DAVID J. CANEPA
President, Board of Supervisors
County of San Mateo

SHAMANN WALTON
President, Board of Supervisors
City & County of San Francisco

BY EMAIL AND REGULAR MAIL
August 11, 2021

The Honorable Shirley Weber
Secretary of State
1500 11th Street
Sacramento, CA 95814

Attn: Deputy Secretary of State Susan Lapsley (SLapsley@sos.ca.gov), NaKesha Robinson (Nakesha.Robinson@sos.ca.gov)

Re: PETITION FOR RULEMAKING TO ADOPT REGULATIONS GOVERNING VOTING SYSTEM PILOT PROGRAMS AS REQUIRED IN ELECTIONS CODE SECTION 19209 (SB 360, PADILLA, 2013).

Dear Secretary of State Weber:

Pursuant to California Government Code sections 11340.6 and 11340.7, in our capacities as President of the San Mateo County Board of Supervisors and President of the San Francisco County Board of Supervisors, we respectfully petition the Secretary of State ("Secretary") to adopt regulations required under Section 19209 of the Elections Code for the experimental use of a voting system in a pilot program held in one or more precincts at a single election. As provided for in the above-cited Government Code sections, we are providing below (A) the reason for the request and the authority of the Secretary to take the action requested; and (B) the substantive nature of the regulation requested, including a draft of the proposed regulation.

Our interest is in our counties being able to use a nonproprietary, open-source voting system in a pilot program, which is exactly the kind of pilot program SB 360 was enacted to allow. As

described below, the absence of regulations is entirely preventing implementation of a law that is more than seven years old.

A. Applicable Law.

The Elections Code[1] provisions for voting system pilot programs that serve as the basis for this petition were adopted as part of SB 360 (2013-2014), which was introduced on February 20, 2013 and approved by the Governor on October 5, 2013. The Code sections relevant to this petition are section 19006 and 19209.

Section 19006 of SB 360, with emphasis supplied, expressly embraces not once but three times a legislative intent to facilitate open source voting systems, including pilot programs of such. The statutes provide in pertinent parts that, "It is the intent of the Legislature that":

- *"…**(c) The Secretary of State study and encourage the development of voting systems that use nonproprietary source code and that are easy to audit."***
- "(***e) California receive the benefits of the publicly funded development of a nonproprietary voting system in the state."***
- ***(f) "A local jurisdiction may use available public funds to research and develop a nonproprietary voting system that uses disclosed source codes, including the manufacture of a limited number of voting system units, for use in a pilot program or for submission to the Secretary of State for certification."***

The Legislature was right to embrace testing open-source voting systems. An open-source paper ballot voting system has many potential benefits to our counties and other counties in California. Once certified, the software for an open-source voting system would be free to use and could use less expensive off-the shelf hardware. This has the potential to reduce significantly the costs associated with purchasing, replacing and maintaining voting systems as compared to proprietary voting systems. Even more importantly, as former Secretary of State Alex Padilla said, *"Open source is the ultimate in transparency and accountability for all."*

Section 19209(b) states that, *"(b) The governing board, without formally adopting a voting system, may provide for the experimental use of the voting system in a pilot program held in one or more precincts at a single election or, in the case of a special election, the special primary election and the special general election, ..."*

We hope to pursue such a pilot program for our counties, ideally for the November 8, 2022 election. We expect that our counties should be able to meet all of the requirements listed in Section 19209(b)(2) to run a pilot program in a handful of precincts, which includes the requirement that the system *"(A) Uses only software and firmware with disclosed source code, except for unmodified commercial off-the-shelf software and firmware."*

[1] Unless otherwise noted, all "section" references hereinafter are to the Elections Code.

However, there is one requirement that our counsel advises requires action by the Secretary before we can institute such a pilot project; a project exactly congruent with legislative intent. Section 19209(b)(2)(C) provides that the pilot voting system must:

> *19209(b)(2)(C) Meet[] the requirements of the regulations adopted by the Secretary of State pursuant to subdivision (g).*

Section 19209(g) spells out the requirement for the Secretary of State to adopt and publish just such regulations:

> *19209(g) A voting system pilot program shall not be conducted in a legally binding election without the prior approval of the Secretary of State.* ***The Secretary of State shall adopt and publish regulations governing voting system pilot programs.*** (Emphasis added.)

Notwithstanding the requirement in subdivision (g) that the Secretary promulgate regulations, and notwithstanding subdivision (b)(2)(C)'s pre-condition that a pilot project to abide by these regulations, the Secretary has not promulgated such regulations. Simply put: the absence of regulations more than seven years after the effective date of SB 360 is, in effect, serving as an operational veto of a law signed by the Governor, enacted by the Legislature, according to our counsel.[2]

For this reason, our counties will not be able to move ahead until the Secretary adopts the regulations that you are required to by section 19209(g).

Not only are these regulations required to be created by the Secretary of State by law, but knowing their details will be crucial for our governing boards to be able to submit a plan for a pilot program that follows the requirements of Section 19209(b) so that we can be reasonably assured it will meet the Secretary of State's requirements for approval.

B. Proposed Text Of Regulations.

We respectfully propose and request the addition of a new section 20708 of the California Code of regulations of Title 2, Division 7, Chapter 6.1, reading as follows which, as explained in the footnotes, is in significant part lifted from current regulations for certification of new voting systems:

> 20708. Voting System Pilot Programs
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> 1. Pursuant to Section 19209 of the Elections Code, a governing board, without formally adopting a voting system, may apply to the Secretary of State for approval of a plan for the experimental use of a voting system in a pilot program

[2] Curiously, the Secretary approved Los Angeles' County's pilot program plan for its November 5, 2019 election despite the fact it did not meet section 19209(b)(2)(C)'s pre-condition that a pilot project abide by such regulations adopted and published by the Secretary.

held in one or more precincts at a single election or, in the case of a special election, the special primary election and the special general election, by doing the following:

1. No later than nine months before the election at which the pilot program of a voting system is proposed to be conducted, the governing board shall submit to the Secretary of State a plan for the pilot program. The Secretary of State shall approve or reject the plan no later than three months after receipt of the plan.[3]

2. The plan for the pilot program shall include the following:

(A) Information about the applicant, including name, address, telephone number, and business address, if applicable.

(B) Information about the voting system to be used in the pilot program, as listed in paragraphs (3) through (5) below.

(C) Information about the pilot program that is proposed to be conducted, as listed in paragraphs (6) and (7) below.

3. If the voting system will be certified or conditionally approved prior to its use in the pilot program, the information about the voting system to be used in the pilot program shall include a description of how it will be certified or conditionally approved prior to its experimental use.[4]

4. If the voting system will not be certified or conditionally approved prior to its use in the pilot program, the information about the voting system to be used in the pilot program shall include, for each of the following requirements, confirmation that the voting system meets the requirement:

(A) Uses only software and firmware with disclosed source code, except for unmodified commercial off-the-shelf software and firmware.[5]

(B) Meets the requirements of subdivision (b) of Section 19101.[6]

(C) Implements risk-limiting audits.[7]

[3] See, section 19209(d).
[4] See, section 19209(b)(1), which allows pilot programs if "*The voting system is certified or conditionally approved prior to its experimental use".*
[5] See, section 19209(b)(2)(A).
[6] See, section 19209(b)(2)(B).
[7] See, section 19209(b)(2)(D).

5. If the voting system has not yet been certified or conditionally approved prior to submission of the plan, the information about the voting system to be used in the pilot program shall also include each of the following:[8]

(A) Information about the voting system vendor, if different from the applicant, including name, address, telephone number, and business address, if applicable;[9]

(B) Information about the voting system including, but not limited to, software and firmware version numbers;[10]

(C) A signed confidentiality agreement providing the Secretary of State, upon demand, source code for all software and firmware and a working model of the voting system;[11]

(D) A signed letter providing that the Secretary of State may receive all reports, testing documentation and trusted build installation disks directly from an appropriate federal Voting System Testing Laboratory (VSTL) that tested the voting system under the federal Election Assistance Commission's (EAC) or its successor entity's Voting System Testing and Certification process, if available;[12]

(E) Final VSTL test reports, if available, for the voting system;[13]

(F) Documentation showing that the voting system is federally qualified, if available;[14]

(G) A list of all commercial off the shelf (COTS) software, firmware and hardware that is either recommended or required to install, operate, and/or provide maintenance support for the system;[15]

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[8] This section is taken from Regulation 20701 for certification of a voting system, with modifications and additions as described in footnotes for each paragraph. The one paragraph of Regulation 20701 not included here at all is paragraph 17 that requires "All the documentation necessary for the identification of the full system configuration submitted for evaluation and for the development of an appropriate test plan for conducting system certification testing…" This information doesn't seem to be needed because the pilot project voting system would not be going to separate testing by an independent contractor who would need this information.

[9] Same as Regulation 20701(1.1) except only for the voting system vendor if it is different from the applicant (whose info is already required in paragraph 1.2(A).

[10] Same as Regulation 20701(1.2).

[11] Same as Regulation 20701(1.3).

[12] Same as Regulation 20701(1.4) except saying "if available" rather than "if applicable" to clarify that it only must be included if it already has been done, not that it could be required.

[13] Same as Regulation 20701(1.5) except saying "if available" rather than "if applicable" to clarify that it only must be included if it already has been done, not that it could be required.

[14] Same as Regulation 20701(1.6) except saying "if available" rather than "if applicable" to clarify that it only must be included if it already has been done, not that it could be required.

[15] Same as Regulation 20701(1.7).

(H) System configurations, option settings and definition parameters for all software, firmware and hardware (including COTS);[16]

(I) A directory listing of program, data, and support files required to install, configure, operate, and/or provide supplemental support for the voting system. If the voting system uses only software and firmware with disclosed source code, except for unmodified commercial off-the-shelf software and firmware, links to a publicly viewable website should instead be provided from which these files, the source code files, and software licenses governing the files can directly be publicly accessed;[17]

(J) A description of known defects, faults or failures as defined in Elections Code section 19210, outstanding bugs, security vulnerabilities or other limitations of the system and any mitigations for each;[18]

(K) A detailed network diagram of what components are connected or related and how they are connected;[19]

(L) A high-level description of the procedures for casting and counting ballots using the voting system;[20]

(M) Photographs of the voting system;[21]

(N) A list of jurisdictional users who use the exact version of the voting system being submitted;[22]

(O) A list of California jurisdictional users who are using a predecessor version of the voting system being submitted;[23]

(P) If the voting system vendor is different from the applicant, all financial relationships between the voting system vendor and the manufacturer, distributor, or retailer of the various components comprising the voting system;[24]

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[16] Same as Regulation 20701(1.8).

[17] Same as Regulation 20701(1.9), but adds the requirement for disclosed source code pilots to provide links to a publicly viewable website for all these files. This is important for disclosed source system plans to verify that the system actually uses publicly-available disclosed source code and to provide the Secretary of State with immediate access for evaluation of the pilot plan if needed.

[18] Same as Regulation 20701(1.10).

[19] Same as Regulation 20701(1.11).

[20] Similar to Regulation 20701(1.12), but just asking for a high-level description of how voters vote and how the votes are counted using the system, as opposed to requiring "Use Procedures for the voting system" to allow separate testing by an independent contractor.

[21] Same as Regulation 20701(1.13).

[22] Same as Regulation 20701(1.14).

[23] Same as Regulation 20701(1.15).

[24] Same as Regulation 20701(1.16), but only required when the pilot program uses an outside voting system vendor, so we're not asking counties to list all their financial relationships.

(Q) A description of past activities or testing activities involving use of the voting system by individuals with disabilities, including nonvisual accessibility for the blind and visually impaired.[25]

(R) Any additional information the Secretary of State may request on an as-needed basis from the applicant.[26]

(S) Any additional information or testing reports the applicant believes may be useful in evaluating the plan. [27]

6. The information about the pilot program that is proposed to be conducted shall describe the number of voting system units deployed in the pilot program, limited to the number necessary to test and demonstrate the capabilities of the voting system in a limited number of precincts or locations, including a prudent number of reserve units to ensure that sufficient working units will be available to conduct the pilot program. In no event shall the number of voting system units exceed 50 percent of the estimated number of units that would be required for full deployment of the voting system at every polling place and early voting site in a statewide election throughout the jurisdiction. Capabilities that may be taken into account in determining the number of voting system units reasonably necessary to test and demonstrate the capabilities of the voting system include, but are not limited to, all of the following:[28]

(a) The capability of the voting system to accommodate voting in all languages in which the jurisdiction is required to provide ballots under applicable state and federal laws.

(b) The capability of the voting system to accommodate voting by persons with a broad range of physical and cognitive disabilities, as required by applicable state and federal laws.

(c) The current and projected number of voting-eligible individuals in the jurisdiction.

(d) The geography and distribution of the population in the jurisdiction.

7. The plan shall also include confirmation that the governing board will comply with the risk-limiting audit requirements of Section 19209(e) and that upon completion of the pilot program, the governing board shall notify the Secretary of State in writing of any defect, fault, or failure of the

[25] This is not part of Regulation 20701 but may be important for a pilot project to show how it has been tested for use by individuals with disabilities.
[26] Same as Regulation 20701(1.18).
[27] This is not part of Regulation 20701 but allows the applicant to provide additional information that could be helpful to evaluation of the pilot project, such as other kinds of testing reports, etc.
[28] See, section 19209 (c).

hardware, software, or firmware of the voting system or a part of the voting system, as required by Section 19209(f).

We would like the option to pursue such a pilot program for the November 8, 2022 General Election. Whatever you can do to ensure that regulations are adopted and published with sufficient time for us to develop, adopt, and submit such a plan would be greatly appreciated. A publication date of November 8, 2021, which would be three months before the nine-month deadline of February 8, 2022, would be ideal to leave adequate time for our counties to prepare and submit a safe and secure plan in time.

We observe that our counties are currently prevented from conducting an SB 360 pilot program for the November 8, 2022 election, as intended by the Legislature. Correcting that by bringing the Secretary into compliance with the seven-year old mandate to promulgate regulations should make this request important enough to merit emergency regulations, if necessary, for them to be adopted and published by November 8th of this year.

Pursuant to the Government Code, please respond to this petition within 30 days. Thank you, in advance, as we move to implement this important regulation to allow our counties and other counties to submit plans for a pilot program of an open-source voting system and finally effectuate the intent of the Legislature.

Respectfully submitted:

David Canepa
President, San Mateo County Board of Supervisors

Shamann Walton
President, San Francisco County Board of Supervisors