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NELSON CHU PAVLOSKY and LUKE
11 THOMAS SMITH

12 UNITED STATES DISTRICT COURT

13 FOR THE NORTHERN DISTRICT OF CALIFORNIA

14 ONLINE POLICY GROUP, NELSON CHU)
PAVLOSKY, and LUKE THOMAS SMITH)

15 Plaintiffs,)

16 v)

17 DIEBOLD, INCORPORATED, and DIEBOLD)
18 ELECTION SYSTEMS, INCORPORATED,)

19 Defendants.
20

No.

DECLARATION OF LUKE THOMAS
SMITH IN SUPPORT OF PLAINTIFFS'
APPLICATION FOR TEMPORARY
RESTRAINING ORDER AND FOR
PRELIMINARY INJUNCTION

21
22 I, Luke Thomas Smith, declare under penalty of perjury that the following is true and
23 correct:

24 I am Luke Thomas Smith, a plaintiff in the above-captioned case. My address is 500
25 College Avenue, Swarthmore, Pennsylvania 19081
26

27 2. I am a second-year undergraduate student at Swarthmore College in Pennsylvania,
28 planning to major in Computational Linguistics/Computer Science am especially interested in

1 the way humans use technology to connect to each other, and form communities.

2 3. I am one of two founding members of the Swarthmore Coalition for the Digital
3 Commons ("SCDC"). The organization was started by myself and Nelson Chu Pavlosky. We
4 started the organization in September, 2003. The group was inspired by the Electronic Frontier
5 Foundation, Lawrence Lessig, Creative Commons, and the Free Software Foundation. Our
6 organization is dedicated to promoting free and open-source technological standards, because we
7 believe that democracy depends on the public being well-informed, particularly about the effect of
8 technology on government, and to encourage Internet users to reclaim the Internet as a democratic
9 medium for the dissemination of information. Our group works to build awareness of the value of
10 nonproprietary information and public discourse
11

12 4. The organization operates a website on the Swarthmore computer network. The website
13 describes the organization's goals and mission, serves as a critical means for notifying members of
14 upcoming meetings, and contains updates on the organization's activities and projects. SCDC uses
15 the website to communicate about projects promoting democracy as it relates to technology, and to
16 convey this information to the general public. Swarthmore provides Internet connectivity to
17 students as a service included in Swarthmore's \$36,000 a year tuition fee
18

19 5. Diebold is a company that makes electronic voting machines. On October 21st, 2003, our
20 organization posted on our web page an email archive that appeared to be from Diebold employees
21 discussing problems with the company's electronic voting machine. Our goal was to show the
22 public the serious and deep-seated problems with the Diebold machines, and we posted the emails
23 on SCDC's website as part of our mission to educate the public about the need for a transparent
24 voting system
25

26 6 One day later, the college administration told us that they had received a letter from
27 Diebold claiming that we were infringing their copyright by posting this information. The school
28

1 disabled Internet access to the archive on October 23rd.

2 7. I first heard about the Diebold email archive from friends active in another Swarthmore
3 student group, Why-War? I was told that the emails contained information on, among other topics,
4 the (lack of) accuracy, security and accountability of Diebold's electronic voting machines widely
5 used in the United States. Many of the emails are themselves copies of news articles that mention
6 Diebold or other e-voting machine manufacturers. The Why-War? website hosted the email archive
7 between October 8th and 10th, and I downloaded a copy from that site

8 8. The Diebold email archive raised grave concerns regarding the reliability and integrity
9 of Diebold's voting system. The archive included the following quotes:
10

11
12 I have become increasingly concerned about the apparent lack of concern over the
13 practice of writing contracts to provide products and services which do not exist and
14 then attempting to build these items on an unreasonable timetable with no written
15 plan, little to no time for testing, and minimal resources. It also seems to be an
accepted practice to exaggerate our progress and functionality to our customers and
ourselves then make excuses at delivery time when these products and services do
not meet expectations.

16 [source: <http://chroot.net/s/lists/announce.w3archive/200110/msg00001.html>]

17 The archive showed Diebold's inability to account for reporting impossible results, as in the 2000
18 Florida Presidential election

19
20 I need some answers! Our department is being audited by the County. I have been
21 waiting for someone to give me an explanation as to why Precinct 216 gave Al Gore
22 a minus 16022 when it was uploaded. Will someone please explain this so that I
have the information to give the auditor instead of standing here "looking dumb".
23 [source: <http://chroot.net/s/lists/support.w3archive/200101/msg00068.html>]

24 Finally, the archive showed Diebold's machines as seriously flawed in their ability to accurately
25 process votes

26
27 28 of 114 or about 1 in 4 precincts called in this AM with either memory card issues
28 "please re-insert", units that wouldn't take ballots - even after recycling power, or
units that needed to be recycled. We returned 7 memory cards, 4 of which we didn't

1 need to, but they were far enough away that we didn't know what we'd find when we
2 got there (bad rover communication).

3 [source: <http://chroot.net/s/lists/support.w3archive/200003/msg00034.html>]

4 9. I immediately recognized the significance of these messages to the SCDC's mission of
5 promoting informed civic participation through transparency and the responsible use of technology.
6 Even before I had heard of the Diebold email archive, SCDC was interested in non-proprietary
7 voting software, and members had discussed doing something about the issue at the first or second
8 meeting. The only way the public can know if the voting technology really works is if they can see
9 how the software works. The archive exposed serious flaws in Diebold voting machines, and the
10 dangers of relying exclusively on a software company to report flaws in their own technology. I
11 felt that the public should know that these machines were flawed, because such problems could
12 potentially affect the outcome of elections. I thought that educating the public about this was a
13 unique opportunity for the SCDC. I wanted people to have a chance to evaluate a system by which
14 many will exercise one of their most fundamental rights - the right to vote.
15

16 10. At some point I was told that Why-War's commercial website host forced them to
17 remove the email archive from their website upon receiving a legal complaint from Diebold
18 Corporation. On October 21, 2003, two individual Swarthmore students posted the documents on
19 the Internet from their personal computers.
20

21 1 On October 21st, SCDC decided to post the email archive on our website. That day,
22 Nelson Chu Pavlosky, two other students, and I were invited to a meeting with the Swarthmore
23 Dean, Bob Gross, for October 22nd. At that meeting, the Dean said that Swarthmore College
24 received a Cease-and-Desist letter from Diebold Corporation. None of the members of SCDC,
25 including myself, had seen the letter in question, but the Dean stated that Diebold's letter referred to
26 an individual student's server posting the email archive, and to links from the SCDC to that server.
27
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1 At the meeting, the administration was not clear about whether or not it would take down SCDC's
2 posts of Diebold archives.

3 12. A few hours after the meeting, I received an email from the system administrator of
4 the student group that hosts the SCDC site saying that they had been instructed by Information
5 Technology Services ("ITS") to remove the files, and had disabled access to them. I first
6 understood that posting the archives was against Swarthmore's policy from ITS's email. After
7 receiving the email, I posted a link to Why-War's website and their copy of the email archives. On
8 or about October 23rd, a Swarthmore student alerted SCDC to the fact that linking to the archives
9 is against Swarthmore's policy, and Neison Chu Pavlosky removed the link. Neither my personal
10 site nor SCDC's website currently displays or links to the archive.

11 13. SCDC is planning a symposium, "Choosing Clarity: Symposium on Voting
12 Transparency" for the week of December 1, 2003. The goal of the symposium is to bring together
13 people from across disciplines to discuss the issue of voting transparency. The symposium will
14 compile recommendations for improvement of the voting process, including the improvement of
15 technical standards for voting machines. Our ability to discuss the significant problems with
16 electronic voting system, problems that could result in erroneous election outcomes and a
17 corruption of our democracy, will be severely curtailed because we won't be able to discuss the
18 Diebold email archive illustrating these problems with symposium guests. Our symposium will not
19 be effective if people are not informed about these serious flaws. Because we cannot link to the
20 archive or distribute or post it for attendees to read, we are effectively prohibited from fully
21 discussing this important matter at the symposium.

22 13. I was seriously concerned that I would be sued by Diebold for making the email
23 archive available. Even though I believe that the public needs to know the information contained
24 in the email archive, the prospect of being sued by a multi-million dollar corporation is extremely
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1 worrisome, given the potential havoc it could wreak by distracting me from my studies and school
2 activities, and potentially derailing my educational, career, and financial goals.

3 14. If I, as an individual, choose to post the email archive or link to it from my own
4 computer, I'm afraid that Diebold could also get the Swarthmore administration to cut off my
5 Internet access, possibly indefinitely, which would hinder my ability to pursue my studies,
6 complete my assignments, or prepare for class.

7
8 15. Diebold's actions have also harmed my experience as a student concerned with the
9 effect of technology on government and society. I am afraid to discuss the Diebold email archive
10 with friends, with other students and with the world at large. I fear that Diebold will come after me
11 and sue me, or pressure the Swarthmore administration to take disciplinary action against me if I
12 discuss the problems with voting technology revealed in the email archive. I feel that my academic
13 freedom and my freedom to discuss the political process and to participate in it – especially as a
14 first-time voter – are seriously hampered.

15
16 16. If SCDC, as a group, posts the email archive or links to it from their website, the group
17 may not be able to get chartered and/or recognized by the Student Council, and thus may lose the
18 possibility of school funding. The website may also be taken off of the Swarthmore network by the
19 administration, hampering communication between the group's members regarding the group's
20 activities, meetings, etc. The general public would not have access to our links and FAQs offered
21 by the website. The administration, via the ITS, can widely block student web servers on the
22 Swarthmore network in order to stop the uploading of the archive, should students choose to move
23 it from server to server. Students would thus be prevented from posting any material to the Internet.

24
25 7. I am very concerned that people need to know about the voting machine flaws discussed
26 in the Diebold email archive, or risk contamination of the electoral process. I fear that these hidden
27 flaws in the voting machines will result in false election outcomes, and may decrease voter
28

1 confidence and participation

2 18. Diebold's letter to Swarthmore prevents me from using the SCDC and its website as a
3 tool for learning and debate about our core mission interest of informing the public about issues
4 that affect citizens' ability to participate in our government and in our society in general.
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6 I declare under penalty of perjury under the laws of the State of Pennsylvania that the
7 foregoing is true and correct and that this declaration was executed in SWARTHMORE
8 Pennsylvania.

9 Date: 2 Nov 2005
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13 LUKE THOMAS SMITH
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