects in our  
9 computerized election system. As a result, county management fraudulently rigged the Regional  
10 Transportation Authority election on May 16, 2006 and has the ability to manipulate the  
11 outcome of any Pima County election, including not only bond elections, but the elections of  
12 members of the Board of Supervisors, themselves.

14 Discovery on this lawsuit has not begun but many facts are known from the three other  
15 lawsuits involving the Pima County Democratic Party and Pima County. The discovery in those  
16 cases was limited but nonetheless has shown the path for future discovery that must be followed  
17 in this lawsuit.

18 The goal of this lawsuit is to protect the “purity of elections” in the future, starting with  
19 the 2012 elections. At the present time it is easy to cheat using our election computers and  
20 impossible to challenge a rigged election. The ease of cheating when matched with the  
21 impossibility of challenging any specific election requires court intervention in order to protect  
22 the purity of elections and ensure that we will have free elections.

24 Three Arizona Constitution sections are primarily relied on for this lawsuit.

25 Arizona Constitution Art. 2 § 21 requires all elections to be “free and equal.”  
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**§ 21. Free and equal elections**

Section 21. All elections shall be free and equal, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.

Free and equal elections are the bedrock of our democracy and the necessary condition for our social compact.

The Arizona Legislature was directed by our Constitution to enact laws to ensure that our elections are pure.

Arizona Constitution Article 7 § 12

**§ 12. Registration and other laws**

Section 12. There shall be enacted registration and other laws to secure the purity of elections and guard against abuses of the elective franchise.

If the legislature fails to enact laws to secure the purity of elections then this Court is required to protect our free elections.

**§ 32. Constitutional provisions mandatory**

Section 32. The provisions of this Constitution are mandatory, unless by express words they are declared to be otherwise.

Article 2 Section 32 of the Arizona Constitution makes our constitutional provisions mandatory. If the legislature has failed then the provisions may only be protected by the Courts. There is no third choice. The inescapable conclusion is that the legislature has failed and that it is practically impossible to challenge any computerized election in Arizona.

**II. Only One Statute Permits Election Contests**

A.R.S. §16-673 is the one statute that explains how a state election might be challenged. The subsequent section, A.R.S. § 16-674, requires county election contests to be “on the same grounds and in the same manner as contests of” state elections.

1 A.R.S. § 16-673 requires that an election contest must be filed within five days after  
2 completion of the canvass and must allege the particulars of how they cheated and that the result  
3 would be different if they had not cheated.

4 § 16-673. Statement of contest; verification; filing

5 A. The elector contesting a state election shall, within five days after  
6 completion of the canvass of the election and declaration of the result  
7 thereof by the secretary of state or by the governor, file in the court in  
8 which the contest is commenced a statement in writing setting forth:

9 .....

4. The particular grounds of the contest.

10 If an elector files an election contest on the 6<sup>th</sup> day, its too late, regardless of the proof,  
11 according to the plain language of that statute.

12 **III. It Is Easy To Cheat With Pima County's Computerized Election System.**

13 The most important legal and factual building block of this lawsuit is the agreed upon  
14 fact that it is very easy to cheat with our election computer software. The ease of cheating may  
15 be counterintuitive, especially among those least familiar with computers, but it is a fact. The  
16 ease of cheating may be a surprise even to those who are familiar with computers but whose  
17 familiarity was derived from securely developed programs. Our election computer system has  
18 quite simply been built to cheat and, at least for that goal, it has succeeded.

19 **1. Pima County Agrees It Is Easy To Cheat**

20 In a prior public record lawsuit between the Pima County Democratic Party and Pima  
21 County (Cause No. C2007-2073) the county resisted the disclosure of its past election database  
22 on the grounds that the software was so totally insecure that it was against the public interest to  
23 permit political parties to obtain that data. A secondary defense of Pima County was that the  
24 election security of other Arizona counties was much worse than theirs, which they argued  
25  
26

1 would heighten the harm of disclosure. Pima County argued that the data should not be released  
2 because the software was not capable of being secure. Christopher Straub, the Deputy Pima  
3 County Attorney defending the Board of Supervisors, in his opening statement, explained the  
4 county's legal assertion that the Diebold/Premier GEMS software used by the county was not  
5 secure.

6  
7 "The databases themselves are not secured. We know that and we agree  
that they can be altered using Microsoft Access."

8 (Opening statement, Trial Transcript, Dec. 4, 2007, Christopher Straub  
36: 18-20, Exhibit 2, attached)

9  
10 "Because it can be easily manipulated, the bottom line is in  
this whole thing is we're only going to catch stupid people,  
11 all right, because one could also alter the audit logs. One  
could do anything."

12 (Opening Statement, Trial Transcript 39: 21-24)

13  
14 "Judge, this case is not about what should happen with  
respect to the machines that we have or anything because  
15 those same experts will tell you right now there is no  
commercially available machine that is certified, no  
16 commercially available machine and software that is  
certified for use in Arizona that does not have some of  
17 these computer security flaws."

18 (Opening Statement, Trial Transcript 43: 22-25, 44: 1-2)

19 In view of the clear admissions by Pima County through its lawyers in C20072073, the  
20 county is estopped from arguing otherwise in this case.

21 **2. The Arizona Attorney General Agrees It Is Easy To Cheat.**

22 After the Pima County Democratic Party alleged that crimes had been committed by  
23 Pima County employees, the Arizona Attorney General combined with the "suspects," the Pima  
24 County Board of Supervisors, to jointly hire a company named iBeta to examine a portion of the  
25 RTA database. Although this was a criminal investigation, the iBeta company primarily  
26



1 examined selected portions of the database through “tests” suggested by the suspects  
2 themselves. After its examination of the software, the company reported that “the GEMS  
3 software exhibits fundamental security flaws that make definitive validation of data impossible  
4 due to the ease of data and log manipulation.”

5 iBETA did discover evidence of cheating but discounted the evidence because it is so  
6 easy to cheat they concluded that evidence inferring cheating was unlikely to have resulted from  
7 cheating because most criminals would have been more careful in covering up their tracks. In  
8 essence they agreed with Christopher Straub that “we’re only going to catch stupid people”  
9 and they assumed county management would not have chosen an incompetent criminal.

11 **3. The Arizona Secretary of State Agrees It Is Easy To Cheat and State Law**  
12 **Prohibits Them from Checking County Computers To Find Out If Counties**  
13 **Are Cheating.**

14 During the “database lawsuit” the Office of the Arizona Secretary of State was deposed  
15 pursuant to Rule 30 (b)(6) of the Rules of Civil Procedure. The Office produced Joseph  
16 Kanefield, then Arizona’s Election Director, to testify on behalf of the Office of the Secretary of  
17 State. The State Election Director confirmed that the insecurity of election software “is no  
18 secret” and is known all over the country.

19 During Mr. Kanefield's deposition he was asked about a statement in the iBeta report  
20 released by the Attorney General which had been given to the Secretary of State and was a  
21 deposition exhibit.

22 Q. BY MR. RISNER: On page 3, there's an “Executive Summary”  
23 and there's a statement that says, “During testing it was discovered  
24 that the GEMS software exhibits fundamental security flaws that  
25 make definitive validation of data impossible due to the ease of data  
26 and log manipulation.”

Would you agree that that's an accurate statement about the GEMS  
software?

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...(Kanefield 58: 19-25; 59:1, Exhibit 1, attached)

Mr. Kanefield responded:

...Yes, we did get this report. And we've seen many other reports that have come to similar conclusions about not just the equipment manufactured by Premier – formerly known as Diebold – but other companies.

...So this is no secret. These issues have been known by not only our office but election offices all over the country.

(Kanefield, Exhibit 1, 59: 25, 60: 1-4 and 15-17)

If the vulnerability of our state's computerized election system is known to the Arizona Secretary of State one might assume that they have examined one or more of our county election databases or, at least, that they could do so if they wanted to do so. Such an assumption would be wrong.

On April 11, 2008, the Pima County Democratic Party and the Pima County Board of Supervisors took the previously mentioned deposition of the Office of the Secretary of State. The Secretary of State chose Joseph Kanefield, the "State Election Director," to testify under oath on behalf of the Office concerning some fourteen topics and to provide official answers on behalf of the Secretary of State. Mr. Kanefield is an attorney who previously handled election matters within the Attorney General's office.

Mr. Kanefield was asked by Mr. Risner:

Q.... First, can we clearly establish that your office never has gone in and examined a database to see if there's been any fraud or manipulation?

A. Our office doesn't have the authority, under law, to do such an examination...

(Deposition transcript, 65:22-25 to 66:1)

Q. Are you aware of any county in Arizona that has ever conducted a post-

1 election examination of the database for evidence of fraud or manipulation?

2 A. I am not aware, other than what's occurred in Pima County.  
3 But that doesn't mean it hasn't happened. It's just that I'm not aware.

4 Q. Okay. So the result, then, is that the Secretary of State, because it has no  
5 authority to, does not examine and has never examined an election database after  
6 an election in any county in Arizona, correct?

6 A. That is correct.  
7 (Deposition Transcript, 67:3-15)

8 The reference to "what's occurred in Pima County" was to the lawsuit filed by the  
9 Democratic Party that resulted in his deposition. In other words, neither the Secretary of State  
10 nor any County Board of Supervisors had ever examined any computer database in Arizona.

11 The most surprising part of the answer is the official position of the Office of the  
12 Arizona Secretary that it "has no authority" of law to examine any computer election database in  
13 Arizona. That lack of authority was the asserted reason why they had never looked. The law  
14 does not allow them to look.

15 The Pima County Democratic Party requested, prior to the 2006 general election,  
16 for Pima County to make numerous changes in the physical security of its election computer.  
17 Those physical changes have made it impossible for the election computer to be hacked into by  
18 "outsiders" and collectively constitute major security improvements. Since then, however, the  
19 major security risk has consistently been identified by election security analysts as coming from  
20 "insiders," such as vendors and election department personnel: the physical protection of the  
21 computer is only part of the necessary security for any election.  
22

23 Another surprising point of testimony from the Secretary of State's office was that it had  
24 "no responsibility" to examine even the elemental issue of the physical security of election  
25 computers. In other words, when the Secretary of State sends a representative to each county for  
26

1 the so-called logic and accuracy test before elections, they are unable to examine the actual  
2 physical security of the election computers. They are unable to do so because the Secretary of  
3 State claims it is not one of their legislatively required tasks.

4 Q. By Mr. Risner: Does the Secretary of State, county by county, examine the  
5 physical security of its election computers?

6 A. Mr. Kanefield: Well, we're not tasked with that responsibility of actually  
7 physically examining and auditing the security . . . .

8 (Deposition Transcript, 79:16-21)

9  
10 **4. Multiple Expert Examinations Confirm the Irredeemable Flaws in Our  
Election Computer Software.**

11 The Democratic Party has disclosed an affidavit from David Jefferson, a nationally  
12 known and recognized expert on computers and election systems. This declaration is part of the  
13 court file in C20072073.

14 15. As a preamble, it is my professional opinion that the GEMS  
15 election management system (and also similar products from competing  
16 vendors) are full of security vulnerabilities of all kinds. The security  
17 mechanisms that are there are generally incorrectly implemented, or  
18 seriously incomplete, or easily circumvented, and in general hopelessly  
19 inadequate to prevent manipulation of ballot records or vote totals by  
20 anyone with even a very short period of access to the system. The opinion  
21 is based on two very thorough reviews of those systems published this  
22 year. The first was done by world class computer scientists led by  
23 computer science Prof. David Wagner of U.C. Berkeley and Prof. Matt  
24 Bishop of U.C. Davis and published a few months ago by California  
25 Secretary of State Debra Bowen in her "Top to Bottom Review" of  
26 California voting systems.  
(See [http://www.sos.ca.gov/elections/elections\\_vsr.htm](http://www.sos.ca.gov/elections/elections_vsr.htm) ) The other was a  
similar thorough review under the name EVEREST by an equally  
distinguished scientific panel under the auspices of Ohio Secretary of State  
Jennifer Brunner and led by Penn State computer science Prof. Patrick  
McDaniel. (See <http://www.sos.state.oh.us/sos/info/everest.aspx> ) Several  
other less comprehensive and less authoritative reports reached similar  
conclusions earlier.

1           The Executive Summary of the Source Code Review of the Diebold Voting System  
2 prepared for the California Secretary of State as part of a “top-to-bottom” review succinctly  
3 states conclusions that confirm the opinions of the experts that are advising the Libertarian  
4 Party.

5           Our analysis shows that the technological controls in the Diebold  
6 software do not provide sufficient security to guarantee a  
7 trustworthy election. The software contains serious design flaws  
8 that have led directly to specific vulnerabilities that attackers could  
9 exploit to affect election outcomes. These vulnerabilities include:

10           •       **Vulnerability to malicious software**

11           The Diebold software contains vulnerabilities that  
12 could allow an attacker to install malicious software  
13 on voting machines or on the election management  
14 system. Malicious software could cause votes to be  
15 recorded incorrectly or to be miscounted, possibly  
16 altering election results. It could also prevent voting  
17 machines from accepting votes, potentially causing  
18 long lines or disenfranchising voters.

19           •       **Susceptibility to viruses**

20           The Diebold system is susceptible to computer  
21 viruses that propagate from voting machine to  
22 voting machine and between voting machines and  
23 the election management system. A virus could  
24 allow an attacker who only had access to a few  
25 machines or memory cards, or possibly to only one,  
26 to spread malicious software to most, if not all, of a  
county's voting machines. Thus, large-scale election  
fraud in the Diebold system does not necessarily  
require physical access to a large number of voting  
machines.

          •       **Vulnerability to malicious insiders**

          The Diebold system lacks adequate controls to  
ensure that county workers with access to the  
GEMS central election management system do not  
exceed their authority. Anyone with access to a  
county's GEMS server could tamper with ballot  
definitions or election results and could also

1 introduce malicious software into the GEMS server  
2 itself or into the county's voting machines.

3 **IV. Computerized Election Cheating Can Almost Never Be Challenged Under**  
4 **Arizona Law.**

5 Arizona statutes that permit election challenges, A.R.S. § 16-671 et seq. require an  
6 elector to file a challenge “within five days after the completion of the canvass...” Furthermore,  
7 the election contest requires a court pleading setting forth “the particular grounds of the  
8 contest.” The permissible grounds set out in A.R.S. § 16-673, as a practical matter, can never  
9 be known within a five-day period, if at all.

10 The iBeta report released by the Attorney General said they found evidence of  
11 manipulation in the RTA database but they discounted it because it is so easy to cover one's  
12 tracks using GEMS. Joseph Kanefield confirmed our reading of their conclusion.

14 Q. BY MR. RISNER: I understand what he's saying is –  
15 this guy – or iBeta is saying, look, it's so easy to erase the  
16 tracks of what you've done that we think even though we  
17 find evidence that might – one might conclude there was  
tampering, there probably wasn't, because anybody that had  
sufficient skill to tamper with it would have covered his  
tracks.

18 Isn't that kind of what he's saying?

19 MS. SHIPMAN: Objection, form, beyond the scope.

20 MR. KANEFIELD: I – yeah, I think that's what he's saying.

21 (Exhibit 1, Kanefield depo, 62: 6-17)(C2007-2073)

22 Thomas W. Ryan, Ph.D. has examined the RTA electronic database. Dr. Ryan has spent  
23 the past seven years examining election integrity issues on behalf of the Democratic Party. He  
24 concludes in his filed declaration that:

25 13. It is well established that the GEMS databases are  
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vulnerable to software errors and can be manipulated using simple software applications or scripts.

...

15. Detection of fraudulent manipulation or software errors in a GEMS database would most likely be difficult, if not impossible, depending on the nature of the manipulation or error.

16. Detection of errors, if possible, would require a thorough analysis of the sequence of database “snapshots”, looking for anomalous data either within a single database or, more likely, among the various snapshots.

17. Software tools are under development to detect logical inconsistencies but these tools are not yet fully automated and will probably never address all possible forms of manipulation or bugs.

18. Unless the manipulation or software errors are blatantly obvious, it will take several weeks to fully analyze the database set for an election.

19. Discovery of manipulation or other errors in election databases would almost certainly take longer than the five-day contest period allowed under A.R.S. 16-673.

Michael a Duniho is a “master computer scientist” who retired to Tucson from a career with the National Security Agency. He has worked with the Democratic Party's Election Integrity Committee since 2006 and was appointed by Supervisor Ray Carroll to the Pima County Election Integrity Commission where he serves along with Dr. Thomas Ryan, another appointed member.

Mr. Duniho confirms in his declaration that manipulation of GEMS is generally undetectable:

It is important to understand that manipulation of the GEMS database is generally undetectable without comparing the database data with actual ballots and poll records. Such a comparison takes not a few days but rather

1 a year or more of intense forensic analysis to compare every computer  
2 information record with every paper information record.

3 ...

4 The only way to confirm the integrity of a computer-counted election is to  
5 compare actual ballots with the data in the databases. In 2006, the Arizona  
6 legislature enacted changes to election law requiring a statistical hand count  
7 audit of elections in Arizona, and we have applied that new law to better  
8 confirm election integrity in Pima County.

9 ...

10 Because the GEMS system has no capability for publishing vote totals by  
11 early ballot scanning batch after the election is complete, the current  
12 process for hand counting randomly arriving early ballots is a jury-rigged  
13 effort that compares a batch of early ballots with a couple of vote total  
14 summary reports printed before and after the batch of ballots is scanned  
15 (4% of the early ballots are selected for possible audit and then 1% are  
16 actually hand counted). A computer operator bent on fraud always knows  
17 which early ballots will be hand counted before they are scanned and could  
18 easily manipulate the vote totals for the 96% of the early ballots that are  
19 guaranteed not to be hand counted.

20 **V. Since No One Can Count Paper Ballots We Must Accept Whatever The  
21 Machines Report.**

22 In September 2004 a very interesting election “recount” occurred in Maricopa County  
23 concerning a Republican Party primary election in Legislative District 20 between John M.  
24 McComish and Anton Orlich. The issues, court testimony, attorney conduct and the court  
25 decision provide important lessons on how our ballots are counted. Mr. Orlich “won” the initial  
26 computer count of his primary election by four votes. Arizona has the most narrow recount laws  
of all fifty states and permits only “automatic recounts” and then only when an election is within  
one-tenth of one percent. The original count was within that narrow limit. Karen Osborne, on  
behalf of the Maricopa County Recorder's office suggested that the most accurate way to recount  
would be a hand count of the ballots. Secretary of State Jan Brewer immediately sent her a



1 memorandum prohibiting a hand count and reminding Ms. Osborne that no matter how logical or  
2 practical such a hand count would be, it was illegal in Arizona to hand count ballots.

3           The recount then proceeded with the result that Mr. McComish won by thirteen votes.  
4 The issue that was most interesting was not the “flip” result but that the machine counted an  
5 additional 489 votes cast that had not counted when those same ballots had been originally  
6 counted by the same machine. Karen Osborne testified under oath that the machine that counted  
7 the mail-in ballots had an error rate of 18.3%. (*See* hearing transcript of proceedings, page 92,  
8 line 6) but that such an error rate was not out of the range because every machine reads  
9 differently. For a flavor of the testimony:  
10

11           Q. By Ms. Hauser: So as I understand it, what was stated is that there is  
12 expected to be an eighteen percent error rate on early ballots.

13           A. Karen Osborne: I believe what I said is that there was not – it was not  
14 out of the range of possibility for there to be this much of a swing on a  
recount for ballots for marginal marks; I believe that's what I said.

15           (Transcript, page 116, lines 18-25)

16           Later, Karen Osborne testified there was “no way” to know why the count was off by so  
17 much.

18           Q. Last question: Is there any concrete way you would have of knowing  
19 for certain, absolutely dead-on certain, exactly why the primary count for  
20 early and provisional ballots generated, you know, 464 more votes in the  
recount?

21           A. No.

22           Q. Is there any way to know for sure?

23           A. No. — I don't know of a way to assure that.

24           (Transcript, page 119, lines 2-10)

25           The court was required to accept the machine count because the machine had passed a  
26

1 counting “logic and accuracy” test before the election. Judge Edward P. Ballinger, Jr. made some  
2 pertinent observations before he signed the order in favor of Mr. McComish:

3                   The Court: If the system is designed to tally accurate counts to show the  
4 intention of voters, then I have questions about whether it works with  
5 respect to those that file early ballots.

6                   (Transcript, 161:15-18)

7                   I feel really bad for you, Mr. Orlich, and the reason is this is the only time  
8 I've been unable to say to someone, “If I'm wrong, you can go up the street,  
9 and three smart people at the Court of Appeals can fix it. Unfortunately,  
10 there isn't any way to remedy the order if I'm incorrect, and I'm sorry about  
11 that; there is nothing I can do.

12                   (Transcript, 167:8-15)

13                   The “take away” lessons from that case is that Arizona law prohibits counting paper  
14 ballots in any recount. Recounts themselves are not permitted unless the initial computer vote  
15 count is within one-tenth of one percent. Finally, whatever result the machine determines must  
16 be accepted.

17 **VI. Political Parties Know Election Security and Are Primarily Responsible for**  
18 **Ensuring Honesty.**

19                   In Arizona the primary responsibility for ensuring the honesty of elections lies with  
20 political parties. Our system assumes that the competitive nature of the parties helps to ensure  
21 that elections are honest and the results accurately reflect the will of the voters. They are the  
22 heart of our democratic system because the essence of democracy lies in fair voting that is  
23 honestly counted.

24                   The Libertarian Party, the Democratic Party, Green Party and Republican Party are  
25 special organizations created pursuant to specific statutes that require a specific form of  
26 organization and grant recognized political parties special privileges. The entire election process

1 is built around those political parties. They are not “clubs” or pressure groups or special interests  
2 or any of the forms of groups that exist with various roles in our political process.

3 Although each voter may register to vote and claim an affiliation with any political party  
4 whether a recognized party or no party at all, those people do not constitute the county  
5 committee. The “county committee” of a recognized political party such as the Libertarian Party  
6 Committee is “composed of the whole of its elected precinct committeemen.” A.R.S. § 16-821.  
7

8 The precinct committeemen are public officials that serve two year terms in office.  
9 A.R.S. § 16-822. The county committees of political parties are therefore composed of hundreds  
10 of elected public officials. Those elected public officials are required by statute to meet at a  
11 specific date and elect designated officers such as a county chairman that are required by statute.  
12 A.R.S. § 16-824.

13 It is a statutory requirement that any vacancy in the office of precinct committeeperson  
14 must be filled from names submitted by the political parties themselves. A.R.S. § 16-821 B.  
15

16 The Board of Supervisors have a small number of employees in their permanent  
17 employment who “direct” election procedures. The largest political parties designate some  
18 3,000 members who actually conduct the elections at the precincts. Those persons are chosen by  
19 the political parties themselves although they are paid by the Board of Supervisors and assigned  
20 to specific polls by the election division.

21 The Board of Supervisors are required to appoint the various polling officials from lists of  
22 names submitted by the political parties themselves. A.R.S. § 16-531. The Board of Supervisors  
23 election division trains those individuals but their appointments must be from names submitted  
24 by the parties. The various political party representatives are the persons who handle the ballots,  
25 account for all ballots and fill out the Official Ballot Report and Certificate of Performance,  
26

1 which they then sign.

2 After the official reports are placed in the ballot bag the contents are “delivered promptly  
3 by two members of the election board of different political parties to the central polling place....”

4 A.R.S. §16-608 A. In addition to those political party members, each political party chairman  
5 can personally designate another person of his party to protect the ballots and guarantee the chain  
6 of custody by accompanying the ballots from each polling place to the central counting place.

7 A.R.S. § 16-608 B.

8 Political party representatives receive the ballots at the central count center.

9 Political party representatives are to observe the ballots at all times. The party observers at the  
10 central count facility cannot touch them but, the election personnel must notify party observers  
11 whenever they are going to touch the ballots. A.R.S. § 16-621 A provides in part:

12 **A.R.S. § 16-621**

13 A. All proceedings at the counting center shall be under the direction of the  
14 board of supervisors or other officer in charge of elections and shall be  
15 conducted in accordance with the approved instructions and procedures  
16 manual provided for in §16-452 under the observation of representatives  
17 of each political party and the public, but no persons except those  
18 authorized for the purpose shall touch any ballot or ballot card or return  
19 ....(emphasis added)

20 Subsection C of § 16-621 requires a video recording of the ballots at the counting center.  
21 Pima County complies with this statute and video records the ballots at all times in the tabulation  
22 room.

23 C. For any statewide, county or legislative election, the county recorder of  
24 officer in charge of elections shall provide for a live video recording of the  
25 custody of all ballots while the ballots are present in a tabulation room in  
26 the counting center. The live video recording shall include date and time  
indicators and shall be linked to the secretary of state’s website. The  
secretary of state shall post links to the video coverage for viewing by the  
public. The county recorder or officer in charge of elections shall record

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the video coverage of the ballots at the counting center and shall retain those recordings as a public record for at least as long as the challenge period for the general election. If the live video feed is disrupted or disabled, the recorder or officer in charge of elections is not liable for the disruption but shall attempt to reinstate video coverage as soon as is practicable. Any disruption in video coverage shall not affect or prevent the continued tabulation of ballots. This paragraph is contingent on legislative appropriation. (emphasis added)

Because of their responsibility to monitor voting, the chain of custody of ballots and the counting of the votes, political parties are knowledgeable concerning security issues. This lawsuit reflects the deep concern of many participants in the process with Pima County’s organized destruction of security.

**VII Chuck Huckelberry Personally Runs the Pima County Election Division**

The legal responsibility for conducting elections lies with the various county Boards of Supervisors who conduct elections with the help of political parties. The election division of Pima County has a single computer operator, a small permanent staff, and thousands of citizens selected from political party lists who work at elections on a part-time or volunteer basis.

Until 1993 the Pima County Board of Supervisors relied on the Clerk of the Board of Supervisors to be in charge of the election division staff. That line of authority changed when Chuck Huckelberry became Pima County Administrator, as he explained in court testimony.

Mr. Straub: Q: Was it in 1994 that the Division of Elections went from supervision by the clerk of the Board of Supervisors to the County Administrator?

Huckelberry: A. I believe that was the date. It was pretty close to after I became County Administrator in December of 1993. The division of Elections, when I came back to the County, was in the Office of the Clerk of the Board; and that was under the supervision of Jane Williams. The Elections Director was Doloris Williams–Doloris Johnson, excuse me. And sometime after that, the Department of Elections was reassigned to the County Administrator.

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(Huckelberry, 12/5/07, 145:2-25; 146:1-6)

Huckelberry had been “involved in elections” since “the mid to late 1980's” when he was an assistant County Manager in Public Works.” After taking administrative responsibility for elections he assigned the supervision of the election division to James Barry. James Barry was at that time an “executive assistant” to Huckelberry.

James Barry and Chuck Huckelberry had worked together for a number of years. Barry was originally hired by Chuck Huckelberry in February of 1985 as the “manager of special programs” while Huckelberry was county director of Transportation and Flood Control.

While working on “special programs” such as transportation bond elections, for Chuck Huckelberry at the county transportation department, he also was paid for his after hours “private” involvement with two separate elections in 1986 and 1990 where Pima County voters rejected a half-cent sales tax increase. County voters in those elections soundly rejected the sales tax increase by an approximate 60% to 40 % margin.

James Barry’s “private” role was to work with the committees formed to advocate for the passage of those bond elections. His role was not informational. Barry describes his work as “polling, benchmark polling, and tracking polling” for those county transportation bond elections. Therefore, James Barry worked for the County Transportation Director Huckelberry on “special programs” at the same time he sold his “polling” expertise to political committees advocating for a county sales tax to pay for roads desired by the county transportation department.

After becoming an “executive assistant to the county administrator” James Barry was assigned by Huckelberry to supervise the Pima County election director until 1998 or 1999, when assistant county manager Martha Durkin took over that role.

1 In 1996 Chuck Huckelberry, James Barry and Bryan Crane learned that the newly  
2 purchased Global, later, Diebold, software system has a “back door” that permitted the vote totals  
3 to be manipulated away from the election computer utilizing the Microsoft Access program.

4 In 1996 Pima County used IBM punch cards at the precincts. F. Ann Rodriguez, Pima  
5 County Recorder, had purchased optical scanners using GEMS to count the early ballots.  
6 Therefore, two separate systems were used that utilized different software. The county initially  
7 hired a San Diego company called Votetec to write a program permitting the results from the two  
8 systems to be merged.  
9

10 Before Votetec could complete its project Pima County brought in a computer expert,  
11 Sophia Lee, from the optical scan company known as “Global.” Its Global Election Management  
12 System or GEMS software had been deliberately constructed so that election departments  
13 nationwide could change election results. This feature was quietly sold to election departments  
14 as a way to “clean up the results” or “cover up warts” in a final canvass.  
15

16 The “back door” was opened by copying the data on a CD and then making all desired  
17 changes on the copy. After making those changes the operator simply erases from the audit log  
18 all notations reflecting data changes and then reloads the data back into GEMS.

19 Bryan Crane described how he learned to operate the back door system.

20 Uh—Global helped show us where their tables in the information  
21 that was needed to have the vote totals, it was—at the time, it was, I  
22 think was were still using SCO. GEMS was an SCO—ran in SCO  
as the operating system. And they helped identify the fields that  
were in their export files.

23 ...

24 I imported the export files from GEMS into

25 ...

26 Q. Okay. Let me see if I understand what you did. You took the vote  
data from GEMS, and you moved that into ACCESS?

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A: Correct.

Q: Yeah. And this is all on that computer, or do you take it somewhere else? Do you use a CD or something like that?

A: I had a separate computer that was put aside. It wasn't connected. So I think it was moved with floppy discs.

Bryan Crane's successful off-line work was at the specific instruction of his supervisor.

Q: And who told you to do that?

A: I think it was two people that were at the meeting. I know for sure it was Jim Barry and Mitch Etter. I think it was a combination that was decided.

Q: Who sort of was the in-charge person who ordered the hand merger?

MS FRAIR. Objection, form.

A: Technically, there was no hand merger.

Q: Okay.

MR MARCH Access merger.

Q: (by Mr. Risner) Okay. So, Access merger.

A: Uhm- we had a large meeting, and Chuck Huckelberry asked me personally if I could do it.

(Quotes from Bryan Crane, March 20, 2007 deposition)

In 2002 Brad Nelson was personally selected by Chuck Huckelberry to be the election director. He does not report to an assistant county manager. He reports directly to Huckelberry and on a strictly oral basis. Nelson has publicly proclaimed that he works for Huckelberry and owes his loyalty to him. He has never been reprimanded by Huckelberry for any of his actions.

**VIII Under Huckelberry's Direction the Election Department Has Systematically Dismantled Election Procedures that Prevent Fraud**



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**A. Official Returns Report**

Starting before statehood Arizona law has provided for the public counting of ballots at each voting location.

**§ 16-601 Tally of Vote**

As soon as the polls are closed and the last ballots has been deposited in the ballot box, the election board or the tally board shall immediately count the ballots cast. The count shall be public, in the presence of bystanders, and shall be continued without adjournment until completed and the result determined and declared.

When an optical scan system is used the counting at the precinct is accomplished by the scanner that records the votes cast.

At the closing of every voting location on election day the optical scan machine prints the vote totals derived from all the ballots cast at that precinct or voting location. The printed totals appear in a cash register type tape officially known as the “Election Results Report” for that location but commonly referred to as a “poll tape” or simply a “tally list.” The bottom of the tape is signed by the official election judges at that location.

The signed election results report is a very important official document as it reports to the public the vote total for each candidate or measure at that voting location. It’s importance is confirmed by the various signatures required.

**§ 16-614. Signing of tally lists after completion of tally**

When the votes are counted and the ballots sealed in the envelope, as required by law, the tally lists shall be signed by the members of the board and attested by the clerks.

Since the tally lists are printed at the polls multiple copies are printed. Pinal County tapes a copy of the vote totals to the door for anyone to read. While voting itself is a secret process for the individual voter the counting of votes at precincts is a public process as demonstrated by the

1 counting and declaration of results required by A.R.S. 16-601.

2 The importance of the printed and signed tally list or official results report can be readily  
3 seen by the care required for those official reports under Arizona law.

4 **§ 16-615. Delivery of returns**

5 A. Before it adjourns, the election board or tally board shall enclose  
6 and seal in a strong envelope provided for that purpose one of the  
7 polls lists and one of the tally lists, signed as required, and the  
8 stubs of the voted ballots and shall direct it to the board of  
supervisors.

9 B. The envelope containing the poll list and the stubs of the voted  
10 ballots shall constitute the official returns of the election and shall,  
11 together with the envelope containing the voted ballots, be  
12 delivered to one of the members of the election board or tally  
13 board, previously determined by lot, unless otherwise agreed upon,  
14 and such member shall by himself, or by an agent agreed upon by  
15 the board and sworn by a member thereof, in the presence of the  
16 board to faithfully perform the duties of election messenger,  
17 without delay, and by the most expeditious means and route,  
18 deliver the packages and envelopes, without opening them, to the  
19 officer in charge of the election at his office, or to the nearest  
20 postmaster or sworn express agent, who shall endorse on the  
21 packages and envelopes the name of the person delivering them,  
22 and the hour and date of the delivery, and forward the packages  
23 and envelopes by the first mail or express to the officer in charge of  
24 the election at the county seat.

25 In addition to the official returns that is enclosed and sealed “in a strong envelope,” a  
26 second copy of the same report is placed in an unofficial returns envelope to be made available  
for the inspection of any voter. A.R.S. § 16-616 sets forth that requirement.

27 **§ 16-616. Preparation and disposition of unofficial returns**

28 One of the poll lists and one of the tally lists used at the election shall be  
29 withheld by the election board from the sealed packages of ballots and  
30 other election supplies and shall be separately sealed in an envelope and  
31 returned to the officer in charge of the election in the same manner as the  
32 official returns. The officer shall, for a period of six months, keep such  
33 envelope open to the inspection of electors.

1           The importance of the tally lists, or official returns report, is that it is a critical audit tool  
2 to make sure that the final accumulated election totals accurately report the results from each  
3 voting location. The vote totals from each precinct are ultimately contained in the report known  
4 as the Statement of Votes Cast that constitutes the final canvass approved by the Board of  
5 Supervisors. The official returns reports are a critical audit tool since the votes recorded as  
6 having been cast at the particular voting location on the Statement of Votes Cast report and the  
7 “poll tape” must match since they report the same thing. If there is any difference there must be  
8 an investigation and explanation of why they are not identical.  
9

10           The Arizona Secretary of State’s Election Procedures Manual discusses the comparison  
11 of the tally tape with the final canvass at page 200:

12                           Prior to presenting the election returns for canvass, if the officer in charge  
13 of elections determines that there is a discrepancy in the election returns in  
14 a precinct, the officer in charge of elections shall notify the political party  
15 representatives of the time and place scheduled for a retally of the votes  
16 cast in that precinct.

17                           If upon the retally, it is found that the original tally of the returns has been  
18 correctly made but that a discrepancy still remains unaccounted for, the  
19 officer in charge of elections shall inspect and test the voting machines and  
20 tabulating equipment or take other actions to determine the reason for the  
21 discrepancy.

22                           If the results from the retally establishes a discrepancy in the election  
23 returns, the necessary procedure for correcting the discrepancy shall be  
24 made and shall be made part of the election returns for the canvass of the  
25 election.

26                           The officer in charge of elections shall create a written record to document  
any discrepancy and corrective action taken.

27           In spite of the clear requirements of law the Pima County Election Division, under  
Huckelberry’s management, no longer requires the official election report or tally lists to be  
placed in the “strong envelope” nor do they notify political parties if there is a discrepancy or

1 prepare a report to document the discrepancy or corrective action taken, all of which are  
2 specifically required. Thus, they follow management instructions to ignore critical procedures  
3 specifically required by law: procedures designed to prevent cheating.

4 The Pima County Democratic Party requested copies of the poll tapes from the RTA  
5 election from Beth Ford, Pima County Treasurer, as those poll tapes had been sealed in ballot  
6 boxes. As directed by Pima County Administration she required the party to file a lawsuit which  
7 she then defended, as requested by Pima County, on the claimed basis that such tally lists are “the  
8 functional equivalent of ballots.” Pima County claimed that “in general” poll tapes are the  
9 functional equivalent of ballots and therefore not subject to Arizona’s public record laws.  
10

11 Pima County’s argument that poll tapes could not be examined by the public or political  
12 parties coincided with Pima County’s purchase and apparent use of a machine or “hack tool” that  
13 permits Pima County to program the optical scan memory card at each precinct to print false  
14 results.

15 In July of 2004 the national group Black Box Voting published a report warning election  
16 departments across the country that a machine called a “Crop Scanner” could be used to program  
17 the Diebold memory cards to print false results. The “HBO” cable television channel produced a  
18 documentary film entitled “Hacking Democracy” that contained a dramatic scene where Finnish  
19 election computer expert Harri Hursti used a Crop Scanner to program the memory card before  
20 voting so that it would print the results he wanted as opposed to the actual votes. The purpose of  
21 the report was to warn county election departments of this potential mechanism of fraud, now  
22 famously referred to as the “Hursti hack.”  
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24 Isabel Araiza was the election department procurement officer at the time of the Crop  
25 Scanner purchase. She described the purchase as being outside of their normal office procedures.  
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Q. In July of 2005, Bryan Crane wanted to buy a crop scanner. Are you familiar with that purchase?

A. I am familiar with that purchase in the aspect that I wasn't notified about the purchase. The purchase was made. And when I received the invoice, I questioned it, and Brad said that it was purchased by Bryan. And so I had to process it through a small-through a small claim.

(Araiza deposition, 10/26/07; 8:20-25; 9:1-2)

Once in possession of the Crop Scanner, Bryan Crane practiced with it and has testified that it was not difficult to get it to print false results. In fact, he said that anyone with good computer knowledge should be able to similarly program a Diebold memory card to print fraudulent results.

The "not difficult" programming of the Epson memory card used in the Diebold scanner is accomplished because the memory card accepts "negative numbers." If the programmer wishes to shift 20 votes, for example in a particular precinct, he would program 10 negative votes which would switch 10 votes for one candidate to another and thereby achieve a 20 vote swing.

If such a device was used for a bond election, a sophisticated user would study prior bond election patterns. Such a study would reveal that some precincts always voted for bond elections and some precincts tended to vote against them. Some areas might vote for roads and some might not be favorable for such items on a bond list. A computer analysis would teach how many votes needed to be switched.

An analysis of prior bond elections made by Jim Barry for the RTA is precisely the type of analysis that would be required. Such an analysis would be aided by the fact that the one-half cent tax increase had been rejected in four prior elections.

Jim Barry retired from his job as a special assistant to the Pima County Administrator

1 in early 2005 and was given a “special contract” to begin the next day to do a computer analysis  
2 of all individual precinct results in prior bond elections and “other duties” as assigned by County  
3 Administrator Chuck Huckelberry. Mr. Barry collected \$75,000.00 from the county for the  
4 contract and its extensions, while at the same time collecting \$12,000.00 from the RTA political  
5 committee for “consulting.” Both Barry and Pima County have refused to turn over Mr. Barry’s  
6 precinct data as a public record, although Barry acknowledged that his data was a public record.  
7

8 Mr. Barry described his previous work polling for two other half-cent elections and his  
9 subsequent special work as directed by Huckelberry for the RTA.

10 Q: In 2006, the RTA election involved a half cent sales increase, is  
11 that correct?

12 A: Um-Hum. Um-hum. Yes. Yes. Yes.

13 Q: Had you been involved in any of the prior elections where a half  
14 cent sales increase had been submitted to the public?

15 A: I would have done some polling work in the ‘86 and the 1990.  
16 County-wide, not in the cities.

17 Q: Okay. And by “polling work,” what do you mean?

18 A: The committees that were running them contracted with– with Jan  
19 Leshner’s firm, and, at the time, a friend of mine, Tom Wilson,  
20 worked for her. And there was polling, benchmark polling and  
21 then some tracking polling, that we would have done during those  
22 two campaigns. And I did it with Leshner for several of the  
23 county’s – for a number of the county bond elections before–  
24 before 1997. So, ‘86- I’m sorry, just the “86 bond election.

25 Q: And this would be on behalf of Pima County?

26 A: No, it would have been on behalf of the committees that were  
formed to advocate for the passage of the – of the propositions.

Q: Okay. So –

A: I did it in the evening, on my off hours. To clarify, this was extra

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work. It wasn't my county work that I was doing, performing, when I was working with the firm that was doing the polling.

Q: So you would work both for the county, and you would you be paid by one of the political committees, the political committee advocating the bonds?

A: Yes. Yes.

Q: Was there any special permission needed for your involvement directly into that election process, as a county employee?

A: As I remember, there wasn't. There were policies about outside employment, but it was just so we were regular. It was for a couple of month period, so that, as I remember, I didn't need any special permission, but I could be wrong on that.

Q: So were you given a special contract by Pima County to work on the RTA election?

A: After retirement?

Q: Yes.

A: I had a contract with the county that called for certain tasks, mostly to do with following up on the bond program. And it was a catch-all phrase: work as directed by the county administrator. And he asked me to do some analysis of precinct voting patterns in Pima County, which I did for him.

Q: What was the point of that?

A: Uhm--It was to look -- to look at where--where voter turn-out was the highest, where it was at the lowest, and looking at the county's 2004 bond elections, where-- where was the support the strongest, where was it the weakest.

(Barry deposition, 11/14/07; 6:20-25;7:1.25;8:1-24)

Further discovery may clarify the special work performed by Jim Barry.

**B. Auditing of County Races Stopped**

For many years the Pima County Election Division permitted a complete hand audit of all

1 the ballots cast at a couple of precincts. The county election director allowed the county chairs of  
2 the major political parties to select a precinct and all the ballots cast at the selected precincts  
3 would be hand tallied to confirm that the machine had counted them properly.

4 Such a confirmatory hand audit of precincts selected by the parties aided the Board of  
5 Supervisors in the performance of their legal duty to make sure that the votes had been accurately  
6 counted. Under the leadership of Huckelberry and Nelson that practice was stopped and the  
7 Pima County Board of Supervisors now refuses to permit any audit of their own races.  
8

9 When the legislature considered requiring some post election hand audits, Brad Nelson  
10 lobbied against any law requiring a hand count of any election for a county officer and as a result,  
11 there are no hand audits for county bond elections or for members of the Board of Supervisors.  
12 The election division's new policy is that they will not do any audits unless specifically required  
13 of them by a specific statute.

14 **C. Huckelberry Requested An Opinion from The Pima County Attorney that**  
15 **Reversed the Board's Authority To Increase Ballot Auditing.**

16 The Board of Supervisors has the express authority to canvass elections and declare  
17 election results and the necessary implied authority to make sure that its obligations are carried  
18 out correctly.

19 A.R.S. § 11-251 lists 66 separate powers of Boards of Supervisors. Number 3 on the list  
20 are its election responsibilities.  
21

22 **§ 11-251. Powers of board**

- 23 3. Establish, abolish and change election precincts, appoint  
24 inspectors and judges of elections, canvass election returns,  
25 declare the result and issue certificates thereof.

26 It is obvious that the board has the authority to make sure that the election computer it



1 uses performs correctly. In the 2008 local election, activists and the Democratic Party urged  
2 Pima County to utilize graphic scanning to confirm the accuracy of its vote count. Graphic  
3 scanning would eliminate the ability of election division insiders to cheat and would enhance  
4 public confidence in election results.

5 Huckelberry requested an opinion from the Pima County Attorney's Office which  
6 supported his denial of graphic scanning by concluding that scanning would not be "advisable."  
7 The opinion (No. 08-01) reached its odd conclusion by relying on a statute that dealt entirely with  
8 ballot handling procedures inside an individual precinct by poll workers. Its inapplicability is  
9 obvious. The full statute relied upon to prevent post-election scanning at the facility is A.R.S. §  
10 16-1018, below:

11  
12 **§ 16-1018. Additional unlawful acts by persons with respect**  
13 **to voting; classification.**

14 A person who commits any of the following acts is guilty of a class  
15 2 misdemeanor.

- 16 1. Knowingly electioneers on election day within a polling  
17 place or in a public manner within seventy-five feet of the  
18 main outside entrance of a polling place or on-site early  
19 voting location established by a county recorder pursuant to  
20 § 16-542, subsection A.
- 21 2. Intentionally disables or removes from the polling place,  
22 on-site early voting location or custody of an election  
23 official a voting machine or a voting record.
- 24 3. Knowingly removes an official ballot from a polling place  
25 before closing the polls.
- 26 4. Shows the voter's ballot or the machine on which the voter  
has voted to any person after it is prepared for voting in  
such a manner as to reveal the contents, except to an  
authorized person lawfully assisting the voter.
5. Knowingly solicits a voter to show the voter's ballot, or

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receives from a voter a ballot prepared for voting, unless the person is an election official or unless otherwise authorized by law.

6. Knowingly receives an official ballot from a person other than an election official having charge of the ballots.

7. Knowingly delivers an official ballot to a voter, unless the voter is an election official.

8. Except for a completed ballot transmitted by an elector by fax or other electronic format pursuant to § 16-543, knowingly places a mark on the voter’s ballot by which it can be identified as the one voted by the voter.

9. After having received a ballot as a voter, knowingly fails to return the ballot to the election official before leaving the polling place or on-site early voting location.

The opinion concluded that “it might be argued” that subsection 4 of § 16-1018 “prohibits showing a voted ballot in such a manner as to reveal its contents.” The opinion requested by Huckelberry thus concluded that hundreds of thousands of ballots should not be scanned at the county election headquarters because of a statute that refers to showing an individual ballot at a precinct before it was placed in a ballot box. Such an interpretation “might be argued” only by someone incapable of understanding the English language.

We argue that any “opinion” that reads the following sentence as prohibiting graphic scanning has simply produced an opinion as legal cover for a decision to reject real ballot security.

4. Shows the voter’s ballot or the machine on which the voter has voted to any person after it is prepared for voting in such a manner as to reveal the contents, except to an authorized person lawfully assisting the voter.

**IX. The Board of Supervisor’s Election Division Regularly Violates Arizona Election Law, and then Lies about It When Caught.**

The Board of Supervisors have never investigated the conduct of their election division

1 even when they knew that division was rife with criminality. The Pima County Board of  
2 Supervisors made a request of this Superior Court to delay the Democratic Party's database  
3 lawsuit when they claimed every employee in their election division might invoke their Fifth  
4 Amendment privilege against self-incrimination. The following quote is from the Board's Reply  
5 in Support of Motion For A Stay of Proceedings (C2007-2073) filed June 6, 2007:  
6

7 Indeed, during the Attorney General's investigation, any attempt by  
8 counsel for other side to elicit testimony from *anybody* involved with Pima  
9 County's Division of Elections or the Pima County elections computer  
10 system runs a significant risk of impacting that witness's constitutional  
11 rights and eliciting as assertion of the Fifth-Amendment privilege. In  
12 *Afro-Lecon v. United States*, cited with approval by the *Ott* court, *supra*,  
the impact of necessary witnesses invoking Fifth-Amendment rights was  
deemed a critical consideration in the granting of a stay of a civil  
proceeding. The *Afro-Lecon* court quoted *United States v. Kordel*, 397  
U.S. 1 (1970) (also cited by *Ott, supra*) for the proposition that:

13 [W]here no one can answer the interrogatories... without subjecting  
14 himself to a "real and appreciable" risk of self-incrimination... the  
15 appropriate remedy would be a protective order under Rule 30(b)  
[of the Federal Rules of Civil Procedure], postponing civil  
discovery until the determination of the criminal action.

16 820 F.2d 198 at 1206. Therefore, it is clear that a stay is  
17 appropriate in this case under the standards cited and promulgated  
by the Court in *Ott*.

18 At no time subsequent has the Board of Supervisors questioned its own election division  
19 employees about the astonishing claim of potential criminality that they high-lighted in their own  
20 court filed pleading. The italicized emphasis on the word "anybody" was made by the Board of  
21 Supervisors in their original pleading.  
22

23 There is one area of the law where the evidence is complete regarding illegal conduct by  
24 the Pima County Elections Division. A.R.S. § 16-621(A) makes it a felony to print actual vote  
25 tallies before the polls are closed in order to see who is winning or losing and by what margin.  
26

1 Since Pima County starts scanning early ballots many days before election day, that kind of  
2 information would be very valuable to any candidate or campaign and extremely valuable for  
3 some campaigns. It's just for that reason that such printing is a felony under Arizona law.

4 The Pima County Election Division has regularly violated state law as a policy matter  
5 for a number of years since Brad Nelson has been the county election director by printing  
6 election tallies days or weeks before election day. Those tallies reported actual vote totals of  
7 "early ballots" received and counted by the election division.  
8

9 Robbie Evans, Junior, an election division career employee was Bryan Crane's assistant  
10 election computer operator for four and a half years before he was transferred to the warehouse.  
11 He testified in court on December 5, 2007 in (C2007-2073) that vote tallies were regularly  
12 printed before election day. Those printings were so common that the election division bought a  
13 rubber stamp to be used on the illegally printed tallies, also called "summary reports," that was  
14 used to stamp the words "unofficial/unaudited" on those printed tallies.  
15

16 Mr. Evans testified about the direct involvement of Election Director Brad Nelson:

17 Q. (By Mr. Risner) But were summary reports printed from time to  
time during the counting of ballots?

18 A: Yes.

19 Q: And on what occasions would they be printed during the counting  
of ballots?

20 A: The director could come in and request a report at any time.  
Bryan could run a report, whatever he wanted. He was in charge.  
21 Basically, I mean, it was operated by Bryan; he ran it whenever, I  
guess, he felt it was necessary.

22 Q: Did you ever see Brad Nelson take a summary report and leave  
the room with it?

23 A: Yes.

24 Q: Do you know how many occasions or-

A: Every major election, that was a common practice.

25 (Roberts Evans deposition 10/26/07; 12:10-19; 17:1-5)  
26

1 (3) Bryan Crane was questioned under oath by Deputy Pima County Attorney Karen  
2 Friar at a deposition on March 20, 2007 and gave sworn testimony completely  
3 contrary to the testimony of Robbie Evans, Jr., his assistant.

- 4 Q. Bryan, just a couple of quick questions.  
5 A. Okay.  
6 Q. When you have run-you testified that you would run summary  
7 reports in order to check the number of votes cast, is that correct?  
8 A. That's correct.  
9 Q. And when you ran the summary reports, was your practice to  
10 normally just run the first page, either look at or print the first  
11 page?  
12 A. That's correct.  
13 Q. Did you look at the rest of the reports?  
14 A. No.  
15 Q. And you used it for what?  
16 A. To basically check that our totals that we were giving from the  
17 early boards was matching the totals that we were counting.  
18 Q. And how long would you have-if you printed that report, how  
19 long would you have it in your possession?  
20 A. Just 'til we-or 'til I verified that the count was correct.  
21 Q. And how long did that take?  
22 A. Seconds.  
23 Q. And then what did you do with it?  
24 A. If it was printed, I shredded it. And if it wasn't, if it was a  
25 preview, I closed the screen.  
26 Q. Did you ever share that information with anyone?  
A. No.  
Q. Did you ever release results of any race with anyone prior to an  
hour after the polls closed?  
A. No.  
Q. Have you done that in any election?  
A. No.  
Q. Have you ever shared the results, the tallies for any particular  
candidates with Brad prior to 8:00 after polls closed?  
A. No.

(Bryan Crane Deposition, 3/20/07, 150:4-25, 151:1-16)

To translate, Bryan Crane is claiming in that under-oath story that he printed a multi-  
page report of specific vote totals in order to simply confirm the number of individual ballots

1 that had been scanned. The GEMS software, however, has a separate feature to obtain that  
2 information known as a “cards cast report.” The cards cast report reveals the number of ballots  
3 processed but not vote totals. Such a feature is required because every known voting  
4 jurisdiction in the United States prohibits printing reports of actual votes if early ballots are  
5 counted days before election day. The GEMS operating manual has multiple specific warnings  
6 prohibiting such printing. For example, these quotes are from the manual:  
7

### 8 3.1.4 Processing Ballots

9 “It is essential that absentee and early ballots only be counted, but not  
10 tallied prior to election close” (Exhibit 1, Diebold Elections Systems  
11 GEMS 1:18 User’s Guide, Revision 4.0. November 1, 2002 Sec. 3.1.4).

#### 12 3.1.4.1 Absentee

##### 13 Central Count

14 ...The central count client should be monitored in order to ensure that no  
15 tallying takes place prior to election close.

16 Once the election has closed, election result reports may be printed  
17 (Exhibit 1, Diebold Elections Systems GEMS 1.18 User’s Guide,  
18 Revision 4.0, November 1, 2002).

19 The GEMS “cards cast report” displays how many ballots/cards have  
20 been processed through the election but not where the votes themselves  
21 went (Exhibit 8, Nelson Deposition, 15: 18-25; 16: 1-2).

### 22 3.4 Election Results Reporting

#### 23 3.4.1 Before election close

24 Before election close, a jurisdiction-wide Election Summary Report is  
25 printed with zero totals in order to verify that the database does not  
26 contain any results before results are uploaded. Click on GEMS in the  
27 menu bar, Election Summary Report in the drop-down menu, type ‘Zero  
28 Total Report’ in the Report field in the Election Summary Report  
29 window, then click on the Print button in order to print the report

(Exhibit 1, Diebold Elections Systems GEMS 1.18 User’s Guide,  
Revision 4.0, November 1, 2002).

1 Chester Crowley, another Pima County Division of Elections employee testified in court  
2 on December 5, 2007 in C2007-2073, that he saw summary reports printed before the close of  
3 the polls on election day and saw printed reports on Bryan Crane's desk in his office outside of  
4 the computer room.

5 Isabel Araiza was a 27-year employee of the Pima County Election Division at the time  
6 of the trial in C2007-2073. Her office is next to Brad Nelson's. She testified that over the years  
7 she heard Bryan Crane walk out of the computer room and hand Brad Nelson a summary report  
8 that had been printed before election day.

9  
10 The evidence and extensive testimony about the regular printing of vote tallies was  
11 especially interesting to the Pima County Democratic Party's Election Integrity Committee  
12 because they had been informed by Brad Nelson that such printing was not possible in 2004.

13 Between the primary and general election that year Thomas Ryan, PhD, and Bill Risner  
14 had met with Brad Nelson on behalf of the Democratic Party to see if tallies of selected early  
15 ballot batches could be printed as part of a secure auditing process to confirm that the computer  
16 was accurately counting the early ballots, which were approximately one-half of all ballots.

17  
18 Mr. Nelson claimed not to know whether such printing was possible. He said he needed  
19 to consult with his technical staff. Later, Mr. Nelson reported back to Dr. Ryan that it could not  
20 be done because the "software did not support" the printing of sub-totals. Nelson claimed that  
21 only the final tally could be printed and, therefore, there could be no auditing of the "early  
22 ballots" vote count.

23 The next year, in 2005, the City of Tucson agreed, when asked by the same individuals,  
24 to print the sub-totals for its election using the same GEMS software. The secure and lawful  
25 process agreed upon with the City was to print a sub-total of all votes counted and then to  
26

1 process a batch of ballots. Then another sub-total would be printed which would show the votes  
2 counted in the sample batch of ballots. The two “sub-totals” or summary reports were printed  
3 upside down and only in the presence of political party observers so that no one could read or  
4 know the numbers. The “summary reports” were then placed in an envelope together with the  
5 ballots counted, which envelope was then sealed only to be opened after the polls had closed as  
6 part of an audit process to confirm the counting accuracy of the machine. That process  
7 preserved the secrecy of the vote totals and permitted an audit after the polls had closed of the  
8 accuracy of the machine.  
9

10 After that 2005 city election local Pima County election activists, through the leadership  
11 of Ted Downing, were able to get the Arizona legislature to mandate a secure early ballot batch  
12 process similar to what was done on the 2005 Tucson City election. That statute, A.R.S. § 16-  
13 602(G), provides that the audit batches of early ballots are to be counted and the summary  
14 reports printed only in the presence of political party observers. That law was effective for the  
15 elections in the fall of 2006.  
16

17 During the scanning of early ballots in that first election since the new legal requirement  
18 became law, the Democratic Party-appointed observers carefully noted on a log sheet the time  
19 and date of each audit batch that was scanned and thus resulted in the printing of two summary  
20 reports before and after. A subsequent examination of the election computers’ audit log after  
21 the election revealed that some “unknown” election division employee had secretly printed a  
22 summary report which revealed actual vote totals. The printing occurred when political party  
23 observers were not present.  
24

25 Upon discovering from the audit log that a secret report had been printed the Democratic  
26 Party then requested to view digitally recorded images captured by camera and stored on a



1 dedicated computer to learn which person had printed the unlawful summary report. The  
2 Election Division, through John Moffatt, refused to permit any such examination that would  
3 have revealed which employee had printed the report until more than 20 days had elapsed  
4 whereupon they announced that such a viewing would be impossible since the computer only  
5 kept 20 days of data. Therefore, the identity of the computer operator could not be determined  
6 solely because of the delay by the Election Division which obviously knew of the capability of  
7 their own video recording system.  
8

9         Since all of the summary reports printed as part of the audit process had been retained  
10 together with the corresponding early ballot batches, the Democratic Party demanded the  
11 election division to produce for inspection all of those summary reports. The Election Division  
12 denied that any reports had been printed except as part of the early batch process when  
13 observers were present. Furthermore, they claimed that all of the printed reports were now  
14 locked inside sealed boxes in the custody of Beth Ford, the County Treasurer, with ballots and  
15 they could not produce them except with a court order.  
16

17         The Democratic Party then sued Pima County and Beth Ford, the custodian of the boxes,  
18 in Pima County Cause No. C2007-0516 for an order opening the sealed boxes and requiring the  
19 production of the summary reports. An order was secured, the boxes were opened and the  
20 summary report identified as having been unlawfully printed was indeed not present in the  
21 boxes, but all of the reports printed in the presence of observers were in the boxes. The  
22 Democratic Party through that lawsuit proved the illegal printing of pre-election day vote tallies  
23 during the 2006 General Election. That illegal printing was accomplished even though a camera  
24 recorded access to the computer at all times and political observers kept accurate records of all  
25 printing pursuant to law in their presence. The printing was an example of the persistence of  
26

1 illegal conduct even in the presence of two monitoring systems designed to prevent such  
2 cheating.

3 During their subsequent database lawsuit the Democratic Party learned that the practice  
4 of printing pre-election tallies had been of long-standing and that Brad Nelson, Pima County's  
5 Election Director, had lied knowingly to the party's representative Tom Ryan in 2004 when he  
6 reported that such printing could not be done using GEM's software.  
7

#### 8 **X. "The Bosses" Permitted Bryan Crane to Take Home with Him CD's of 9 Election Results during Elections**

10 A previous section discussed the "back door" that permits the GEMS database to be  
11 changed on any home computer, such as the home computer of Bryan Crane's, that has on it  
12 Microsoft Access. Ample testimony from several employees confirms that Bryan Crane  
13 regularly took home with him copies of the election database. Isabel Araiza is the election  
14 division's senior employee. She supervised the division prior to Huckelberry selecting Brad  
15 Nelson to be director. After Brad Nelson became director she complained about Bryan Crane  
16 taking the election CD's home with him every night. She told Nelson "that that was never a  
17 practice in the past" and that "it was a concern" to her. She said "I didn't feel that was right"  
18 but "the practice was left."  
19

20 In 1999 the county had installed a fire proof safe in the election computer room for  
21 secure storage of back up CD's. Bryan Crane's excuse for continuing to take the CD's home  
22 with him after Brad Nelson was hired in 2002 was "in case of fire."

#### 23 **XI. The "Contradiction" in Huckelberry's Management Style.**

24 Chuck Huckelberry is a brilliant hands-on manager. He may be the most aware manager  
25 Pima County has ever had. His habits as a manager of the smallest details are well known in  
26

1 our county. His known management style confirms that he personally approves of the actions  
2 and policies of the election department that he personally supervises as they are his policies.

3 **1. Early Printing of Tallies.**

4 When Jim March learned from his examination of the county election computer that the  
5 election department was illegally printing tallies he prepared a report of his findings that he  
6 personally delivered to Chuck Huckelberry and the entire Board of Supervisors. Neither the  
7 board nor Huckelberry investigated the serious allegations in that report according to  
8 Huckelberry's testimony.  
9

10 Risner Q: Okay. But are you aware that a report was then  
11 later sent directly to you that informed you and the  
12 Board of Supervisors that Bryan Crane had been  
13 printing Summary Reports during elections before  
14 the polls closed?

15 Huckelberry A: I don't recall directly the report being sent to me,  
16 but I do know that's one of the allegations, yes.

17 Risner Q: Okay. Once you knew that allegation, have you at  
18 any time asked for an internal investigation of the  
19 activities of the Election Department?

20 Huckelberry A: No.

21 The only reason such a serious allegation of repeated criminal conduct would not be  
22 investigated is if it was approved by management itself.  
23

24 **2. Taking The Fifth**

25 The Board of Supervisors claimed that there was a substantial risk that everyone in the  
26 election division might refuse to speak to county investigators because of a fear that they might  
implicate themselves in criminal activities. There was no county investigation of that shocking  
assertion and it was never even brought up in conversation according to Huckelberry.

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Risner Q: How often have you met with John Moffatt concerning the Election Department?

Huckelberry A: Oh, probably a number of times. I can't tell you the number.

Risner Q: During any of those meetings with Dr. Moffatt, did he tell you that he was here in court and heard an argument from the County lawyers saying that every person in the Election Department had substantial risk that they would take the Fifth Amendment?

Ms. Straub: Same objection.

The Court: Well, what I'm concerned about is actually attorney/client privilege. Are you asking for what advice?

Mr. Risner Q: No, no. What I'm asking is whether John Moffatt, who's not a lawyer, since he's meeting with Moffatt on a regular basis and there's an allegation that everybody's going to take the Fifth, whether Moffatt told him that; because I'm surprised that there's not been an internal investigation of what's going on in that department.

The Court: I'll allow you discussion, but it's getting a little tenuous. Do you recall the question?

The Witness: Yes, I do; and , no, Dr. Moffatt never mentioned it to me.

(Trail testimony, 12/15/2007, p.136-137)

**3. Bryan Crane Taking CD's Home**

Huckelberry testified that whatever Bryan Crane took home was proper.

Mr. Risner Q: So as of 1999, when the County acquired the fire-proof safe inside the Election Department, was that safe to be utilized to safeguard the backup data for the Election Department?

Mr. Huckelberry A: I assume that's what they were using it for, yes. It

1 made sense. I mean, I've been asked to criticize an  
2 employee who probably was doing what he felt  
3 was best to protect the integrity of the data and  
4 information should a disaster occur; and I think  
5 that was correct action on his part.

6 Mr. Risner Q: You think it was a correct action?

7 Mr. Huckelberry A: Yes.

8 Mr. Risner Q: Okay. Did you learn that the backup data for the  
9 office information was on tapes, like a little  
10 cassette tape?

11 Huckelberry A: That's what I've heard, yes.

12 Risner Q: And did you learn that the election computer has a  
13 CD burner and that the backup information on the  
14 election computer is on CDs?

15 Huckelberry A: I don't know. I mean, CD/Tape, I don't have any  
16 idea.

17 Risner Q: Yeah. Have you learned what the risk would be  
18 with an election employee taking home the CD  
19 backup of an election?

20 Huckelberry A: I don't know that the employee took home the CD  
21 backup of the election.

22 Risner Q: The question was: What would the risk be if that  
23 had occurred? Are you aware of what the risk  
24 would be?

25 Huckelberry A: No.

26 (Trial testimony, 12/5/2007, p. 142-143)

#### 4. Daisy Chain of Ignorance

Brad Nelson is Huckelberry's choice to be the Election Director of a large county that utilizes a computerized system to conduct elections. Brad has testified that he has no comprehension of how the computer software works or of any potential security issues. He

1 testified to the following:

2 Brad Nelson has never operated GEMS. (Nelson Deposition, 2/28/2007,  
3 13:3-15).

4 Brad Nelson is not certain that he even has a rudimentary understanding  
5 of the GEMS Diebold System. (Nelson Deposition, 2/28/2007, 14:7-15).

6 When Brad Nelson reads articles about computer security he does not  
7 know what they are talking about “when it gets into technical stuff.”  
(Nelson Deposition, 2/28/2007, 34: 22-25; 35: 2-10)

8 Brad Nelson is not aware that the GEMS Audit Log is part of the data file  
9 itself. (Nelson Deposition, 2/28/2007, 44:15-20; 124:8-12).

10 Brad Nelson does not know what security problem is created when the  
11 audit log is part of the data file itself. (Nelson Deposition, 2/28/2007, 44:  
12 15-24).

13 Brad Nelson was not aware that the computer software as used by Pima  
14 County did not record which person was operating the computer until  
15 January 2007. (Nelson Deposition, 2/28/2007, 34:13-21)

16 Brad Nelson does not know what interpretive code is nor whether it is  
17 permitted under federal law. (Nelson Deposition, 2/28/2007, 17-21)

18 Approximately 45% of the precinct-cast ballots in Pima County are  
19 counted on Diebold AccuVote OS machines. (Nelson Deposition,  
20 2/28/2007, 39:3-11).

21 Elections Director Brad Nelson does not know why the computer  
22 operator (i.e. Bryan Crane) would preview election results because  
23 Nelson has never operated GEMS and hence does not understand the  
24 software. (Nelson Deposition, 2/28/2007, 29: 18-25; 30:1-13)

25 Brad Nelson asked to be a member of the Election Center Research and  
26 Technology Committee but claims that the committee never met. Nelson  
claims he joined this National Committee so he could have more  
exposure to what was going on in the election area. ( Nelson Deposition,  
2/28/2007, 61:6-25; 62:1-11)

Huckelberry is fully aware of Brad Nelson’s computer ignorance.

Mr. Risner Q: Mr. Huckelberry, you mentioned that the quality of  
the administration had improved and is more than

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adequate in the Election Department. Is that what you had said?

Huckelberry A: I said that the quality of management is improved and it is more than adequate. I would say that's probably an accurate statement.

Mr. Risner Q: Okay. And do you understand that all our votes are counted on a computer system, correct?

Huckelberry A: Yes.

Mr. Risner Q: And do you understand that our county election administrator has only a rudimentary knowledge of how that system works?

Mr. Risner Q: Yes.

(Trial testimony, 12/5/2007, p. 154-155)

Brad Nelson relies on Bryan Crane for computer expertise. Bryan Crane started using the GEMS software in 1996 when he was taught to use the "back door." Nonetheless, eleven years later he testified that he did not know any GEMS software security issues.

Huckelberry purports to rely on Dr. John Moffatt, PhD., for his computer advice. He was asked at deposition about what the security implications would be if the Democratic Party obtained the database after an election.

Q: And what is your understanding of what the security implications would be of the Democratic Party getting the database?

A: The person who, frankly, I relied on in making the decision was Dr. Moffatt, who indicated that there were certain components to the database and software that, if the public-if given to the public, could in fact, jeopardize future elections or make it more vulnerable to attack.

Q: And what's your understanding of what those elements are?

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A: I really don't have any understanding of those elements, because I'm not a trained expert in the area of computer science.

Q: Okay.

A: I relied on Dr. Moffatt and his knowledge.

(Deposition of Chuck Huckelberry, Nov. 15, 2007; p. 14-15)

**XII The Board of Supervisors Bad Faith Response about the RTA Election.**

The American people learned through the Watergate scandal that one can learn a lot about who was behind a crime from the coverup. Therefore, the actions and inactions of County Administrator Charles Huckelberry and the Pima County Board of Supervisors is of evidentiary interest in the face of allegations of criminality in the Pima County Election Division.

**A. The "Poll Tape" Litigation"**

The Pima County Democratic Party made a routine request to examine the RTA Election Results Reports or poll tapes at a time when they were in the possession of Beth Ford, Pima County Treasurer. Beth Ford refused to permit access. The Democratic Party then sued and Beth Ford defended the lawsuit on the claimed basis that such tally lists are "the functional equivalent of ballots." Pima County claimed that "in general 'poll tapes' are the functional equivalent of ballots and therefore not subject to Arizona's public record laws."

Those arguments are pure nonsense, as revealed by A.R.S. § 16-616 and the prior discussion in this disclosure statement concerning poll tapes and might be characterized as delusional, except that Pima County's Election Division was completely aware of the function and publicly available nature of the poll tapes, which are key audit documents that they use to reconcile numbers for all elections. The arguments did, however, delay for many months the physical production of the poll tapes at which time 44% were determined to be missing.



1           **B.       The “Database Litigation”**

2           In December of 2006 a written request was made by the Democratic Party pursuant to  
3 Arizona’s Public Records statute (A.R.S. § 39-121 et seq.) for a copy of Pima County’s  
4 computer election database. The county refused, but ultimately agreed to meet with technical  
5 representatives of the Democratic Party so they could offer a reason for their refusal. At that  
6 meeting, Pima County’s technical representative, John Moffatt, said that the database could not  
7 be released because Bryan Crane used a unique system of coding candidates (eg. “20” or “30”)  
8 that, if known, might reveal his personal pattern of choices of random numbers for a future  
9 election. Michael Duniho then handed John Moffatt a printed list of the codes used by Bryan  
10 Crane that Mr. Duniho had printed off the Arizona Secretary of State’s public website. John  
11 Moffatt stated that, in spite of Pima County having publicly published those less than revealing  
12 numbers, Pima County would not permit an examination of its computer data from past  
13 elections. Moffatt could not think of any reason to articulate but announced, nonetheless, that  
14 his decision was final even if he did not have any reason. The Pima County Democratic Party  
15 was then required to sue pursuant to public record laws. The Board of Supervisors furiously  
16 defended the lawsuit for the past election data over many months and many hundreds of  
17 thousands of dollars of attorney fees and expenses.  
18  
19

20           At the eventual trial, Dr. John Moffatt, PhD testified that the “number one reason” that  
21 Pima County did not want the Democratic Party to receive a copy of the election database after  
22 the election canvass had been finally approved was that the Pima County Democratic Party  
23 might themselves print a report of its own with different numbers simply to sow confusion. Dr.  
24 Moffatt was fearful that such a fake report might successfully stir the public because the party  
25 would be able to use the same font and page layout as the official statement of votes cast report.  
26

1 Dr. John Moffatt's testimony on behalf of the Pima County Board of Supervisors is so  
2 astonishing that the full background of his testimony and the lawsuit must be examined. The  
3 plaintiff was the Pima County Democratic Party that had approved the filing of the lawsuit by  
4 unanimous vote of both the entire County Central Committee and its County Executive  
5 Committee. The defendants were the entire Pima County Board of Supervisors of whom three  
6 out of five were members of the Democratic Party.  
7

8 County Administrator Chuck Huckelberry testified at deposition that the decision to  
9 refuse to provide the database to the Democratic Party was a collective decision of Election  
10 Director Brad Nelson, himself, Dr. John Moffatt and the Pima County Attorney. As for the  
11 Board of Supervisors, he claimed they had "no role."

12 Risner Q: Yeah. Was it your decision that the database not  
13 be provided to the Democratic Party?

14 Huckelberry A: It was kind of a collective decision that to do so  
15 would potentially make the election process less  
16 secure than it is today.

17 Q: Who participated in that collective-

18 A: The elections director, myself, Dr. Moffatt, county  
19 attorney.

20 Q: What role has the members of the Board of  
21 Supervisors had in the decision not to turn it over  
22 to the Democratic Party?

23 A: None.

24 Q: And what is your understanding of what the  
25 security implications would be of the Democratic  
26 Party getting the database?

A: The person who, frankly, I relied on in making the  
decision was Dr. Moffatt, who indicated that there  
were certain components to the database and

1 software that, if the public-if given to the public,  
2 could in fact, jeopardize future elections or make it  
3 more vulnerable to attack.

4 Q: And what's your understanding of what those  
5 elements are?

6 A: I really don't have any understanding of those  
7 elements, because I'm not a trained expert in the  
8 area of computer science.

9 Q: Okay.

10 A: I relied on Dr. Moffatt and his knowledge.

11 Q: (by Mr. Risner) Okay. Do I understand that as of  
12 today you cannot recall what it is that Dr. Moffatt  
13 believes is a security risk? Is that correct?

14 A: I can't elaborate on it, because I'm not that  
15 knowledgeable about the technical details of the  
16 security. All I know is that Dr. Moffatt says, and  
17 has indicated to me, that to release the database,  
18 that information would pose a potential security  
19 threat to future elections.

20 Q: Okay.

21 A: That's good enough for me.

22 (Deposition of Chuck Huckelberry, Nov. 15, 2007; 14:3-  
23 25, 15:12-22)

24 Dr. Moffatt's key trial testimony concerned the "risk" of providing all political parties  
25 with a copy of the election database after the election had been finally completed and the Board  
26 of Supervisors had approved the final canvass that had been printed and distributed to the public  
in a written report known as a Statement of Votes Cast Report. At that point each political party  
would have a copy of the database, the Arizona Secretary of State would have a copy, and the  
ballots themselves would be securely stored in the vault of the Pima County Treasurer.

1 Dr. Moffatt's "number one fear" was that the Democratic Party might decide to print and  
2 release a fake set of numbers to the public. As noted by Judge Miller such an event would be a  
3 felony, but let us read Dr. Moffatt's explanation from the trial transcript.

4 Risner Q: Yeah. So now, let's talk about what's the specific harm  
5 you see if the Democratic Party has a copy of the database,  
6 specific material harm that you see that's probable?

7 John Moffatt A: Well, the probable is, I guess, for your judgment. The  
8 concerns I have are more of what we've been talking about  
9 with –and the largest concern, and one of the major  
10 reasons that I made the recommendation that I did that we  
11 not release this, is having the database and the ability to  
12 look at it is one thing. Having the GEMS software and  
13 having the ability to generate ballots, having the ability to  
14 generate reports with the report headings and everything  
15 that are in the system look – you know, I could generate a  
16 statement of votes cast that is not the same as the  
17 statement of votes cast generated out of the official  
18 elections result by going in and using some of the  
19 methodologies that Mr. March has shown and that other  
20 people have talked about, to go in and change the  
21 numbers, generate a very valid statement of votes cast, one  
22 day, two hours after releasing the database and having that  
23 in my hands, I could generate a statement of votes cast that  
24 has different numbers on it than was officially submitted  
25 for canvass. That's one.

26 *(Trial Transcript, Dec.7, 2007, C2007-2073, 116:19-25;  
117:1-13)*

The final argument to the court by the Pima County Board of Supervisors in the database  
litigation was made by Deputy County Attorney Thomas A. Denker who argued that the most  
serious risk of the Democratic Party receiving the database was the risk of "mayhem and chaos."

But then we've got what's probably the most serious risk  
is this idea of mayhem and chaos. I believe Dr. King used  
the idea of chaos and Mr. Crane said, well, you know, said  
there's mayhem....

*(Trial Transcript, Dec. 7, 2007, C2007-2073, 144:20-23)*

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One could, of course, write off the defense of that lawsuit as delusional, absurd or simply separated from the rational world. Certainly, anyone who understood political parties, their history and role in our society, and the manner of their formation and operation through thousands of volunteers would understand the absurdity of Pima County’s concern that any political party would print their “own numbers” after the approval of the canvass when the actual ballots would reveal they were wrong.

There are two views that might explain the fierce and expensive resistance of the Board of Supervisors (Except for Supervisor Ray Carroll).

The first view is that they had something very important to hide in the existing database. The something being the RTA election fraud.

The second view is that the board and Huckelberry may have rationally believed that the precedent of providing an election database to political parties would prevent the election division from rigging a future election because of the very reason that Dr. Moffatt stated. Namely that a political party might reveal different numbers based upon their analysis of the database.

That view would attribute rational conduct to both the board of supervisors and to Chuck Huckelberry. It also focuses on the central issue that this lawsuit seeks to prevent, which is the county’s unfettered ability to cheat in any future election. Sufficient information permitting the discovery that they cheated could fairly be labeled as a “number one concern.”

The possibility that a political party might fake numbers for the sole reason of creating mayhem is patently absurd. The possibility that a political party might discover that the board of supervisors has cheated is not absurd. After all, the Board of Supervisors themselves

1 informed this court that they believed everyone in the entire Election Division might remain  
2 silent on questions of illegality as they “plead the Fifth.”

3 **XIII Available Evidence All Points to a Fraudulent “RTA” Election.**

4 (1) Tucson resident Zbigniew Osmolski swore in an affidavit that he had spoken  
5 with Pima County’s election computer operator Bryan Crane on January 27, 2008 and Mr.  
6 Crane told him that he “fixed” the RTA election on the instruction of his bosses and he did what  
7 he was told to do. Mr. Crane expressed his concern about being indicted.

8 (2) The Pima County Board of Supervisors conducts all state and county elections in  
9 Pima County. All five board members endorsed the RTA tax increase that had been rejected on  
10 four previous occasions when put to public vote. Supervisor Ramon Valadez was also the  
11 Chairman of the RTA.

12 (3) Bryan Crane was the “one guy” employee of the Election Division operating the  
13 election computer for the RTA election on May 16, 2006.

14 (4) The Pima County Division of Elections uses Diebold System Inc.’s Global  
15 Election Management System (“GEMS”) software to process elections including the May 16,  
16 2006, Regional Transportation Authority (“RTA”) election.

17 (5) GEMS creates a database for each election. The format is based on the format  
18 used by Microsoft Access, a general database program. Each database ends with the letters  
19 “mdb,” which stands for “Microsoft Data Base.”

20 (6) The GEMS-created mdb files circa 2006 and prior up through approximately  
21 early 2008 can be opened without a password using Microsoft Access. Data in the file can be  
22 manipulated. Password protection can be overwritten. It is even possible to extract the existing  
23 password from a main election data file, store it elsewhere, change the password so as to allow  
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1 manipulation both in the MS-Access application and the official GEMS application, and then  
2 once the tampering is finished swap the the password back to what it was originally so as to  
3 leave the official system operator unaware that a password change ever happened.

4 (7) Although the Microsoft-sponsored mdb format is widely used, it has size and  
5 input limitations. Microsoft has warned against using the mdb format for some critical  
6 applications, such as election management software.

8 (8) There are significant security flaws with the architecture of the GEMS software.

9 (9) The Pima County Election Division purchased a “Crop Scanner” computer-  
10 hacking tool ten (10) months before the RTA election. This tool has no other purpose in the  
11 Election Division than to illegally alter the programming of precinct voting machines. The  
12 machine was ordered by the Election Division less than two weeks after being alerted by Black  
13 Box Voting Org. that such a machine could be used to program Diebold optical scan machine  
14 “memory cards” to print false results. Each precinct uses a separate memory card. Those cards  
15 are programmed by the central election computer GEMS program. The “Crop Scanner”  
16 machine is a “read-write” device that can program the same Epson memory cards as GEMS  
17 does. Its only known use is to program those cards by corn farmers so they know when  
18 moisture levels will require field irrigation. Hence, it is called a “Crop Scanner” and is sold by  
19 an agricultural supply company in Minnesota.

21 (10) Bryan Crane testified that he practiced before the RTA election with the “Crop  
22 Scanner” and confirmed that it could program the memory cards to print false election results  
23 with a pre-determined result for any voting precinct. Crane also testified that no controls on the  
24 location, secure storage or use was placed on the “Crop Scanner” device by county election  
25 officials.  
26

1 (11) In the first week of February 2006 Brad Nelson changed the Election Division  
2 policy concerning access to the computer room so as to restrict access to employees who  
3 previously were permitted to enter. The RTA GEMS audit log reveals that this was the same  
4 week that Bryan Crane started building the RTA database in secret.

5 (12) Jim Barry retired from his job as a special assistant to Pima County  
6 Administrator in early 2005 and was given a special contract the next day to do a computer  
7 analysis of all individual precinct results in four prior bond elections and “other duties” as  
8 assigned by County Administrator Chuck Huckelberry. Mr. Barry collected \$75,000.00 from  
9 the county for the contract, while at the same time collecting \$12,000.00 from the RTA political  
10 committee for “consulting.” Both Barry and Pima County have refused to turn over Mr. Barry’s  
11 precinct data as a public record. Such precinct data would be highly useful in individual  
12 precinct manipulation of vote totals using a “Crop Scanner” hack tool.

13 (13) The use of a “Crop Scanner” to program memory cards for optical ballot  
14 scanners requires skill and patience; otherwise the memory cards “fail.” During the 2008  
15 primary election, where the memory cards were programmed by GEMS, pursuant to the normal  
16 function of GEMS, there were no card failures. During the RTA election that used a simple  
17 ballot, the Election Division reported to the media on election night that 35 precinct optical  
18 scanners had failed. A memorandum from the Election Division two weeks later stated that 75  
19 scanners had failed. The database appears to show that 149 scanners may have failed. No other  
20 election has ever had as many card failures. The Nov. 2, 2004 general election only had a total  
21 of 4 memory cards reloaded and that was a far more complicated election. The RTA only had 4  
22 items compared to the 2004 general election that had 115 items.

23 (14) If memory cards are downloaded a second time, GEMS permanently erases the  
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1 original data from the first download. The RTA database shows that 85 precinct memory cards  
2 were downloaded a second time. Approximately 70 other memory cards failed to upload by  
3 phone line and had to be loaded the first time at the central computing room. The activity of  
4 reloading memory cards a second time started at 10:13 p.m. After Rep. Ted Downing, the  
5 media and others had left, 53 memory cards were reloaded. Then, the next morning,  
6 Wednesday, one more memory card, and on Friday, eight more memory cards were loaded. The  
7 first backup of the database was finally performed at 5:01 p.m. Finally, on Saturday the 20<sup>th</sup>, 23  
8 more memory cards were reloaded.

10 (15) A Microsoft Access manual was seen and photographed in the vote tabulation  
11 room on RTA election night as it was being used by Bryan Crane. Use of Microsoft Access on  
12 an election computer was and is illegal. The GEMS Software is built by Diebold on a Microsoft  
13 Access base.

14 (16) A Microsoft Access manual was seen and photographed in the vote tabulation  
15 room on election night by former Representative Ted Downing. Use of MS Access on an  
16 election computer was and is illegal. Downing described a Microsoft Access manual being  
17 referenced by Election Department technician Bryan Crane. Downing then called Donna  
18 Branch-Gilby, at that time the Chair of the Pima County Democratic Party, and asked her to  
19 bring a camera. Donna came with her husband , Bob Gilby who took pictures of the open MS-  
20 Access manual sitting next to the central tabulator. Downing requested that Brad Nelson make  
21 a backup of the election database, put it an envelope, sign it, and get it to the sheriff's office to  
22 hold. This request was due to the problems he witnessed. Nelson refused.

24 (17) The "missing" poll tapes from the RTA election strongly correlate with entries in  
25 the database showing that those memory cards were reloaded in the days after election day  
26

1 during the period when backups of the data were not created contrary to normal practice.

2 (18) Over 13,600 ballots were counted on May 10, 2006, the first day of early ballot  
3 processing. That data was then “backed up” before the computer was shut down.

4 (19) Testimony revealed that Bryan Crane’s regular practice was to take home a CD  
5 backup copy of the election data during elections. Brad Nelson was aware of his practice of  
6 taking a CD backup copy of the election home with him. On his home computer utilizing the  
7 common Microsoft Access program Bryan Crane could open the database and make alterations  
8 in the data file and then erase from the audit log evidence that the data had been altered. The  
9 failure of Diebold to separate the vote data from the audit file is a known defect. That defect  
10 was described by Christopher Straub, Deputy Pima County Attorney, in his trial opening  
11 statement when he told the court in C2007-2073 (the “database case”) that “we know” “the  
12 databases” “can be altered using Microsoft Access” “because one could also alter the audit  
13 logs.” (See p. 3 of the disclosure statement).

14 (20) GEMS can be instructed to read “no” votes as “yes” votes with a simple change  
15 of candidate ID numbers that is required to be done only once. If such an altered CD was later  
16 introduced into the database, GEMS would automatically change all precinct results to reflect  
17 the new instructions. Since the audit log is part of the data file, it can be erased and any change  
18 in instructions could be erased. Alternatively, if the hacking is done in Microsoft Access, the  
19 audit log would be bypassed automatically since changes in the election date are not tracked at  
20 all by the audit log system in MS Access.

21 (21) On the second day of early ballot processing, approximately thirty-three (33)  
22 seconds after the election database computer had been activated, Bryan Crane completely erased  
23 the first day’s database backup by “overwriting” it. This required responding to two warning  
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1 messages: one from GEMS and one from Windows. Such an overwriting of data is consistent  
2 with the introduction of altered data on a CD and inconsistent with the normal GEMS  
3 procedures.

4 That highly unusual and suspect procedure led to the destruction of the original vote  
5 tallies and database of an identical name. Crane then illegally printed two copies, ten minutes  
6 apart, of the election “summary report,” a detailed report of actual vote totals. By law, these  
7 reports are not to be printed until one hour after the polls close on Election Day. To summarize,  
8 Crane ran what looked like normal actions on 5/10/06 and made a “snapshot backup” of the file  
9 when counting was done for the day. On the morning of 5/11, he wrote over the database from  
10 the day before, which destroyed and replaced the original data. He then printed two copies of  
11 the new vote totals only ten minutes apart.  
12

13 (22) At that time, Bryan Crane had been using GEMS for ten (10) years. The  
14 overwriting of the prior ballot results was not known to have been done in any prior election.  
15 Bryan Crane could not explain at deposition why he erased the original vote count or why he  
16 illegally printed two detailed summary reports of the vote totals as recorded by the computer.  
17

18 (23) Prior to the RTA election, the Arizona Secretary of State had been sent, as  
19 required by law a tape showing the ballot layout and the instructions to the machine on how  
20 votes were to be counted. The purpose of sending that tape to the Secretary of State is for it to  
21 be used in a fraud investigation. That tape could have been used by the Libertarian Party to  
22 compare the actual instructions used in the RTA vote counting. That tape was never examined  
23 by the Secretary of State or the Attorney General. Instead, it was mailed back to Pima County  
24 where Election Director Brad Nelson personally delivered it to Bryan Crane. Once in Bryan  
25 Crane’s possession the tape disappeared and has never been seen or examined by anyone outside  
26

1 of the Elections Division. The mailing back of the tape had never been done before by the  
2 Secretary of State for any election jurisdiction in Arizona.

3 (24) The destruction of the very tape that is to be used to detect fraud prevented one  
4 of the safeguards in our election system from being used for its purpose. The Office of the  
5 Secretary of State testified that the tape was in the box when mailed to Pima County.  
6

7 (25) At the end of the RTA election day, the database was not backed up, as it has  
8 been in virtually every other election. The database was not backed up until three days later  
9 (Friday at 5:00 p.m.), after all results had been published.

10 (26) The "Crop Scanner" is able to program the precinct Epson memory cards to print  
11 false results. The printed results, as printed by the scanner at the close of every election, are  
12 known alternately as the "election results tape" or "poll tapes" or "tally tapes." Unless the  
13 person using the "Crop Scanner" is careful, an examination of the printed "poll tapes" can  
14 reveal evidence that the memory card had been programmed to print false results. An  
15 examination of the poll tapes for such evidence was attempted by the Pima County Democratic  
16 Party through a public record request.  
17

18 (27) Pima County and Beth Ford, the Pima County Treasurer, who is the custodian of  
19 the RTA ballots, resisted providing the poll tapes for examination. After lengthy and protracted  
20 litigation the poll tapes were finally produced. A review of the poll tapes showed that 44% were  
21 missing when all should have been in the ballot boxes.

22 (28) After the RTA election the elected chair of the Pima County Democratic Party  
23 met with Brad Nelson at the Election Division offices. The party Chair, Donna Branch-Gilby,  
24 requested to be able to visually examine the election computer used in the RTA election to  
25 verify the cable connections to that computer. Ms. Branch-Gilby was to be accompanied by Jim  
26

1 March, a technical consultant hired by the Democratic Party. The computer room was vacant.  
2 All election work was completed many days previously. The computer room was adjacent to  
3 where the request was made. Brad Nelson refused to permit Pima County's largest political  
4 party from simply looking at the computer in his presence so they could see what else may have  
5 been connected to the election computer.  
6

7 **XIV. There Is No One But This Court To Protect Our Democratic System.**

8 The Libertarian Party seeks the intervention of Arizona's courts because it is the only  
9 governmental entity that is available to protect the purity of our elections.

10 **A. Secretary of State**

11 As noted on page six, the office of the Arizona Secretary of State testified under oath  
12 that it has no authority to examine any county's election database and has not been "tasked"  
13 with the responsibility of actually physically examining and auditing "the security of county  
14 election computer."  
15

16 The authority of the Secretary of State is in fact surprisingly limited. The Arizona  
17 Legislature has instructed the Secretary of State to prescribe procedures for "... counting,  
18 tabulating and storing ballots." A.R.S. § 16-452(A). That section is the source of the Secretary  
19 of State's election procedure manual. It is the various Arizona county Boards of Supervisors  
20 that have the legal responsibility to run an honest election with sufficient auditing to ensure the  
21 accuracy of the vote counts.

22 That fact is what makes the malfeasance of the Pima County Board of Supervisors in  
23 turning all control over the election process to the County Administrator Chuck Huckelberry so  
24 serious.  
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**B. Attorney General**

The Arizona Attorney General’s Office has taken the position that its role in election matters is to be the lawyer for the Secretary of State. They claim that they have no independent role.

The role the Office of the Attorney General has been obstructive when they have acted. For example, after the Pima County Democratic Party advised the Attorney General Office of evidence of criminal activity the Attorney General teamed up with the “suspects” for a limited study of a part of their database. The Attorney General relied on Dr. John Moffatt, on behalf of the “suspects,” to suggest which “tests” to run. He suggested tests he knew they could pass. Other logical and useful tests were not run. The Attorney General’s office received a draft report from the testing agency that the Attorney General noted was a public record. They refused to provide the Democratic Party, the complainant, with a copy of the report and instead told them to get a copy from the Pima County Attorney’s office.

After a local newspaper reported that John Moffatt was editing the unreleased report, the Democratic Party asked the Pima County Attorney for a copy of that public record as previously suggested by the Attorney General. The Attorney General then, in a written order, instructed the Pima County Attorney not to release the public record report. Thus the report was kept away from everyone but the “suspects” until the Attorney General Terry Goddard, released it at his press conference.

**C. County Election Directors**

County Election Directors and County Clerks have a state-wide organization that regularly meets but has not discussed computer “security” at their meetings, although all counties utilize computers for their ballot counting. Brad Nelson was president of the group

1 for six years. The group had not exchanged information at any time during Nelson's term of  
2 office about security problems with Diebold software that is used by twelve out of fifteen  
3 Arizona counties.

4 In 2002 Brad Nelson was a member of the Arizona State Planning Committee for the  
5 Help America Vote Act (HAVA). There was no discussion in that committee relating to  
6 technology and security.  
7

8 **D. Diebold User Group**

9 The twelve Arizona counties that use Diebold equipment are part of a "Diebold user  
10 group." The group participates in telephone conferences together with a technical representative  
11 from the Diebold Company. Software computer problems had not been discussed in those  
12 conferences.

13 **E. The Election Software Is a Private Secret.**

14 The GEMS software is secret and is owned by a private company. It is used in eleven  
15 Arizona Counties. Nine of the counties do not have any technical employees who can define  
16 their ballots for them and must therefore, rely on another private company in Glendale, Arizona,  
17 to define their ballots and instruct their county computers on how to count their ballots. None of  
18 those counties are known to have investigated that company or to have any personnel who could  
19 conduct such an examination. They each accept whatever software is sent to them.  
20

21 The Arizona Secretary of State claims it has no jurisdiction to examine the computer or  
22 data base of any county or even to examine the physical security of any county's election  
23 computer.

24 The Arizona Secretary of State's Office does not examine any election software. They  
25 simply take the word of the vendors and rely on approval of the software by the federal Election  
26

1 Assistance Commission (EAC). The federal commission in turn relies on an examination  
2 conducted by a private company paid by the software company itself that defines in the contract  
3 what they may examine.

4 Pima County's GEMS software was examined by a company named Ciber. The contract  
5 between Ciber and Diebold did not request that the software be examined for security and it was  
6 not. Not only was it not examined for security but Ciber was later determined to have done such  
7 a poor job that they were prohibited from future software certifications. Ciber then claimed that  
8 Diebold had lied to them by claiming that a key part of their software was "COTS," or off-the-  
9 shelf unchanged software, when in fact it was not. Furthermore, GEMS could not properly be  
10 certified because it includes legally prohibited code.

12 The subsequent examinations by the State of California and others demonstrated that the  
13 private GEMS software is unsecurable.

#### 14 **F. Pima County Cannot Be Trusted**

15 Pima County has demonstrated through many separate ways that it cannot be trusted to  
16 conduct an election without rigorous checks at all stages. There is nothing surprising about that  
17 conclusion, as banks have learned they need adequate procedures and checks to protect the  
18 currency in their vaults.

20 1) John Moffatt provided the clearest example that even the most stringent  
21 protective procedure may easily be evaded by Pima County when he walked into the Clerk's  
22 Office of the Pima County Superior Court and walked out with the box containing the  
23 Democratic Party's copy of the database contrary to Court Order. He proved that this court's  
24 vault was not secure.

25 Moffatt's demonstration of hubris was stunning, and apparently approved by his  
26



1 Supervisor. The full story is as follows:

2           During the “database” lawsuit the parties agreed that two copies of the database could be  
3 made and held securely in the court’s own vault to await the outcome of the case. The two  
4 copies were made and stored on new hard drives that were placed in a box that was securely  
5 sealed with appropriate signatures and ceremony.

6           The box was then carried by a Pima County Sheriff Department deputy accompanied by  
7 lawyers to the Pima County Clerk’s Office to be securely held in its vault.

8           An 8 ½ by 11 inch Court Order was taped to the top of the box entirely covering the top.  
9 The order simply said that the box could only be opened pursuant to a Court Order in the future  
10 and only in the presence of both the County’s representative and the Democratic Party’s  
11 representative.  
12

13           The Democratic Party won the lawsuit but continued legal issues delayed opening the  
14 box. Meanwhile, the Democratic Party publicly explained that it wanted to build a computer  
15 program to examine the database. Pima County, through John Moffat, started to build their own  
16 program for a similar analysis. Their program had not been completely built when the court  
17 ruled that the parties could pick up their database at the same time. John Moffatt immediately  
18 walked into the Clerk’s Office and was permitted to walk out with the box with the Order  
19 preventing him from doing so taped to the top of the box. He was not required to so much as  
20 sign his name. No document recorded his presence or act in violation of the parties agreement  
21 and the Court Order.  
22

23           John Moffatt claims to have kept the box next to his desk. Meanwhile he and Pima  
24 County engaged in an elaborate negotiation with the Democratic Party over the time when and  
25 how the boxes could be picked up at the Clerk’s Office, while all along the box was in his  
26

1 office.

2 As if that demonstration of power was not enough Moffatt, claimed that the Democratic  
3 Party's lawyer must have picked up the box.

4 When the Democratic Party learned what Moffatt had done its representatives went to  
5 the Clerk's Office, whereupon Moffatt walked in from his office proudly carrying the box he  
6 had purloined from the vault.

7  
8 The entire event is a concrete example of why a system must be put in place by the court  
9 that does not rely on honesty, good faith, or trust.

10 2) Noel Day is a former employee of the Pima County Election Division. He is an  
11 American Indian who worked with our county's tribes. One day he returned from the Tohono  
12 O'dham Nation earlier than expected following an election and discovered Election Division  
13 employees Mary Martinson and Romelia Romero at the Election Division warehouse with  
14 sealed ballot bags open and ballots on the table where they were working.

15 State law and the Secretary of State procedural manual prohibits the opening of ballot  
16 bags without notice to political party observers who were not notified.

17  
18 3) Pima County utilizes a "ballot-on-demand" system that permits its Election  
19 Division to print ballots they choose at any time. The existence of that system provides another  
20 method of rigging elections as they can demand additional ballots as they choose.

21 4) Pima County was ordered by Judge Michael Miller to turn over to the  
22 Democratic Party its election database. Suspiciously, the 2006 Primary Election .mdb file was  
23 missing. That election file included the election defeat of Ted Downing, who had been a strong  
24 and effective critic of the Election Division.

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1 **XV. Prospective Relief Sought**

2 The graphic scanning of all ballots cast and the provision of those images to the public  
3 would prevent the fraudulent counting of votes. Such a process is relatively inexpensive. It  
4 must be done utilizing procedures to preserve the chain of custody of the ballots.

5 **Legal Theory**

6 The Arizona Court of Appeals in its Memorandum decision discussed the legal theory of  
7 the Libertarian Party. The central claim is that A.R.S. § 16-673 does not adequately protect the  
8 purity nor does it ensure the fairness of our elections as required by Article II, § 12 of the  
9 Arizona Constitution. Hence, there is not an adequate remedy at law to protect the integrity of  
10 future elections.  
11

12 The Libertarian Party will prove past harm as an element in establishing its entitlement  
13 to prospective injunctive relief to prevent a future reoccurrence that would cause harm to the  
14 party and to the public at large.

15 The election system in Pima County is so “fraud friendly” without recourse by our  
16 citizens or their political parties that the court must protect the purity of elections even without  
17 definitive proof of past fraud.  
18

19 The destruction of evidence by Pima County alone requires an inference of fraud  
20 pursuant to the authority and logic of State v. Willits, 96 Ariz.184, 393 P.2d 274 (1964).

21 The Board of Supervisors’ discussions with counsel in the Democratic Party cases are  
22 not privileged under the crime fraud exception to the attorney-client privilege.

23 **Constitutional Provisions**

24 Article 2 § 1 of the Arizona Constitution;

25 Article 2 § 2 of the Arizona Constitution;  
26

- 1 Article 2 § 3 of the Arizona Constitution;  
2 Article 2 § 21 of the Arizona Constitution;  
3 Article 2 § 32 of the Arizona Constitution;  
4 Article 2 § 33 of the Arizona Constitution;  
5 Article 7 § 7 of the Arizona Constitution;  
6 Article 7 § 12 of the Arizona Constitution;  
7 Article 1 § 4 of the U. S. Constitution;  
8 Article 4 § 4 of the U. S. Constitution.

9  
10 **Witnesses**

11 The counter claimant expects to call the following persons at trial.

- 12 1. **Robert Evans, Jr.** is retired from employment at the Pima County Elections  
13 Division. He is expected to testify about the regular practice in the Election  
14 Division of printing vote tallies before the polls close on election day. He may  
15 testify about Bryan Crane taking home with him during elections compact disc  
16 (CD) copies of the election database. Mr. Evans has been deposed in another  
17 case about some matters relevant to this case and is expected to testify consistent  
18 with that deposition and his trial testimony before Judge Miller. He may testify  
19 regarding the operation of GEMS and activities of the election warehouse. He  
20 may be deposed in depth about his experiences and the operation of the Election  
21 Division.
- 22 2. **Bryan Crane**, the operator of the RTA election computer. He learned how  
23 to program the Epson memory cards used in the Diebold optical scan machines  
24 with the “Crop Scanner” machine purchased before the RTA election by Pima  
25 County. Mr. Crane may explain his actions and process during the RTA election  
26 as well as his normal process.
- Mr. Crane may explain the disappearance of the key evidentiary tape from  
the Secretary of State that Brad Nelson personally returned to him. He may  
testify to the instructions he received from his bosses regarding the RTA and  
office security issues.
3. **Zbigniew Osmolski**, c/o Risner & Graham, is expected to testify regarding the  
statements made to him by Bryan Crane concerning his rigging of the RTA  
election at the instruction of his bosses.

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4. **James Barry**, 4102 E. Paseo Grande, Tucson, Arizona 85711, 327-8097, special assistant to the County Manager Chuck Huckelberry, will testify concerning his computer analysis of each precinct historical vote in prior bond elections and his special project working for Chuck Huckelberry on the RTA. Mr. Barry also worked as a consultant for the RTA-Yes Committee and may describe the nature of his private employment in addition to his public employment. Other issues or areas of testimony may arise after deposition.
5. **C.H. Huckelberry**, Pima County Administrator, will testify about his management direction to Brad Nelson, John Moffatt, Martin Willett, and James Barry concerning election issues or the RTA. He will also describe his knowledge of the election system in Pima County and the Board of Supervisors involvement in election issues and the RTA. He may testify about the various changes in security he has caused and the manner and content of his supervision of the election division.
6. **Isabel Araiza**, is expected to testify concerning the areas in which she has previously testified and the management, security activities and policies of the Election Division.
7. **Chester Crowley**, is expected to testify concerning the areas in which he has previously testified and the management, security, activities and policies of the Election Division. He may also testify about the election warehouse where he worked.
8. **Mary Martinson**, may testify about her job duties at the Election Division and her relationship with Brad Nelson. She is expected to testify about the packing of the RTA boxes after the election and the normal procedures for that task. She may testify about her observations in the computer room and procedures at the warehouse.
9. **Romelia Romero**, is a Pima County Election Division employee. She is expected to testify about the handling of the RTA ballots and poll tapes. She is expected to testify concerning the policies and operation of the Election Division.
10. **Ted Downing**, 1402 E. Kleindale Rd., Tucson, Arizona 85719, (520) 621-2025. Ted Downing is a former member of the Arizona Legislature who is expected to testify about his observations at the Election Division on May 16, 2006.
11. **Robert Gilby**, 3027 N. Gaia Place, Tucson, Arizona 85745, (520) 743-9153. Mr. Gilby is a foundational witness to a couple of photographs he took at the Pima County Election Division on May 16, 2006. Pima County previously deposed him for several hours with several lawyers present. We think everything relevant about the photographs was likely disclosed during those hours of examination.

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12. **Donna Branch-Gilby**, 3027 N. Gaia Place, Tucson, Arizona 85745, (520) 743-9153. Donna Branch-Gilby is a former Chair of the Pima County Democratic Party. She may testify about her observations at the Election Division on May 16, 2006 and her request to be able to accompany Jim March and Brad Nelson to look at the election computer and to see what cables were attached to the computer.

13. **Larry Bahill**, 3542 N. Wilson Ave., Tucson, Arizona 85719, 323-2430. Mr Bayhill is a former Pima County Election Director who may testify about the procedures and practices during his tenure.

14. **John Moffatt**, 2365 E. Edison St., Tucson, Arizona 85719, 740-8463. Dr. Moffatt is expected to testify about his testing and other work on the RTA database and the Pima County election computer. Dr. Moffatt will testify about his work with Chuck Huckelberry and the various instructions he received and reports he provided to Mr. Huckelberry. He will testify regarding Jim March's and the Democratic Party's efforts to learn who unlawfully, printed a pre-election vote tally in the 2006 general election. He will describe how and why he violated a court order in retrieving the election computer database from the vault of the Pima County Superior Court. Dr. Moffatt is expected to testify in accord to his past and future depositions. He may testify about his involvement or direction of various investigations.

15. **Brad Nelson**, c/o Pima County. Mr. Nelson is the Pima County Election Director. He is expected to testify about procedures and practices and their changes over the years. He may testify about his receipt of pre-election vote tallies, his permission to Bryan Crane to take CD's of the election database home with him. He will testify about his relationship with Chuck Huckelberry, James Barry and John Moffatt. He may testify about his knowledge of Pima County's election computer system and the security risks inherent in that system.

16. **F. Ann Rodriguez**, Pima County Recorder, 115 N. Church Ave., Tucson, Arizona 85701, 740-4350. Ms. Rodriguez or other person from her office may testify about their receipt of election materials from the Arizona Secretary of state and their turning those materials over to the Election Division.

17-20. **John Brakey**, 5947 S. Placita Picacho del Diablo, Tucson, Arizona 85706, 578-5678.

**James March**, 5947 S. Placita Picacho del Diablo, Tucson, Arizona 85706, (916) 370-0347.

**Michael ("Mickey") Duniho**, 1590 N. Saddleback Ave, Tucson, Arizona 85715, 731-3157.

**Thomas W. Ryan**, 9115 E. Sierra St., Tucson, Arizona 85710, 722-1796.

Pima County has deposed these four computer experts and election procedure

1 experts for approximately four hours each with four lawyers from Pima County  
2 present during the “database” lawsuit. Michael Duniho, John Brakey and  
3 Thomas W. Ryan testified at the database trial. They are expected to testify  
4 regarding the same issues as were thoroughly explored at those depositions. New  
5 opinions will be disclosed. Michael Duniho, Thomas W. Ryan and John Brakey  
6 have additionally made declarations or affidavits that are of record in the election  
7 cases with Pima County.

#### 8 **Persons Who May Have Knowledge or Information**

- 9 1. **Ramon Valadez**, 130 W. Congress, Tucson, Arizona 85701, (520)740-8126. Mr  
10 Valadez is a member of the Pima County Board of Supervisors. He is a member  
11 of the RTA board and may have been a member during the period of the RTA  
12 election and during the various lawsuits concerning election related public  
13 records. Mr. Valadez is expected to have information about the role of James  
14 Barry regarding the RTA and his various consultations. He is aware of the Board  
15 of Supervisors’ motivations for the passage of the RTA. He is aware of the  
16 coordination between the RTA board, its support group, Chuck Huckelberry and  
17 the Board of Supervisors and the boards involvement in the various lawsuits.
- 18 2. **Sharon Bronson**, 130 W. Congress, Tucson, Arizona 85701, (520) 740-8051.  
19 Sharon Bronson is a member of the Pima County Board of Supervisors and was a  
20 member during the period of the RTA election. She is one of the persons who  
21 has the legal responsibility to conduct all elections in Pima County and should  
22 have information about the method and manner that the board carries out its  
23 responsibilities. She supported the RTA and should have relevant information  
24 about the motivation and actions of the board in support of that election. She  
25 should have information about the Board of Supervisors handling of the various  
26 law suits filed by the Democratic Party.
3. **Richard Elias**, 130 W. Congress, Tucson, Arizona 85701, (520) 740-8126. Mr.  
Elias should have information concerning the same subjects as Sharon Bronson.
4. **Martha Durkin**, 1010 E. 10<sup>th</sup> Street, Tucson, Arizona 85719, (520) 225-6040.  
Ms. Durkin was an Assistant County Manager at one time and supervised the  
Election Division. She may have relevant information about the operation of the  
division during that period of time.
5. **Richard Harding**. Mr. Harding is a former employee of the Election Division  
and may have information about the operation of the division and security  
changes made by Brad Nelson before the RTA election.
6. **Larry Bahill**, 3542 N. Wilson Ave, Tucson, Arizona 85719, (520) 323-2430.  
Mr. Bahill was formerly the Election Director of Pima County for a number of  
years. He has information about the procedures of the office during his term and

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various requirements of law as it related to his work.

7. **Bryan Latches**, c/o Iron Mountain Inc. He should have information about the storage of the RTA ballots.
8. **Runbeck Election Services, Inc., 2404 W. 14<sup>th</sup> St., #110, Tempe Arizona 85281.** This Maricopa County business printed the RTA ballots and may have important information about the ballots and their security protocol.
9. **Bill Doyle of Elections Operations Services (EOS)**, Glendale, Arizona. Mr. Doyle owns a company that programs the Diebold GEMS database for nine Arizona counties. He should have valuable information about the security of that process and the technical capabilities of the various counties.
10. **Peter Zimmerman and Carol Zimmerman**, Zimmerman Public Affairs, 425 N. Tucson Blvd. Tucson, Arizona 85716, 798-0900. Zimmerman & Associates were hired to promote the RTA and conducted extensive polling and fund raising. They worked with James Barry. They should have important relevant information.
11. **Carolyn Campbell**, c/o Coalition for Sonoran Desert Protection, 300 E. University Blvd., #120, Tucson, Arizona 85705. Ms. Campbell was a co-chair of the RTA YES Committee with Lawrence Hecker. The two co-chairs should relevant information about the campaign and the involvement of county personnel.
12. **Lawrence Hecker**, 405 W. Franklin St., Tucson, Arizona 85701, 798-3803. Mr. Hecker should have information related to the same issues as Ms. Campbell, his co-chair.
13. **Noel Day**, his current address is not known. He has information concerning the violation of ballot security by the election division. He is a former employee of the Election Division.
14. **Thomas Kalesinskas**, is a Pima County employee who formerly worked as an assistant to Bryan Crane. Mr. Kalesinskas may testify in English or Lithuanian about his observations of the election division during his employment. He is believed to have extensive information.
15. **Office of the Secretary of State.** The Office of the Secretary of state may explain why they mailed back to Pima County the security tape of the RTA election computer for the first time ever following a request from Pima County.
16. **Martin Willett**, Chief Deputy County Administrator, 130 W. Congress, 10<sup>th</sup>



1 Floor, Tucson, Arizona 85701, 740-2740. Mr. Willett may have an oversight  
2 role of the Election Division and the various efforts of Pima County to prevent  
disclosure of election information.

3 Potential additional expert witnesses. It is not known if Pima County will attempt to  
4 deny the security risks of its computer system. The following persons may have technical  
5 information to provide.

6 Dr. David Jefferson, Ph.D, a declaration from Dr. Jefferson has previously been filed.  
7 He is one of the authors of a report entitled "Security Analysis of the Diebold Access Basic  
8 Interpreter," dated February 14, 2006.

9 Ariel J. Feldman, J. Alex Halderman and Edward W. Felten of Princeton University,  
10 Princeton, New Jersey 08544. Those three individuals authored a report concerning their  
11 independent study of Diebold Accuvote-TS voting machine, including its hardware and software.

12 Dr. Richard R. Lee, Ph.D has provided a declaration concerning the Diebold company's  
13 fraud. The analysis by James March entitled "The Fraud Behind Diebold's Touchscreen  
14 Certifications" has as an attachment Dr. Lee's declaration. The UHL citation is listed in this  
15 disclosure.  
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18 **Documents**

19 Pima County has been a defendant in four election lawsuits with the Pima County  
20 Democratic Party related to the issues in this case.

21 The depositions taken in that case are already known to the defendant Pima County. The  
22 Libertarian Party intends to utilize all of those depositions and requests that the court take  
23 judicial notice of its own files in C2007-2073, and C2008-8876, and C20070516. The  
24 depositions include the following:  
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	<u>NAME</u>	<u>CASE NUMBER</u>	<u>DATE</u>
1			
2	Isabel Araiza	C2007- 0516	10/26/07
3	James Barry	C2007- 2073	11/14/07
4	Bryan Crane	C2007- 2073	7/10/07
5	Bryan Crane	C2007- 0516	2/27/07
6	Bryan Crane	C2007- 0516	3/20/07
7	Bryan Crane	C2007- 2073	11/1/07
8	Chester Crowley	C2007- 2073	11/13/07
9	Kathryn Cuvlier	C2007- 2073	11/6/07
10	Michael A. Duniho	C2007- 2073	11/9/07
11	Martha Durkin	C2007- 2073	11/27/07
12	Paul Eckerstrom	C2007- 2073	11/19/07
13	Robert Evans	C2007- 0516	10/26/07
14	Chris Gniady	C2007- 2073	11/19/07
15	Chuck Huckelberry	C2007- 2073	11/15/07
16	Thomas Kalesinskas	C2007- 0516	2/27/07
17	Merle King	C2007- 2073	11/8/07
18	James March	C2007- 2073	11/9/07
19	Mary Martinson	C2007- 2073	11/14/07
20	John Moffatt	C2007- 2073	7/9/07
21	Brad Nelson	C2007- 0516	2/28/07
22	Brad Nelson	C2007- 2073	11/2/07
23	Brad Nelson	C2007- 2073	8/24/07
24	Deborah Rainone	C2007- 2073	11/27/07
25	Romelia Romero	C2007- 2073	11/13/07
26	Thomas W. Ryan	C2007- 2073	4/7/08
	Thomas W. Ryan	C2007- 2073	11/8/07

17 **Reports and Files**

18 <http://www.blackboxvoting.org/BBVreport.pdf> – the original “Leon County report” covering the  
19 hackability of the Diebold optical scan machines very similar to what are used in Pima County.  
20 Primary authors are Bev Harris of BlackBoxVoting.org and Harri Hursti. Date: July 4<sup>th</sup> 2005.  
Among other issues, this is the report that revealed the possible illicit uses of the “CropsScanner”.

21 [www.blackboxvoting.org/BBVtsxstudy.pdf](http://www.blackboxvoting.org/BBVtsxstudy.pdf) – Emery County UT study of the Diebold  
22 touchscreens, with special emphasis on the TSx with “paper trail” same as used in Pima. Hursti  
writing for BBV again; date is May 11<sup>th</sup> 2006.

23 <http://citpsite.s3-website-us-east-1.amazonaws.com/oldsite-htdocs/voting/> - the Princeton study  
24 of the Diebold touchscreens, by Ed Felton, Sept. 13<sup>th</sup> 2006.

25 [http://www.eac.gov/assets/1/Documents/Formal\\_Investigation\\_ESS\\_Unity\\_3200\\_FINAL\\_12.20\\_11.pdf](http://www.eac.gov/assets/1/Documents/Formal_Investigation_ESS_Unity_3200_FINAL_12.20_11.pdf) – this document shows that a recent-model ES&S precinct optical scan system made it  
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1 out into the field with horrendous flaws despite being “federally certified”.

2 [http://www.votetrustusa.org/pdfs/California\\_Folder/DieboldReport.pdf](http://www.votetrustusa.org/pdfs/California_Folder/DieboldReport.pdf) – This report by  
3 computer scientists David Wagner, David Jefferson and Matt Bishop was written for the  
4 California Secretary of State's office and published February 14, 2006. It covers a pattern of  
5 illegality wherein “interpreted code” was used in the Diebold systems, and what the security  
6 implications are. “Interpreted code” is banned under the federal “Voluntary Voting System  
7 Guide” (VVSG), the rulebook under which voting systems are certified. In other words, we see  
8 a security violation by the vendor (Global/Diebold/etc.) and the test labs that approved this  
9 problem. It also explicitly confirms the Black Box Voting study of May 11<sup>th</sup> 2006 mentioned  
10 above.

8 <http://www.sos.ca.gov/voting-systems/oversight/top-to-bottom-review.htm> – this is the top-level  
9 page of the California “top to bottom” review of voting systems. The technical reviews were  
10 conducted by computer scientists with the University of California computer science  
11 departments.

11 <http://www.blackboxvoting.org/wincefraudwalkthrough.pdf> – an overview of Diebold's  
12 Windows CE-related fraud, by Jim March. This document shows that Diebold deliberately  
13 subverted the federal software certification process by declaring code that they had modified,  
14 “COTS” (“Commercial Off The Shelf”). This is a companion to the declaration of Dr. Richard  
15 Lee below.

14 <http://www.blackboxvoting.org/rrlee-wincedeclaration.pdf> – the declaration of Dr. Richard Lee.  
15 Dr. Lee is well familiar with the configuration and design of “Windows CE”.

16 <http://www.gao.gov/new.items/d05956.pdf> – the 2004 GAO report.

17 Dated this 12<sup>th</sup> day of January, 2012.

18 Ralph E. Ellinwood  
19 **ELLINWOOD, FRANCIS & PLOWMAN, LLP**

20 **RISNER & GRAHAM**

21  
22 \_\_\_\_\_  
23 William J. Risner  
24 *Attorney for Defendant*

24 **COPY** of the foregoing mailed  
25 this 12<sup>TH</sup> day of January, 2012, to:

26 Ralph E. Ellinwood  
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