IN THE

SUPREME COURT OF GEORGIA

Garland Favorito, et al

Appellants

Versus

Karen Handel, Secretary of State, et al

Appellees

Docket Number

S09A1367

BRIEF FOR APPELLANTS

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JURISDICTIONAL STATEMENT

This is an action for declarative and injunctive relief. Appellants have challenged the constitutionality of the State of Georgia's almost universal use of Diebold AccuVote TS-R6 electronic touch-screen voting machines as the same are authorized in various sections of the Georgia Election code as they relate to both the United States Constitution and the Georgia Constitution. Therefore, this court and not the Court of Appeals has jurisdiction over this appeal. Georgia Constitution , Article VI, § VI, ¶ II

STATEMENT OF FACTS

The most important single fact in this case is that Georgia's Diebold-supplied voting machines that are being used in almost all elections do not produce independent paper ballots or tangible records at the actual time of voting but rather "report" electronically-compiled, accumulated votes later when called upon to do so. [R.63, p.33] Secondly, the audit facilities of the county and state tabulation servers cannot prevent fraudulent manipulation of the reported results. [R.62, p.74]

In the year 2000 the State of Georgia, under the guidance of its then-Secretary of State, Cathy Cox, began considering how to implement a statewide voting system using electronic-capture equipment that could tabulate and accumulate votes at every level of the elections held in Georgia. The initial

enabling legislation, Act 789 of the 2001 General Assembly, specified that any system to be acquired must produce an independent audit trail of votes cast.

During the voting machine evaluation and selection process, public and official comments were solicited. From the response to these solicitations, Defendants and/or their predecessors, associates and subordinates received numerous, easily verifiable warnings that the problems and shortcomings concerning the proposed usage of certain electronic voting machines were reasonably to be anticipated with the adoption of the system. [R.65, pg 234, 271; R.61, pg 11-12]

Notwithstanding such warnings, and ignoring other verifiable electronic systems on the market, then-Secretary of State Cox promoted and implemented electronic voting by the use of Diebold Accuvote TS-R6 Touch Screen Voting Machines (hereinafter DRE) in Georgia starting in 2002 and continuing through this day. Pursuant to such adoption, the State of Georgia adopted the use of that specific DRE, entered into a contract to acquire and distribute same, and used the new machines to replace the voting systems of Georgia with such DREs at the cost to the taxpayers of Georgia of more than 54 million dollars. [R.65, pg 267- 270]

Through their acquisition of the Diebold equipment, Defendants cannot implement procedures necessary to provide public, reliable audit controls, verification, and recount capabilities comparable to those of optical scan and punch

card systems that were in place in Georgia at the time of the DRE purchase. [R.63 pg 13, 19, 26, 42-43]

The Diebold touchscreen voting system is, in effect, a glorified adding machine.

Appellants asserted their claims in thirteen individual counts {Count Nine having been dropped} which for clarity will be set forth severally in the Argument and Citation of Authorities section below.

Both parties filed Motions for Summary Judgment. In denying Plaintiffs' motion and granting Appellees' motion in its order filed on February 20, 2009, the Fulton County Superior Court, Michael D. Johnson presiding, held that as to all constitutional claims the appropriate level of scrutiny was one of ***rational basis*** rather than ***strict scrutiny*** and that Appellants did not meet their burden of persuasion as to any of their asserted counts. The Court granted Appelees' motion and dismissed all counts of the complaint without a trial. [R. 60].

From that decision Appellants appeal, showing as set forth below that their due process rights were violated when the Court denied their right to trial, when it issued an order containing numerous fact conclusions conflicting with, or unsupported by, evidence in the record, and when it applied the wrong legal standards in its struggle to reach its decision.

ENUMERATION OF ERRORS

Part One: ERRORS OF LAW

1. The Court below erred when failed to recognize that voting is a fundamental right and improperly applied a rational basis test instead of a strict scrutiny test to Counts 5, 12 and 13 of Appellants' claims.

2. The trial court erred when it improperly shifted the burden upon the Appellants to establish their claims.

Part Two: ERRORS OF GENUINE ISSUES OF MATERIAL FACT

3. The Court below erred in denying Appellants' Motion for Summary Judgment and in granting the Appellees' Motion for Summary Judgment as to Counts 5, 12 and 13 in that there were no genuine issues of material fact present in the record that justified such a ruling.

4. The Court below erred in granting the Appellees' Motion for Summary Judgment as to Counts 1, 2, 3, 4, 6, 7, 8,10 and 11 because there were genuine issues of material fact present in the record as to each such Count.

ARGUMENT and CITATION OF AUTHORITIES

STANDARD OF REVIEW

As this appeal is taken from a grant of summary judgment, the Supreme Court has the authority to look upon the entire face of the record *de novo* and is not bound by the findings of the lower court. *Rubin v. Cello Corp.,* 235 Ga App 250 (1998)

Part One: ERRORS OF LAW

With no disrespect to the trial court intended, Appellants note that the order from which this appeal is taken is replete with that court's findings of fact with which Appellants strongly disagree as set forth herein below. Its un-segregated conclusions of law, most of which relate back to the disputed findings, are also scattered throughout the order. Appellants will attempt to present their arguments in an orderly manner which will help this Court address the important issues now before it.

1. The trial court below erred when failed to recognize that voting is a fundamental right and improperly applied a rational basis test instead of a strict scrutiny test to Count 5, 12 & 13 of Appellants' claims.

COUNT FIVE contends that Georgia's use of the DRE denies the Equal Protection rights of Election Day DRE-using voters relative to absentee or early-voting voters. The right to the equal protection of law is set forth in Article I, Section I, Paragraph 2 of the Constitution of Georgia which says in part: *"No person shall be denied the equal protection of the laws".*

COUNT TWELVE makes a comparable claim of Equal Protection rights violations based upon the United States Constitution. The right to the equal protection of law is set forth in the 14th Amendment Equal Protection Clause of the U. S. Constitution that reads in part

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive… any person within its jurisdiction the equal protection of the laws." U. S. Const. amend. XIV, § 1.

COUNT THIRTEEN contends that the legislative and executive Acts of the State of Georgia deny the Plaintiffs the free exercise of their fundamental right to vote in violation of the Due Process Clause of the same 14th Amendment of the U. S. Constitution. "No State shall … nor shall any State deprive any person of life, liberty, or property, without due process;" *Id*. Virtually every count of this lawsuit provides evidence that Appellants' due process rights have been violated.

The right of the people to elect their officials by voting clearly meets the test of a fundamental right. Voting is "objectively, "deeply rooted in this Nation's history and tradition," ("so rooted in the traditions and conscience of our people as to be ranked as fundamental"), and "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed." *Washington v. Glucksberg*, 521 U. S. 702, 721, 722 (1997). The Defendants are unable to refute that voting is a fundamental right therefore, they must assume the burden of strict judicial scrutiny, not have their acts and doing judged merely by a rational basis standard.

In 1962, the United States Supreme Court again reaffirmed and restated its previous opinions regarding the fundamental, protected right to vote when it received an appeal from the District Court for the Middle District of Tennessee. *Baker v. Carr*, 369 U. S. 186, 209 (1962), was filed alleging that a 1901 statute apportioning the members of the state's General Assembly among the counties of the state deprived them of federally protected constitutional rights by virtue of debasement of their votes. The District Court dismissed the case, stating it lacked jurisdiction of the subject matter and that there was no claim upon which relief could be granted. The Plaintiffs appealed to the Supreme Court, which held, "A citizen's right to a vote free of arbitrary impairment by state action has been judicially recognized as a right secured by the Constitution, when such impairment

resulted from dilution by false tally, cf. *United States v. Classic*, 313 U. S. 299, 61 S. Ct. 1031, 85 L. Ed. 1368; or by refusal to count votes from arbitrarily selected precincts, cf. *United States v. Mosely*, 283 U. S. 383, 35 S. Ct. 904, 59 L. Ed. 1355, or by a stuffing of the ballot box, cf. *Siebold*, 100 U. S. 371, 25 L. Ed. 717; *United States v. Saylor*, 322 U. S. 385, 64 S. Ct. 1101, 88 L. Ed. 1341." *Baker v. Carr, id.*

Not to be neglected is the ruling by the Supreme Court in *Bush v. Gore*, 531 U.S. 98, 104 (2000) where the Court held that there existed in Florida's proposed presidential election recount an obvious violation of the Equal Protection Clause protections for the aggrieved party. In his opinion, Chief Justice Rehnquist stated, "When the state legislature vests the right to vote for President in its people, the right to vote as the legislature has prescribed is fundamental, and one source of its fundamental nature lies in the equal weight accorded to each vote and the equal dignity owed to each voter." He went on to confirm that, "The right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise. Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another*." Id.*

In this case, the threat to our electoral system through accident, mistake, and fraud can easily be seen, as can the Equal Protection issues among the three classes of voters, to wit, Advance voters, Absentee Ballot voters, and Election Day

electronic voters. On the one hand, only those voters casting their ballots on paper can be sure that their votes can accurately be recounted if necessary. Ironically, though, even an overwhelming paper vote could be diluted by a rigged or malfunctioning, electronic voting system that cannot be physically audited.

In its conclusion impacting Counts 5, 12 and 13, the trial court misapplied case law from both Georgia and the U.S. Supreme Court. It declared that: *"Plaintiffs, as well as any other voter, have the option of casting an absentee ballot or using the touchscreen electronic voting machines on election day."* [R.60, p.6]

On Election Days, those wishing to vote are *not* entitled to request and/or use a paper ballot at that time. O.C.G.A.§21-2-380 (b) requires those wishing to use paper ballots to request them no later than the Friday of the week preceding Election Day. This was pointed out to the Court in Appellants' response brief to Appellees' brief in support of their Motion for Summary Judgment. [R.51]

Notwithstanding the facts before it as well as the law as presented in Appellants' briefs, the lower court misapplied U.S. case law in regards to Counts 5, 12 & 13 when it declared that: "Without a suspect or quasi suspect classification involved in this matter the appropriate standard of review is the rational basis standard." and that: "…Plaintiffs have not demonstrated that they are part of a suspect class that has been unequally treated by the State." [R60, p. 13]

The U.S. Supreme Court decision in *San Antonio School District vs. Rodriguez*, 411 U.S. 1, 93 S. Ct. 1278, 36 L.ED.2d 16 (1973), which was cited by the lower court, takes precedence over *Nichols vs. Gross,* 282 Ga. 811, 653 S.E, 2nd 747 (2007). The U.S. Supreme Court decision states that the "test for strict judicial scrutiny of a state's laws is reserved for cases involving laws which... interfere with the exercise of fundamental rights and liberties explicitly or implicitly protected by the Constitution." *San Antonio School District, Id*. Because voting is an undeniable fundamental right the plaintiffs were not required to be a member of a suspect class.

2. The trial court erred when it improperly shifted the burden upon the Appellants to establish their claims.

A strict scrutiny analysis of the issues before the court places the burden upon the Appellees to show that a compelling state interest supports Georgia's adoption and use of the DRE paperless voting system currently in use throughout the State. Appellees use of voting equipment that does not provide an independent audit trail of the votes cast and cannot prevent undetectable fraudulent manipulation of the vote is facially deficient.

With regard to Counts 5, 12, and 13, constitutional case law is clear that upon a threshold showing by the Plaintiffs that a fundamental right is at issue, the law or

act contested will be presumed invalid and the burden will be upon the State to come forward and show that the act or law is necessary or narrowly tailored to effectuate a compelling State interest. See *Roe v. Wade,* 410 U. S. 113, 156 (1973); See also *Ambles v. State*, 259 Ga. 406, 407 (1989). The State interest must be an actual objective. Merely wishing to have "instant results"—accurate or otherwise—on Election Night is clearly not a compelling State interest that should trump the people's interest in having accurate, verifiable election results.

Part Two: ERRORS OF GENUINE ISSUES OF MATERIAL FACT

3. The Court below erred in denying Appellants' Motion for Summary Judgment and in granting the Appellees' Motion for Summary Judgment as to Counts 5, 12 and 13 in that there were no genuine issues of material fact present in the record that justified such a ruling.

Appellants should have been granted summary judgment each and all of COUNTS FIVE, TWELVE and THIRTEEN for the legal reasons set forth above in their arguments made in support of Enumerated Errors 1 and 2 which arguments are incorporated herein.

The trial court failed to rule on, and misinterpreted, the Plaintiffs argument when it declared that**:** *"After thoroughly reviewing the record in this matter, it is clear that Plaintiffs arguments are based primarily on hypothetical situations*

which cannot be utilized as a basis for Plaintiffs claims ." [R60, p. 15] Appellees asserted below that their fundamental right to vote is *currently* being injured because the recording, counting and retention of their votes are not properly protected. Appellees' own witness has admitted that the Appellees currently have no means to detect whether or not the voters' votes are being swapped to other candidates on Election Day. [*Deposition of Britian J. Williams*, R62, p. 44,ln 22] The State's witness has further admitted that county and state tabulators cannot prevent fraudulent manipulation of the Plaintiffs' votes on Election Day. [*Id* at 64] These admissions show an existing state of facts that establish a clear, present danger and dilemma to the Appellants as described in *Brown vs. Lawrence* 204 Ga 788, 51 S.E. 2d 651 (1949).

Appellants should have been granted summary judgment on each and all of these three counts for the legal reasons set forth above in their arguments made in support of Enumerated Errors of Law, which are incorporated herein. More specifically, Appellants' Count Five and Twelve should have prevailed since it is indisputable that the current form of electronic "ballot" cannot provide protection equal to the form of paper ballot currently used for absentee and advanced voting in regards to voter verification, recount completeness, investigation of discrepancies and contested elections. Appellants therefore contend that those sections of the Georgia Election Code promote unequal protection among different

classes of voters, including O.C.G.A. 21-2-493, O.C.G.A. 21-2-495 and others must be struck down as being unconstitutional.

When asked the question: " And is it not true that the voter himself cannot see at the time that he votes whether or not the information that he has tried to put in on the touch screen has been properly recorded on the card? Appellees' Mr. Cobb stated: "That is correct. The voter cannot see the electronic bits." [*Ray Cobb Deposition*, R63, p.13, ln 5]

Mr. Cobb explained that the difference in scope between a re-accumulation of electronic votes and a recount of ballots occurs because only a portion of the voting process is actually recounted when electronic votes are re-accumulated. He admitted that when electronic votes are re-accumulated under current procedures: "The recount starts with the PCMCIA card". [Id. at 42, ln13] Mr. Cobb also admitted that with optical scan equipment: "In a recount they would rescan the ballot. It starts with the ballot rather than the card" [Id at 43,]. Thus, under current Georgia election procedures, the recording process of the electronic votes that were verified by the voter are not, and cannot be, fully recounted.

Appellants' Count THIRTEEN should have also prevailed for the same reasons previously stated. In addition, it is also indisputable that election results produced by the tabulation servers used by the county and state can be altered without detection by election officials [*Williams Deposition* , R62, p. 64, 78]

A ballot is evidence of a voter's intention given to the government at or before an election. It should not be considered as being just one part of a government controlled, secretive, unverifiable "process" that at the end of the day allows us to be told who and what the majority of us supposedly voted for.

4. The Court below erred in granting the Appellees' Motion for Summary Judgment as to Counts 1, 2, 3, 4, 6, 7, 8, 9, 10 and 11 because there were genuine issues of material fact present in the record as to each such Count

The ruling of the Fulton County Superior Court is replete with many errors the court made in findings of fact upon which it based its ruling. Taken in segments as to the several affected Counts, such erroneous findings are quoted in italicized sections with references to the Order are:

COUNT ONE asserted that O.C.G.A. 21-280 attempts to exempt voting machines from the Constitutional requirement to conduct elections by ballot and is therefore unconstitutional. Appellants showed the court that the Appellees allege that the electronic records made in the innards of the DREs are a "process" and recognize as we all do that such "ballots" are invisible. The lower court held that ***"****Electronic voting existed, though not in its current form, in 1983 when the current Georgia Constitution was ratified and enacted.* [R.60, p. 6] No evidence was entered by the Defendants in the case to show any kind of electronic voting that

existed in 1983. The Appellants challenged the fact that Georgia law cannot exempt voting machines from the Constitutional requirement to produce a ballot as explained in Appellants' response to Page 19 of Appellees' Motion for Summary Judgment [R.51] The Georgia Constitution requires that elections be conducted by ballot. Id. O.C.G.A. 21-2-280 attempts to exempt voting machines from the constitutional requirement to conduct elections by ballot when it states: "*All primaries and elections in this state shall be conducted by ballot, except when voting machines are used as provided by law."* The Court therefore did not properly acknowledge or rule on COUNT ONE of Appellants' claim.

COUNT TWO asserted that the people are deprived from their constitutional right of "elections by the people" by the current delegation of critical election functions entirely to vendor voting machine processes that cannot be verified or audited by the people.

The lower court erroneously found as a statement of fact for all counts "[That] *following the election, each voter's ballot can be displayed and printed"* [R.60, p 3] The Defendants entered no evidence to prove the ballot selections that can be displayed and printed after the election were the same as the ballot that the voter saw when casting the vote. Such proof is technically impossible with the current

electronic voting machines used in Georgia. Appellants specifically disputed this very point as follows.

> The Plaintiffs dispute the Defendants' implication in this fact that the voter's ballot can be displayed and printed after the elections. While a ballot image may be displayed and printed after the election, the Defendants have provided no evidence that proves this image is the same ballot with the selections that the voter originally saw on the touchscreen before casting his or her vote on Election Day. Since those selections disappear when the vote is cast, there is no mechanism that could ever determine if the two so called ballots are actually the same. Mr. Cobb had admitted in deposition, there is also no way to be sure that the results of software tampering won't be passed along to those "ballot images". [R.63, p. 40, ln 18 & p. 41, ln 10]

The lower court also found "*The evidence presented in the record is clear that there is no less custody and control over one's ballot now as there was in 1908."* [R.60, p 6] The court does not cite the evidence, but it is irrefutable that voters could see selections on the ballots they gave to officials in 1908 and cannot see selections on the PCMCIA card that they turn over to officials today. Any argument that a voter has proper chain of custody over his ballot simply because the voter had possession of a PCMCIA card on which the votes were allegedly cast

is absurd when considering that the votes electronically stored on the card are not known to the voter. The voter obviously cannot see these electronic bits as Mr. Cobb explained [R.63, p13, ln 9]. The voter is only able to establish custody over the votes that appeared on the touchscreen and these votes disappear at the time the ballot is cast thus breaking the chain of custody.

During discovery Appellants collected numerous admissions in regards to the multiplicity and ambiguity of what currently may be called a ballot under O.C.G.A.§ 21-2-280. For example, Mr. Ray Cobb, Appellees' expert witness, explained during deposition:

> "The vote or the ballot, in my understanding, according to the definition in the code book, is the image that the voter sees, the process that the voter uses to touch the screen, the equipment on which the screen is touched, and the electronic media that's involved from that point through the PCMCIA card all the way up through the uploading into the county server where the votes are tabulated." He further added: "The ballot is a process, correct, involving all of those things." [R.63, p 11, ln 8]

Counsel for the Appellees further explained the state's position on the record during the deposition of the State's expert witness, Ray Cobb:

> "So certainly we think that the memory card as well as the DRE machine, which is mechanical and electronic, is part of the ballot by that definition"

[R.63, p. 22, ln 8]

The lower court also held or found that "*The machines have an internal storage unit that can be audited in order to confirm the ballots cast."* [R.60, p..8]. Apparently the lower court arrived at such a conclusion by ignoring the evidence spread across the record or by amending the common definition of "audited".

Internal storage cannot confirm the ballots cast because the ballots could have been corrupted by the recording process prior to being internally stored. Furthermore, there is no independently created evidence of voter intent that can be used to audit the internal storage. Appellants have admitted that even the state's expert witness does not know the format of the records of votes cast once they are stored. Therefore, neither he nor any election official, nor any voter can determine if a ballot was actually cast as the touch screen indicated. When asked: "Mr. Cobb, do you know the format of the records of votes cast as stored in the electronic voting machines implemented in '02?" he replied: "No, I do not." When asked: "Do you know the format of the records of votes cast as stored in the memory cards used by those voting machines?" he replied: "I do not." When asked: "Do you know the format of the records of votes cast as stored or compiled by the servers in the servers?" he replied: "No." [R.63, p.18, ln 12]

The lower court also held that "*Each vote is then recorded on the flash card that the voter receives after that particular voter's identification is verified"* [R.60,

p. 16] The Defendant's could offer no evidence to prove that any vote ever recorded on any flash card used on Election Day was the same as the vote shown to the voter on the touch screen In fact, it is technically impossible to prove the lower court's conclusion with the current voting machines and procedures in use.

The lower court held that "*The machines have an internal storage unit that can be audited in order to confirm the ballots cast."* [R60, p. 8]

Internal storage cannot confirm the ballots cast because the ballots could have been corrupted by the recording process prior to being internally stored. Furthermore, there is no independently created evidence of voter intent that can be used to compare to the alleged internally stored information. As set forth above, Appellees' own expert witnesses have admitted that they do not know the format of the records of votes cast once they are stored. Therefore, neither an expert state employee nor any election official, nor any voter can determine if a ballot was actually cast and recorded as the touchscreen indicated it would be.

COUNT THREE asserted that the current DRE implementation does not comply with O.C.G.A.§ 21-2-379.1 in that it fails to assure that each vote is accurately counted.

The lower court found that *"There simply is no evidence the voting machines make selections for the voter or instead of the voter."* [R.60, p.7] It should first be

noted with reference to the arguments made with respect to Appellants' firt three enumerations of error number 3 above that the trial court shifted the burden of proof to the Appellants.

Be that as it may, when Appellees implemented electronic voting in Georgia in violation of O.C.G.A. 21-2-301(b), they specifically eliminated the capabilities to collect such evidence as the Court describes. Nevertheless, Appellants produced evidence that was not refuted showing the machines have recorded both more and less votes than the voters could have possibly selected. Appellants summarized the evidence in their response to Page 23 of Defendants' Motion to Dismiss:

> "The Defendant's claim that no instance of failing to record votes properly has ever been discovered is also challenged by the evidence. At his deposition, Plaintiff Favorito turned over Direct Record Electronic Voting Machine Recap sheets from the November 2, 2004, Bibb County elections. These sheets show that Machine #8 in the Howard 7 Precinct did not accumulate votes resulting in 123 lost votes. In the same election, properly operating Hazzard 5 precinct machines recorded five more votes than the number of voters shown on the Electors List and Hazzard 6 machines recorded four less votes than the number of voters shown on the Electors List." [R.65, p. 263, Exhibit]

Plaintiffs documented corresponding admissions by Professor Williams in their

footnote to their Dispute of Defendants Fact 12 and their response to Page 23 of the Defendants Motion to Dismiss. Specifically, when asked: "If a voting system recorded a portion of one candidate's votes for his opponent during an election, how would that be detected after the polls were closed?" Professor Williams said: "It wouldn't. That's something that's got to be prevented before the election. The machine's got to be properly set up and monitored and the accuracy established before the election. If a machine itself was reporting inaccurately on a given election, nobody would know it." [R.62, p. 44, ln 22]

The lower court also found that **"***...the testimony of former Secretary of State Cathy Cox, demonstrates that the current DRE's are in fact, in compliance with the directives of O.C.G.A. 21-2-379.1."* [R.60, p. 8] The Court does not cite what specific testimony from former Secretary Cox demonstrates compliance with the requirement in O.C.G.A. 21-2-379.1 that each vote must be recorded accurately and correctly at the time the voting machines are used on Election Day. On the contrary, when Secretary Cox was asked "… how could the governing authorities move to investigate or prosecute allegations of electronic vote fraud perpetuated by way of software tampering?" she replied: "Well, you have to have evidence it occurred first." [R.64, p. 48, ln 22]. She was unable to cite any such evidence that could be produced on Election Day in the remainder of her answer. In fact, the

evidence is irrefutable that no such procedure exists because it would be technically impossible to achieve with the existing equipment.

The record is replete with other instances of DRE vulnerabilities. When asked "Is it possible that a GEMS voting database used by our machines could be altered using Microsoft Access, Notepad or a DOS command prompt without leaving any record of that alteration?" Appellees' Professor Williams said: "I believe in Access you could…. It's possible." [R.62, p. 64]

When then asked: "How could the equipment prevent fraudulent manipulation of vote count recording and counting if it allows such alterations?" Professor Williams admitted: "The equipment can't prevent it. This is one of those areas where you have to have external procedures to protect your equipment and that's the generic statement that applies to any voting system you're talking about. You have got to protect that system from unauthorized access or bad things are going to happen to you." [R62, p 64. ln 21]

When asked: "Do county election officials have access to the GEMS voting database? Mr. Williams said: "It's on their machine. Yeah, they have access to the database." [R.62, p 78. ln 22]

At the deposition of Ray Cobb, the Appellants presented a list of 10 academic and state commissioned reports previously give by Plaintiff Favorito to the former Legal Affairs Council for the Secretary of State. These concluded that voting

machines, nearly identical to those used in Georgia, can record selections differently than what the voter saw. No such procedure exists in Georgia to protect the voter from this scenario since such protection would be technically impossible to achieve with existing equipment. [*Cobb Deposition* , R63,]

COUNT FOUR alleged that the DRE, as configured and implemented, denies candidates and their supporters their rights to complete and true recounts of votes in close elections. Once again burden shifting, the lower court wrote *"Here again, the Plaintiffs have failed to provide evidence of even a single specific instance where there has been an actual inconsistency between the ballots cast and the subsequent recount. Plaintiffs merely allege the possibility of inconsistency as a reason for invalidating the DRE system"* [R.60, p.9] Had the court read Appellants' briefs, the Court would know that Appellants never alleged the possibility of inconsistency in recounts,. Appellants allege *the impossibility* of inconsistency in electronic recounts, which thus subverts the intent of the recount law as explained in Plaintiffs response to Defendants Motion to Dismiss, to wit:

> "The Defendants' own witnesses prove the validly of Count Four. The state's expert witness, Ray Cobb, has admitted that he knows of no recount of electronic votes in Georgia that has ever produced a count different than the original vote count [*Cobb Depo*.,R.63, p 24, ln 12]. Professor Williams

has further admitted that any recounts of electronic votes in Georgia 'will give you the exact same answer on a recount as they do on the original count…'" [*Williams Depo.* ,R.62, p 46, ln 21]

The aforesaid admissions demonstrate that a re-accumulation of electronic votes with the current equipment and procedures serves virtually no purpose and subverts the intent of O.C.G.A. 21-2-495 (c). It effectively abolishes the rights that the law provided to candidates and their supporters for a legitimate recount.

With respect to arguments set forth in the Equal Protection enumerations above, it should be remembered that the lower court did not rule on the equal protection aspects of recounts given that a recanvass of electronic votes does not cover the same scope of the election process as a recount of tangible ballots.

Mr. Cobb explained that the difference in scope between a re-accumulation of electronic votes and a recount of ballots occurs because only a portion of the voting process is actually recounted when electronic votes are re-accumulated. He admitted that when electronic votes are re-accumulated under current procedures: "The recount starts with the PCMCIA card". [*Cobb Depo.*, R.63, p. 42, ln13] Mr. Cobb also admitted that with optical scan equipment: "In a recount they would rescan the ballot. It starts with the ballot rather than the card." [d., at 43, ln1]. Thus, under current Georgia election procedures, the recording process of the electronic votes that were verified by the voter are not and cannot be recounted.

When asked the question: " And is it not true that the voter himself cannot see at the time that he votes whether or not the information that he has tried to put in on the touch screen has been properly recorded on the card? The state's expert witness, Mr. Cobb, admitted: "That is correct. The voter cannot see the electronic bits." [*Id*.. at. 13, ln 5] . A recanvass of votes (recount of electronic votes) performed upon DREs uses no direct tangible evidence of voter intent with custodial linkage to the voter and requires no direct physical evidence of voter intent to be retained for recounts and/or for investigations of discrepancies, fraud detection, and contested elections. Especially in contested election hearings, where O.C.G.A. § 21-2-525(b) explicitly empowers the court to "compel the production of evidence," the severed chain of custody between the voter and evidence of voter intent impairs the forensic value of DRE "evidence," creating two unequal classes of evidence, and two unequal classes of protection and deterrence against election fraud and misconduct." O.C.G.A. § 21-2-525(b)

COUNT SIX complained that Georgia's Audit Trail Pilot Project, as implemented, failed to comply with time if use voting accuracy requirements and cannot safeguard the rights of the people or provide assurances against future DRE failures or fraud. **COUNT SEVEN** complained that the use of the Diebold Accuvote TSX voting machines in the 2006 Audit Trail Pilot Project unconstitutionally undermined the affected voters' rights to have secret ballots.

In the 2006 general election, the office of the Secretary of State conducted a three precinct audit trail pilot that included the new DRE voting machines and a manual audit of their results. The office of the Secretary of State selected for use during the pilot Diebold Accuvote TSX voting machines that roll election results into a sealed canister in the exact order in which voters voted. The Voter Verified Paper Audit Trail Pilot Project Report published by the Office of the Secretary of State on April 11, 2007 admitted: "The sequential printing of the VVPAT paper ballots does not guarantee voter anonymity as required by Georgia law." It also noted that the manual audits, which were conducted after the election was certified, were very time consuming. [*Deposition of Garland Favorito*, R65, p. 200]

The voters' right to a secret ballot would be irreparably harmed by the Accuvote TSX machines used in the 2006 pilot. The Secretary of State has the authority to use these machines at any time and there is no other adequate remedy under law other than that of injunction as to the said sequential recording roll-up canister type adding/voting machines.

The trial court failed to rule on, and misinterpreted, the Plaintiffs argument when it declared in that*: "Because the laws establishing these projects have been repealed, the issues that Plaintiffs assert are now moot and are hereby dismissed."* [R.60, p.16] The challenge in Count 7 is based on the Article 2,§1,¶1 of the Georgia Constitution which has not been repealed. The challenge in Count 6 is

based on O.C.G.A.21-2-379.1, which also has not been repealed. Therefore, these challenges cannot be moot and the acts of Appellees are capable of repetition that would escape review..

Somehow the trial court found that *"...Moreover, Plaintiffs have failed to provide any specific examples of a voter's identity being revealed at any point during the voting process."* [R.60, p. 5] Had the court read the Appellants' briefs the Court would know that except as to the use of roll-up drums in retro-fitted DREs in pilot projects, Appellants never challenged the secrecy of the ballot provided by the regular DREs. Furthermore, there is no issue of fact in the Appellant's Motion for Summary judgment as to Count 7 since the Secretary of State's own report has admitted the unlawful nature of the voting machines that Appellant's seek for the court to enjoin from further use.

COUNT EIGHT set forth that having no legal remedy, the Appellants were in their rights to seek mandamus relief. O.C.G.A. § 9-6-20 sets forth the appropriate circumstances when a writ of mandamus is to be issued. A writ of mandamus will issue when there exists a legal duty that was not performed.

The trial court found that: "this requests fails as a matter of law" The Appellants met the burden required for a writ of mandamus by demonstrating that the Appellees failed to perform a non–discretionary, legal duty of ensuring that

”such voting machines have an independent audit trail of each vote cast” as required by O.C.G.A 21-2-301(b) of the 2001 Georgia Election Code which was in effect for the entire time that when the machines were procured, piloted, certified and purchased with approximately 54 million dollars of taxpayer funds on May 3, 2002. The Appellees’ expert witness, Ray Cobb, admitted that “I'm not aware of any audit trails independent of the equipment.” [*Cobb Depo.,* R63, pg 33, ln 13]

The lower court further held that *Plaintiffs have once again failed to present any evidence of specific acts evidencing that Defendants have either failed or refused to perform a definite and unambiguous duty mandated by the law.* [R.60, p. 19] Again, when the General Assembly passed legislation to begin procurement and testing of electronic voting machines in Georgia, they explicitly protected the rights of the citizens by ensuring that ‘such systems have an independent audit trail of each vote cast’. [O.C.G.A. 21-2-301 (b) of the 2001 Georgia Election Code] Mr. Cobb admitted [*Cobb Depo.* R.63, p. 33] and the Court could take judicial notice of the fact that current DRE voting machines have no such capability.

Somehow the lower court found that *“Unlike paper ballots, there are two sources that record the ballot of a touch screen voter, allowing voter intent to be independently verified.”* [R.60, P. 16] It is irrefutable that neither of the two sources cited by the court allow voter intent to be independently verified because they require that the voting system have already captured the vote, thus they cannot

be independent of the vote recording process in the same manner as a standard Voter Verified Paper Audit Trail (VVPAT) that is typically employed for electronic voting machines.

Appellants explained in the following response to Page 22 of the Appellees' Motion for Summary Judgment that even the state's expert witness does not know the format of the votes recorded in the internal storage and could not independently verify them. It pointed out to the court that even the state's expert witness does not know the format of the records of votes cast once they are stored. Therefore, neither he nor any election official, nor any voter can determine if a ballot was actually cast as the touchscreen indicated. When asked: "Mr. Cobb, do you know the format of the records of votes cast as stored in the electronic voting machines implemented in '02?" he replied: "No, I do not." When asked: "Do you know the format of the records of votes cast as stored in the memory cards used by those voting machines?" he replied: "I do not." When asked: "Do you know the format of the records of votes cast as stored or compiled by the servers in the servers?" he replied: "No". [*Cobb Depo.*, R.63, p. 18, ln 12]

COUNT NINE, abandoned during the course of litigation and incorporated into COUNT TWO complained that the contract with Diebold to purchase and service the DREs constituted a delegation of critical election functions entirely to

vendor voting machine processes that cannot be verified or audited by the people, created an on-going relationship with the vendor that constituted an unconstitutional grant of gratuities and franchises.

COUNT TEN complained that the DRE system has been operated in the absence of certifications required by law and that the systems cannot be properly certified because they cannot meet current federal and state certification requirements. The lower court ruled as a statement of fact for all counts that *"The voting machines were tested and then recertified by State officials."* [R.60, p.2] The Defendants provided no certification reports whatsoever for the above 2001-2002 time period that is referenced by the Court. Plaintiffs provided irrefutable evidence in support of Count 10 that, in the 2001-2002 time period referenced above by the Court, the machines that were allegedly certified violated O.C.G.A. 21-2-301(b) which was in effect from the time that DRE voting machines were first procured and tested through the time the Diebold electronic voting machines were acquired with a $54 million contract. Plaintiffs' footnote in dispute of Defendant's Fact 12 also provides extensive evidence of numerous improprieties in the certification process, especially during this time period. [R. 52]

The lower court erred when it declared that**:** *"At oral argument in this dispute, Defendant provided filed copies of the certifications in dispute. The certifications provided by Defendant directly rebut Plaintiffs declaration that the current touch screen voting machines are not certified in accordance with Georgia law".*[R.60, p. 20] The Appellees provided one page certificates at oral arguments not the certification reports that are required by law and samples of which are in their custody. *Ambles v. State*, 259 Ga. 406, 407 (1989) [O.C.G.A.§ 21-2-368]

Furthermore, the Appellants have shown that regardless of what certificates exist, the voting equipment was not and cannot be properly certified according to Georgia law or procedures as follows:

- The tabulation servers cannot meet vote fraud prevention federal guidelines employed by Rules of the Secretary of State, 590-8-1-.01. [*Williams Depo.,* R62, pg 74, 78]
- Testable requirements cannot be written to ensure that the DRE software is correct according to the Security and Transparency Committee of the Election Assistance Commission; [*Id. At* 72, ln 8]
- No Penetration Analysis was performed on the voting machines by the federal certification testing authority; [*Favorito Depo.,* R65, pg 249-253 ,Exhibit 8]

The Appellants have also submitted the following historical controversies that further call into question the credibility of the certification process:

- The voting machines were certified with one ore more known security flaws [*Williams Depo.,* R. 62, pg 65]
- Professor Williams has admitted [*Id.* at 59] that in 2002:
    - The machines received a software patch prior to the election;
    - The patch required the machines to be recertified prior to use;
    - No recertification was performed prior to the 2002 election
    - The failure to recertify violates the law (O.C.G.A. 21-2-379-2)
- A December 3, 2002, letter from the Secretary of State's office to Diebold CEO, Bob Urosevich states that office was still awaiting confirmation from the vendor "for a verifiable analysis of overall impact of the patch to the voting system", "that the statewide voting system is appropriately certified" and "that the 0808 patch was not grounds for recertification at the federal and state level". [*Favorito Depo.,* R65, pg 255-256 Exhibit 7]

Surely the cases and controversies cited are adequate to demonstrate how current certification procedures are conducted in a manner that is adverse to the valuable right of the people to ensure that votes are counted properly and that such

rights are in imminent danger of infringement as described in *Brown vs. Lawrence 204 Ga 788, 51 S.E. 2d 651 (1949).*

COUNT ELEVEN: Sought declaratory judgment that the certification of the DRE equipment used in the 2001 pilot projects and subsequent 2002 acquisition was invalid as not meeting the requirements of O.C.G.A. §21-2-301 (c). The lower court held that *"The length of delay places an unnecessary burden on the State to properly defend this action given that many of the original documents that were created during the adoption of the system may no longer be available"* [R.60, p.7] Appellants' case is based on *current* violation of rights, not historical violations. Any missing original documents, such as the 2001-2002 certification reports, have no bearing on Count Eleven. No loss of evidence has occurred that would affect the Defendant's ability to defend the allegations in this count.

The trial court failed to cite supporting evidence when it declared that: "*Each vote is then recorded on the flash card that the voter receives after that particular voter's identification is verified"* [R60, pg 16] The Defendant's could offer no evidence to prove that any vote ever recorded on any flash card used on Election Day was the same as the vote shown to the voter on the touch screen In fact, it is technically impossible to prove the lower court's conclusion with the current voting machines and procedures in use.

CONCLUSION

Appellees are currently conducting elections with virtually no way to prove either to themselves or to the public that so-called electronic "ballots" cast on Election Day are being recorded and tabulated correctly. The unique way in which they have administered elections since 2002 threatens the foundations of our democracy, the trust and confidence of the public in the electoral process itself, and therefore the ability of the people to govern themselves. Without openly conducted, transparent elections governments may soon become even less the servants of the people. Through their closed-system use of paperless unauditable, unrecountable electronic "voting systems" such as those now in use in Georgia, governments could soon become the unseatable masters of a hapless public.

The people, in delegating authority to public servants, are now told by those servants that they have no right to oversee elections that the servants conduct. As voters, they are removed from their ballots by violations in established chain of custody procedures and told that they no longer have the right to see the votes that were given to officials on Election Day. Local election officials are reduced to puppets who must certify election results even though they have no ability to prove that those results are correct. Candidates are faced with the fact that a recount of invisible "ballots" will in most cases determine the outcome of an election.

The U.S. Supreme Court has ruled that the right of the people to have their vote counted is as open to protection as the right to put a ballot in a ballot box. Every count asserted herein, provides evidence that this right has been or could be abridged. Current election laws, voting equipment and operating procedures clearly do not protect that right but instead leave it highly vulnerable to undetectable fraud and errors.

We, the people, can never afford to relinquish the right to know our elections are being carried out with the utmost integrity. To do so would change the course of history for the worse. Georgia is the only state in the union planning to conduct elections on statewide unverifiable voting equipment in 2010. Most other states have already moved to ban, decertify or otherwise replace the same equipment that Georgia uses. Georgia must provide its citizens with comparable protections.

All avenues of recourse for the Plaintiffs within the state are exhausted. Only the Georgia Supreme Court stands between the people and a rocky road that leads to tyranny. The complexities of the case and its widespread implications demonstrate that the case is best handled by this court.

Respectfully submitted,

_____ and _____.

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Certificate of Service

I, Walker Chandler, Attorney for Appellants, hereby certify that I have served this Brief For Appellants upon The Honorable Stefan Ernst Ritter, counsel of record for Appellees,.by personally handing same to him or his assistant, this ___day of ____, 2009.

_____

Walker Chandler

State Bar of Georgia No. 120675