IN THE SUPREME COURT
STATE OF GEORGIA

GARLAND FAVORITO, MARK SAWYER, RICARDO DAVIS, AL HERMAN, FRIEDA SMITH, KATHRYN WEITZEL, ADAM SHAPIRO, and CATHIE CALABRO,	*	
Appellants,	*	
	*	**CASE NO.**
v.	*	**S09A1367**
KAREN HANDEL, Secretary of State, SONNY PERDUE, Governor, and GEORGIA STATE ELECTION BOARD,	*	
Appellees.	*	

APPELLEES' BRIEF

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SUMMARY

This case involves a challenge to the use of electronic touchscreen voting in Georgia with summary judgment granted to Appellants on cross motions. The Appellants' case is not supported by expert testimony or reports. It involves no *actual* loss of vote to any citizen – real or alleged -- and no loss of vote to the Appellants. Rather, it involves wide ranging allegations that electronic touchscreen voting violates the Georgia Constitution, the United States Constitution, Georgia statutory law, and what Appellants have claimed is the "historic intent" of the law to disallow electronic voting. The law and material facts, as shown below, do not support these allegations.

In their thirteen count complaint Appellants largely rest their key allegations that their case involves "voting" and so "strict scrutiny" must, in their view, be applied. That is not the law, as numerous cases have established. *See, e.g.*, *Burdick v. Takushi*, 504 U.S. 428, 432-37 (1994). And the Georgia Constitution expressly provides that the methods of voting are those "conducted in accordance with procedures provided by law." Ga. Const. Art. II, Sec. I, Para. I.

As outlined in the Statement of Facts, there was a detailed basis for the electronic voting system now used in Georgia. Indeed, the current system is the most reliable Georgia has ever had – without dispute – and Georgia has used every other recognized method of voting at one time or another. The Appellants'

individual counts each have been separately addressed below, and a summary of the response to these can be gleaned from the table of contents, *supra*. There was no material issue of fact that would allow Appellants to escape summary judgment.

STATEMENT OF THE CASE

A. Procedural History

This case was initiated with a complaint filed by Appellants in July 2006. [R. at pp. 26 to 49.] That Complaint, spanning 76 numbered paragraphs, asserted eight counts. *Id.* The Complaint was then amended adding a Count IX which has been withdrawn. [*See* Deposition of Garland Favorito ("Favorito dep.") at p. 230.] The complaint was again amended to apparently make party Plaintiff changes [Second Amendment to the Complaint], and was then amended again adding 25 more numbered paragraphs and two more counts.

Discovery was extended multiple times in this case, with the Complaint being amended once shortly before discovery expired and again after discovery expired (adding Counts XII and XIII, which seem to duplicate Count V). The parties by agreement each cross moved for summary judgment.

Following hearing, the trial court entered a lengthy and detailed order granting Defendants' motion in full.

B. Statement of Facts

The following facts are without dispute in the record before the trial court

and now before this Court:

Nine years ago, in 2000, extraordinary difficulties arose in determining the winner of the Presidential electoral vote in Florida.[1] As the Court is likely aware, this situation involved manual recounts of ballots with obscure methods of trying to divine "voter intent" by reading the "hanging chads" of voter punch-cards and ultimately led to an election which required the Supreme Court to issue a ruling to resolve the dispute as to who was President. *Id.*

The machines used in Florida in causing this unprecedented crisis in the election of a President were those using punch cards, lever machine ballots, optiscan ballots and paper ballots. No electronic touchscreen voting machines were used; the technology now in use essentially did not exist. *Bush*, *supra*; *Palm Beach County*, *supra*; *Gore v. Harris*, *supra*.

In response to this crisis Congress enacted the Help America Vote Act ("HAVA"). 42 U.S.C. § 15301 *et seq.* [*See also* Affidavit of Raymond O. Cobb ("Cobb aff.") at ¶ 9.] HAVA expressly authorized the federal government to make payments to States to replace their punch card, lever machine, and other outmoded voting systems. 42 U.S.C. § 15301. HAVA likewise created the Election

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[1] *See Bush v. Gore*, 531 U.S. 98 (2000) (describing the situation); *Palm Beach County Canvassing Bd. v. Harris*, 772 So. 2d 1220 (Fla. 2000), *rev. by Bush*, *supra* (same); *Gore v. Harris*, 772 So. 2d 1243 (Fla. 2000) (same).

Assistance Commission ("EAC") and a formal Technical Guidelines Development Committee ("TGDC") to, among other things, set standards, guidelines, and assistance for the implementation of new systems in the States. [*See* Deposition of Cathy Cox ("Cox dep.") at pp. 14-15.] 42 U.S.C. § 15321 *et seq*. Appellees' witness Dr. Brittain Williams is a member of the TGDC and has been substantially involved in drafting standards, guidelines and certification protocols put out by the EAC and the TGDC. [Cobb aff. At ¶ 8; deposition of Dr. Brittain Williams ("Williams dep.") at pp. 5, 23.]

During the 2000 Presidential election Georgia experienced similar problems to Florida's, though these problems were not widely publicized. [Cox dep. at pp. 26-27, 44; Cobb aff. at ¶ 9.] Georgia investigated how to improve its system. [*Id.*; Williams dep. at pp. 10, 20; *see also* Williams dep. at p. 37 for an example of implementing changes to improve the system.] A study commission was formed (the Twenty-first Century Voting Commission), an RFP was issued, bids were received and considered, and a contract was awarded to Global Management Systems, Inc., later purchased by Diebold Election Systems, Inc. (hereinafter collectively "Diebold"). [Deposition of Michael Barnes ("Barnes dep.") at pp. 6-12; Cox dep. at pp. 6-8, 10-16, 26-28, 34-44; Williams dep. at pp. 12-17.]

In this process, the authority to determine what voting system to use was expressly granted by the General Assembly to the Secretary of State (who, with the

State Election Board, has also has authority regarding numerous election matters in Georgia). O.C.G.A. §§ 21-2-50.2, 21-2-300, 21-2-379.2; *see also* §§ 21-2-30 *et seq.* (State Election Board), 21-2-50 (duties of Secretary of State), 2005 Op. Att'y Gen. 2005-3 (allocation of duties and authority between Secretary of State and State Election Board). [*Cf.* Williams dep. at 15, 23.] Of the seven companies making electronic voting machines who submitted bids only three met all certification requirements, and only Diebold met the requirements and could deliver voting machines in a timely matter to meet the State's needs. [Barnes dep. at pp. 6-8, 24-25; Cox dep. at pp. 27-29; Williams dep. at pp. 14-17.] The funds to purchase such machines were expressly authorized by the General Assembly. 2002 Ga. Laws 598 *et seq.*

In this process, Georgia was the first State to implement a uniform system of touchscreen voting across the State. [Cox dep. at pp. 12-13, 42.] *See* O.C.G.A. § 21-2-379.3. The initial money for this system, as approved by the General Assembly, came from the sale of bonds as the initial purchase predated HAVA's enactment. [Cox. dep. at pp.13-14, 46.] Officials from Georgia, however, were well aware of the pending HAVA legislation in Congress, which passed a few months later (specifically, October 2002): HAVA funds reimbursed the State the initial $54 million cost to implement the system. [*Id.* at pp. 13-16, 46; Cobb aff. at ¶ 9.] *See* 42 U.S.C. § 15301 (notes as to date of enactment of HAVA).

Georgia's system of touchscreen voting machines was also unique in creating an independent center – the Center for Election Systems at Kennesaw State University – which has become a world leader on election systems. [Cobb aff. at ¶¶ 3, 8; Williams dep.] As stated by its former director, Ray Cobb, "Among its many functions the Center is involved in overseeing the implementation and use of touchscreen voting systems at polling places throughout Georgia, designing the ballots used at most of the precincts in Georgia, and implementing and maintaining the software and hardware used in elections involving touchscreen voting machines in Georgia." [Cobb aff. at ¶ 3.] Unlike other States' systems, the Center is significantly involved in security protocols and monitoring, as well as testing of voting machines for certification. [*Id.* at ¶¶ 3, 4, 7, 8; Williams dep. at pp. 7, 41-78; Barnes dep. at pp. 19-24, 33-39.]

The total system involved in electronic voting, in this regard – and as monitored and partially assisted in creation independently at the Center – includes (excluding incidental equipment like modems, testing equipment, etc.) computer hardware (or which there are servers both at the State level and at the county level, touchscreen voting machines, and electronic poll books which check voter registration, as well as, of course, testing equipment), computer software (including software programs in the different servers used and the touchscreen

voting machines),[2] computer media (including electronic Voter Access Cards (i.e. a "smartcard") and other PCMCIA cards used for transferring data), and the protocols and methods by which the system is implemented and its security maintained. [*See* Barnes dep. 33-34; Cobb dep. *passim*; Cobb aff. *passim*.]

No touchscreen voting systems were eligible for purchase in Georgia unless they met federal certification requirements first. [Cobb aff. at ¶ 7; Barnes dep. at pp. 7-8, 19-21.] Such systems are then tested and certified again at the State level. [*Id.*] As summarized by Mr. Cobb in his affidavit:

> Georgia uses only electronic hardware and software that is certified at the federal level. After that equipment is certified, it is then again tested by KSU for the State and then certified by the State. The combination of hardware and software used in Georgia is unique. It is not used in California, Ohio, Maryland, Nevada, Colorado or any other state or district in the United States that uses electronic voting. Georgia also has unique protocols and procedures – including the maintenance of the KSU Center for Election Systems as an independent entity to review and monitor voting in Georgia.

[Cobb aff. at ¶ 7; *see also* Williams dep. *passim*; Barnes dep. *passim*.]

Following testing and certification and purchase, the individual units received are then tested again on receipt and distributed to local jurisdictions – a form of testing called "acceptance testing." Ga. Comp. R. & Regs. 183-1-12-.02(2)(a). [Barnes dep. at pp. 19-21] There they are kept under lock and seal by

[2] The primary software used is a proprietary system customized for Georgia called the Global Election Management System ("GEMS"). At the local level this software is only distributed in an executable format, and it cannot be altered. [Cobb. dep. at p. 16.]

law, with highly regulated conditions as to the circumstances in which they must be kept. *See, e.g.,* Ga. Comp. R. & Regs. 183-1-12-.02(2)(b)-(g). If at any time it is learned of a possible compromise to equipment, that equipment is re-tested and cannot be used until it is re-tested. [Cobb dep. at pp. 17-18.] The software is checked by generating a source code file known as "hash code" which is then checked against the potentially compromised equipment. [*Id.*] Although repeatedly checking and testing for the possibility, no electronic compromise or hacking of any voting machine in Georgia has ever been discovered, and the chance of it occurring are, in fact, miniscule. [Cobb. dep. at pp. 26, 27, 32; Barnes dep. at pp. 22, 33-34; Williams dep. at pp. 39-41; 58, 69-78; Cox dep. at pp. 46-47.] Georgia's voting machines, for example, are never connected to the internet, which would be a source of computer "Trojans" and viruses. [*See* Cobb aff. at ¶ 7; Barnes dep. at p. 22.]

At the time of an election, each of the pieces of equipment in the system – including even computer media – are again tested to assure that they have not been tampered with. [Cox dep. at pp. 29-30, 46-47; Barnes dep. at pp. 19-20, 33.] Ga. Comp. R. & Regs. 183-1-12-.02(3)(b) (detailing requirements at length). This testing is open to the public. *Id.*

Each precinct in Georgia – even in a federal election – has a unique ballot at an election since each precinct has its own local officials seeking office and issues put to the electors. As described by Ray Cobb:

> There are approximately 3200 precincts in Georgia. Each precinct has unique ballots depending on the federal, state, and local offices and issues being voted on in that precinct. Thus, for instance, in the general election that will be held on November 4, 2008, there will be thousands of different ballot designs. The physical location of candidate names on a ballot varies for each ballot because of the different races that are applicable for each ballot design. The ballots are usually finished for an election 60 days before the election.

[Cobb aff. at ¶ 5.]

Thus, the idea that touchscreen voting equipment is subject to malicious code inserted into the machines in advance – an idea that Appellants repeatedly floated at the depositions in the case and in written discovery – is a chimera. That is because the malefactor can not know the ballot design which varies widely by precinct and is not known by anybody until shortly before an election. [Cobb dep. at p. 31.] As explained by Mr. Cobb at his deposition:

> The only way software can be written to change the votes is to have a knowledge of who's on the ballot, what party they belong to, where they're physically located on the touch screen.
>
> The software we have was installed in 2005. There's no way a person could know to modify that software in 2005 that says who's on the ballot in 2007, who's there, what party are they, where are they located on which page of the touch screen.
>
> That's why I contend the likelihood of modifying software and then getting modified software into the machine with the security procedures

> that we have – nothing is absolute but I don't believe it can be done. Can I expand a little more?
>
> **Q. Sure.**
>
> **A.** When our software was installed we had a Democratic governor, which meant all Democratic candidates appeared first on the ballot. In 2006 we have a Republican governor. Is that right? I'm sorry. 2004 we had a Republican governor. That order switched and so all Republican candidates appeared first. How would that be known to somebody to modify the software beforehand?

[*Id.*]

Thus, the idea, for instance, that Diebold could determine the outcome of an election by secretly making machines or software to yield certain results, which the Appellants repeatedly asserted in discovery, is simply not tenable (if not entirely impossible), at least in Georgia. Diebold does not have access to the ballot designs and could not design Trojan software to find the right place on the touchscreen or to mimic the actual ballots. [*Id.*; see also Cox dep. at pp. 30-31, 46-47; Williams dep. at pp. 63, 67, 70; Barnes dep. at pp. 22, 32.]

On election day the Center also conducts random parallel testing of voting machines. [Cobb. dep. at pp. 34-35; Barnes dep. at 38-39; Williams dep. at pp. 46, 75-76.] This has been described as follows:

> But basically on parallel testing what we do is we randomly select precincts and randomly select machines and set them up in the back room here and during election using the actual – the same database, election database that's used in those counties and in those precincts, we conduct a controlled vote where voters are given a script to vote and two people stand there. One calls it out and

> watches what's happening and the other one votes as a check that it's entered accurately.
>
> And the video cameras record that and then at the end of the day we close the polls. We print those ballot images out and have an independent person count those ballot images manually. We don't tell them what the answer is.
>
> And when they get them counted then we compare that to the electronic record and they've got to match a hundred percent.
>
> I believe one time – now, this is from memory so this may not be a hundred – there may have been another one, but to my knowledge, there was only one time that there was a one vote difference and we went back to the video cameras and actually found where one of the voters had hit the wrong button. So yes, that is an independent record of the vote.

[Williams dep. at pp. 75-76.]

This system assures that there is no state-wide swapping out of software or results, since it would discover it by the parallel test. Likewise, since which jurisdictions will be subject to parallel testing is not known by other than those conducting it, local attempts to subvert results can be discovered; again, no such fraudulent attempts by electronically manipulating the ballot or the votes has ever been discovered under electronic voting. [Cobb. dep. at pp. 26, 27, 32; Barnes dep. at pp. 22, 33-34; Williams dep. at pp. 39-41; 58, 69-78; Cox dep. at pp. 46-47.]

It should be noted that the Appellants have expressly disclaimed any government conspiracy as to voting in Georgia. [Appellants' Responses to Appellees' First Interrogatories at ¶¶ 5, 6 (originals to be filed by Appellants).]

The process of voting by electors at the polls and the subsequent tabulation of votes is set out in several statutes in Georgia. In his affidavit Mr. Cobb factually summarizes this process:

> When voting at the polls in Georgia, each voter (or elector) first fills out a certificate which also identifies election, the voter, and in case of a primary election, the party. The voter's identification is then checked. The voter's certificate is then checked to make sure he or she is properly registered. Each voter then receives a voter access card, which is a smart card containing the election ID, the precinct ID, and the ballot style number appropriate for the voter. When the card is inserted in a touchscreen voting machine, the proper ballot is displayed (or spoken for hearing impaired voters), and the voter then votes by selecting his or her choices on the electronic ballot by touching the screen. After going through the ballot, the voter then views a screen which allows the voter to confirm his vote. If the vote does not match his selections he can go back and change them. Once the votes are cast, they are recorded on a flash card, as well as on the touchscreen voting machine. The flash card is taken to a central computer referred to as the server at the county office, where the votes are tabulated, and unofficial results are then transmitted by each county to the Secretary of State's Office, where they are then again tabulated and compiled. The unofficial votes are transmitted by the county over a phone line using a private number; at no time are the touchscreen voting machines or the servers at the county connected to the internet. After the county has certified the election, the official votes are placed on a CD and taken to an assigned State Patrol office where they are picked up by employees of the Office of the Secretary of State and taken to the State Elections Division. The votes are then tallied for federal and state races and certified by the Secretary of State.

[Cobb aff. ¶ 6.]

The elector's votes cannot be traced back to the elector because he or she is not identified with a particular voter access card. [*Id.*] Once the card is voted and

turned it, no one knows which voter voted that card. [*Id.*] It should be noted that the meaning of what is the "ballot" is set by several statutes and a regulation, discussed in the text, below. *See, e.g.,* O.C.G.A. §§ 21-2-2(2), 21-2-2(18), 21-2-280; 21-2-379.4; Ga. Comp. R. & Regs. 182-1-12-.02(1)(a). The ballot in an electronic machine – which takes electronic data from software and electronic media and uses that to display information on a screen and then stores such results back on the media –involves the combination of several things, hardware and software – operating together to create and display the ballot. [*See* Cobb. dep. at pp. 10-16, 42; Cox dep. p. 33.]

After the election the voter's ballot can be displayed and printed (although it is not identifiable to a specific elector, as above maintaining the elector's secrecy). [Cobb dep. at p. 5-7, 28; Cox dep. at p. 10; Barnes dep. at p. 16.] The touchscreen voting machines also have a paper printout (internal in the machine) which records the votes cast. [Cox. dep. pp. 10, 38; Cobb dep. pp. 7, 28.] A printed receipt given to a voter, however, while it may cause, comfort, is not technically necessary and would give rise to malice, as those who which to subvert the system could easily print their own "fake" receipts "any way they want them.' [Williams dep. at pp. 39, 40.] As explained by former Secretary of State Cathy Cox:

> I have certainly learned about people who would love to cause mischief in elections and would love to stick that receipt in their pocket and walk on out so the vote totals don't reconcile at the end of the day.

> There are people who would love to pay people for voting. If that voter could walk out the door with a receipt and prove that they voted for or against a candidate in order to get illegal remuneration, you have a problem.

[Cox dep. at pp. 35-36.]

The paper trail created by the machines allows their results to be physically audited, as does the numerous electronic information from the servers, voter cards, PCMCIA cards, and touchscreen machines. [Barnes dep. at pp. 16, 18-19, 24; Cobb dep. at pp. 33-35; Williams dep. at pp. 12-13, 24, , 27, 29-30.] Witness after witness explained without dispute that these materials generate an audit trail by which the performance of the machines and election results can be and are examined. [*Id.*; *see, e.g.*, Williams dep. at 24.]

Any voter in Georgia, however, who does not wish to vote with the electronic voting system can vote – for any reason – with a mail-in absentee ballot. O.C.G.A. § 21-2-380 *et seq.* A mail-in ballot is a paper ballot. *See, e.g.*, O.C.G.A. §§ 21-2-383 to 21-2-385.

Voters at the polls, however, can be confident in the outcome. The votes are tabulated in public and posted locally. [Williams dep. at p. 45.] Such results are also sent to the Center at KSU, where they can be checked against the local results. [Cobb. aff. ¶ 6.] A voter likewise knows who he or she voted for at the time of voting because voters can check their ballot after making their selections to make sure their votes are identified for the right candidates or issues. [Cox. dep. at pp.

29-30.] And voters have had a very high confidence in the system with survey after survey showing that over 80% of Georgia voters have confidence in the voting system. [Williams dep. at p. 73.]

The voters' confidence in the system is justified. Again, as stated by Mr. Cobb:

> While no system is theoretically free from errors, the error rate for "over votes" (where more than one vote is cast for a race, so the vote is not counted) has declined to 0, since the touchscreen voting machines will not allow this to occur. Likewise, the rates for "under votes" (where no vote is cast in a particular race) has substantially declined compared with the previous systems. In the 2000 election, the undervote in Georgia for the presidential race was 3.5%, equating to 96,000 voters who voted in the election but did not vote for a presidential candidate. The undervote for the top race on a ballot is recognized as a measure of a successful election. Using the electronic voting system in the 2004 election, the undervote for president was less than 0.4%, indicating a nine-fold improvement over the election in 2000. Indeed, in the 2000 general election, Georgia had similar problems to the highly publicized problems in Florida. Georgia was at that time like Florida was using a combination of lever machines, punch cards, optical scan machines, and paper ballots. The prior methodologies used were also highly susceptible to fraud (for instance, fake paper ballots are easy to create, and real paper ballots are easy to destroy) compared with electronic touchscreen voting. Indeed, in Georgia's history, like other states, there is a history of voter and election fraud – including defrauding voters and candidates on racial lines – which touchscreen voting helps prevent. Studies have shown that touchscreen voting is easier for poorly educated and illiterate voters to use. It also allows blind voters to vote without assistance when casting their ballot (since the system allows the ballot to be read to them); the previous systems of voting in Georgia did not do this. Electronic touchscreen voting is in my opinion the most reliable system of voting available and is the system that best protects the vote and the secrecy of the ballot.

[Cobb aff. at ¶ 9; *see also* Cox dep. at p. 44 (explaining same results).]

The Appellants are entitled to their views as to electronic voting. They are entitled to – indeed, they are *encouraged* to – vigorously question the system. However, they are not entitled to go forward on claims that are without merit. This is a case where there is no merit to the Appellants' claims as shown by the undisputable facts and Appellees properly receivedd summary judgment.

ARGUMENT AND CITATION OF AUTHORITY

The order of argument below follows the Appellants' brief for ease of reference.

I. The Rational Basis Test is the Correct Standard Governing the Secretary of State's Administrative Decision to Use Electronic Voting Equipment in Georgia

This case involves, overall, a challenge to the Secretary of State's administrative decision as to the type of voting equipment to be used in Georgia. Counts V, XII, and XIII, which Appellants refer to regarding strict scrutiny, all involve explicit challenges to the type of voting equipment selected to be used in Georgia. There is no explicit claim that any individual voter was ever denied the right to vote. There is no claim in this case that anyone was turned away from the polls. There is no assertion that any of the Appellants specifically were denied an opportunity to vote or were turned away from the polls.

There is, in short, no individual voting rights claim.

The Appellants are dissatisfied, rather, with the methodology of voting used in Georgia. They are most dissatisfied with the type of paper record generated by Georgia's electronic voting machines. There is no dispute, in this regard, that a paper record is generated, but it is internal in the machine; it is not reviewed, handled or kept by the voter. The Appellants evidently cannot agree amongst themselves as to what would constitute an adequate paper record and stated that they were not trying to propose solutions (indeed, none of the solutions they did propose would withstand scrutiny), but they think the current system is invalid.

The Georgia Constitution explicitly provides:

> **Method of Voting.** Elections by the people shall be by secret ballot and shall be conducted in accordance with procedures provided by law.

Ga. Const. Art. II, Sec. I, Para. I (emphasis added).

Georgia statutory law provides that the procedures governing voting are set by the Secretary of State. *See, e.g.*, O.C.G.A. §§ 21-2-300, 21-2-324, 21-2-368, 21-2-379.2 *et seq*. Regarding DRE (which are touchscreen) voting, the law requires the Secretary of State to examine and approve systems, O.C.G.A. § 21-2-379.2, and provides that the approved systems be a uniform system of DREs used in the State. O.C.G.A. § 21-2-379.3. These actions of the Secretary of State are

administrative functions guided by state statute and regulation. *See id.*; Ga. Comp. R. & Regs 183-1-12-.01 *et seq.*

While the United States Constitution does not mention a right to vote, there is no dispute that the right to vote is a fundamental right. *Washington v. Glucksburg*, 521 U.S. 702, 721, 722 (1997). Yet the Supreme Court has repeatedly held that unless this fundamental right is directly abridged State laws regarding voting are not subject to strict scrutiny. As explained in what is perhaps the seminal case, *Burdick v. Takushi*, 504 U.S. 428 (1994):

> Petitioner proceeds from the erroneous assumption that a law that imposes any burden upon the right to vote must be subject to strict scrutiny. Our cases do not so hold.
>
> … It does not follow, however, that the right to vote in any manner and the right to associate for political purposes through the ballot are absolute. [Cit.] The Constitution provides that States may prescribe "the Times, Places and Manner of holding Elections for Senators and Representatives," Art. I, § 4, cl. 1, and the Court therefore has recognized that States retain the power to regulate their own elections. [Cits.] Common sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections; "as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." [Cit.]
>
> Election laws will invariably impose some burden upon individual voters. Each provision of a code, "whether it governs the registration and qualifications of voters, the selection and eligibility of candidates, or the voting process itself, inevitably affects -- at least to some degree -- the individual's right to vote and his right to associate with others for political ends." [Cit.] Consequently, to subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest, as petitioner

> suggests, would tie the hands of States seeking to assure that elections are operated equitably and efficiently.

504 U.S. at 432-33, *citing Munro v. Socialist Workers Party*, 479 U.S. 189, 193 (1986); *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983); *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 217 (1986); *Storer v. Brown*, 415 U.S. 724, 730 (1974); *Sugarman v. Dougall*, 413 U.S. 634, 647 (1973); *Bullock v. Carter*, 405 U.S. 134, 143 (1972).

The conclusion in *Burdick* is instructive: there the Court found that the refusal of Hawaii to allow write-in votes was not subject to strict scrutiny and was constitutional. Likewise, in the recent case of *Washington State Grange v. Washington Republican Party*, __ U.S. __, 128 S. Ct. 1184; 170 L. Ed. 2d 151 (2008), the Court again discussed at length the States' interests in regulating voting and the deferential attitude that must be taken to it. *See, e.g.*, 128 S. Ct. 1191-92. The court refused to strike down on a facial challenge (like the present case) California's blanket primary system (which lumped all candidates in a primary on a single ballot but identified them by self-selected party preference), and the Court refused to find as persuasive the Appellants' speculation about "voter confusion" (as is likewise alleged in the present case). *Id.* at 1193-95. So, too, in the recent case of *Clingman v. Beaver*, 544 U.S. 581 (2005), the Court upheld the State of Oklahoma's semi-closed primary system based on the indirect (if any) impact on the right to vote and the State's interest in selecting its own system.

None of the cases cited in the Appellants' strict scrutiny section address this issue – the State's interest in determining the manner of voting – nor do they even mention the extensive Supreme Court case law on the subject.[3] Appellants also do not mention, for that matter, the Georgia Constitution's explicit statement that "Elections … shall be conducted in accordance with procedures provided by law." Ga. Const. Art. II, Sec. I, Para. I. Some of the cases have nothing superficially to do with the issues here: *San Antonio School dist. V. Rodriguez*, 411 U.S. 1 (1973), for example, involves educational rights and the Court found that the equal protection clause was not violated by differential educational opportunities.

Other jurisdictions that have addressed the question of whether the "right to vote" is violated by electronic touchscreen voting when "paper ballots" or paper receipts are not provided have rejected the claim.[4] For instance, in *Weber v. Shelley*, 347 F.3d 1101 (9th Cir. 2003), the Ninth Circuit considered this issue at length and found that such a system was constitutional and appropriate. Similarly, in *Wexler v. Lepore*, 342 F. Supp. 2d 1097 (S.D. Fla. 2004), a district court found

[3] The Court should note that Count V as well as XII of the Complaint, as amended, are nominally equal protection claims. The Appellants do not discuss equal protection under enumeration I of their brief, and so the equal protection aspects – which are meritless – are discussed herein in addressing Counts V and XII, below.

[4] In fact, Georgia does allow voting on paper if he or she chooses. Each and every voter may vote in advance by requesting a paper mail in ballot. Voters may also vote provisional paper ballots at the polls. *See, e.g.*, O.C.G.A. § 21-2-380 *et seq.*

that Florida's manual recount procedures for touchscreen paperless voting systems were constitutional.

Georgia's constitutional explicitly provides that the methods in Georgia are to be "in accordance with procedures provided by law." Ga. Const. Art. II, Sec. I, Para. I. Such procedures are not without standards – they must meet both the statutory requirements that are set as well as (as all legislation) the basic requirements of rationality. *Cf. Nichols v. Gross*, 282 Ga. 811, 813-14 (2007). But Georgia law, by expressly providing that voting methods are "in accordance with procedures provided by law" is not subjecting those procedures to "strict scrutiny" but is deferring to the legislative branch and its designee, the Secretary of State, to determine such standards.

And there are ample reasons why the touchscreen voting system used in Georgia is appropriate. (*See* Statement of Facts, *supra*.) As the facts in the record demonstrate without material dispute, it is the least prone to error. (R-.) Each and every other voting system has equal or greater problems. The notion of a "paper ballot" – which Georgia law expressly does not require, O.C.G.A. § 21-2-280 ("A ballot may be electronic or printed on paper") – leads to the enormous difficulties and inaccuracies in counting and, in fact, is the type of ballot most subject to fraud. That is because anyone can forge a paper ballot. Few, have any idea how to even

being to forge an electronic ballots. And if that were to occur it would be much easier to detect.

The Appellants' "strict scrutiny" assertion is without merit.

II. The Trial Court Did Not Improperly Shift The Burden Upon Appellants to Establish Their Claims; Appellants' Claims are Unsupported as a Matter of Law and Undisputable Evidence from the Record

The Appellants' argument that the trial court improperly shifted the burden to them is based entirely on their notion that "strict scrutiny" must be applied. As discussed above, that contention is erroneous. The law is well established that in responding to a motion for summary judgment, once the movant establishes that he is entitled to summary judgment as a matter of law, the burden shifts to the respondent to rebut that motion. *Lau's Corp. v. Haskins*, 261 Ga. 491 (1991). Here Appellants did not and could not adduce law or facts to rebut the right to summary judgment that Appellees established. There was no error by the trial court.

III. The Trial Court Properly Awarded Summary Judgment to Appellees and Denied it to Appellants on Counts V, XII, and XIII because there is no Equal Protection or Fundamental Rights Violation

A. Count V

Count V is an equal protection claim. Appellants claimed in front of the trial court that the "classes" underlying this equal protection claim were those who

chose to vote on touchscreen voting machines and those who chose to vote absentee. (R-.) But such a classification – if it is a classification at all (and it is not because a voter can choose to vote either way: the options Georgia law allows apply equally to everybody; there is one group with everybody in it given the same choices as to how to vote) – involves no "suspect class." There is no distinction based on race or gender or age or national origin or religion or anything else.[5] It applies equally to all voters. As such it is patently subject to rational basis review and not "strict scrutiny." *Nichols v. Gross*, 282 Ga. 811, 813-14 (2007); *Morgan County Bd. of Comm'rs v. Mealor*, 280 Ga. 241 (2006) (rejecting challenge based on equal protection, rational basis test); *State v. Heretic, Inc.*, 277 Ga. 275 (2003) (same). It is well established that "The States possess a " 'broad power to prescribe the "Times, places and manner of Holding elections .. which power is matched by state control over the election process for state offices.'" C*lingman v. Beaver*, 544 U.S. 581, 586 (2005).

There is substantial reason for allowing any voter to vote absentee. First, it should be noted that voting absentee in general is permitted by HAVA. It is necessary to guarantee the franchise for those citizens who cannot come to the

[5] The absentee ballot provisions used to be limited to only certain qualifying voters but now any voter can use them. O.C.G.A. § 21-2-380(b) ("An elector … shall not be required to provide a reason …"). There are a number of different ways electors may choose to cast an absentee ballot, but one of them is to cast a mail-in written ballot. O.C.G.A. §§ 21-2-384, 21-2-385.

polls. Allowing everybody to do so does not deprive anybody of anything but increases their options. The Secretary of State and General Assembly could reasonably have believed that some citizens might like to vote via mail-in ballot and some via touchscreen. Indeed, the confidence in the touchscreen system is very high and it is a desirable option for many people. [*Cf.* Williams dep. at pp. 72-72.]

In their brief the Plaintiffs ignore what they pled in their Complaint (which was equal protection) and again view their argument as one involving "fundamental rights." That argument – which is evidently premised on their erroneous "strict scrutiny" argument discussed above –misrepresents the undisputed facts of record. They claim that "Appellees have no means to detect whether or not voters' votes are being swapped to other candidates on election day." (Appellants' brief at p. 16.) To the contrary, as discussed at length in the Statement of Facts, above, there are numerous controls that prevent swapping from occurring. (*See, e.g.*, R-.) And Appellants contention in this regard hardly amounts to a violation of a fundamental right. Indeed, the very statement that Appellants misrepresent also includes the statement (regarding uncoving certain fraud after the pols are closed): "That's true of any voting system." (R-.)

Likewise, the fact that a witness testified that one cannot see "electronic bits" (Appellants' brief at p. 17) does not amount to a violation of a fundamental

right. Likewise, Appellants misstate the nature of Georgia recounts, since they involve not only rerunning, from scratch, all the electronic PCMCIA cards, but also recounting mailed in votes, provisional ballots, etc. *See* O.C.G.A. §§ 21-2-493 to 495.

The fundamental conceit of Appellants' equal protection challenge was that having options supposedly deprives people of rights. Likewise, there is no "fundamental right" not to vote on a touchscreen, though voters in Georgia can do so. As discussed above, there is a rational basis for touchscreen electronic voting in Georgia as well as for providing those who may not like the system with the option of another way to vote. The Appellants' Count V was meritless and summary judgment was properly granted upon it.

B. Count XII

The Appellants added Counts Twelve and Thirteen at the close of discovery in this case claiming that Georgia's electronic voting system violates due process, equal protection, and the right to vote. They make no meaningful distinction in their brief between these counts and Count V (which they now argue as one involving fundamental rights). (Appellants brief pp. 15-18.) As discussed above, however, the rights to due process and to vote, however, do not give one the right to choose any method they would like to vote. Indeed, the Georgia Constitution, which is the source of the right to vote in Georgia, specifically provides that the

conduct of elections is as provided by law. As discussed at length above, that law has been consistently adhered to.

C. Count XIII

Plaintiffs argument regarding Count XIII is meritless for the same reasons as discussed regarding Counts V and XII, above.

IV. No Genuine Issues of Material Fact Remain Allowing Trial on Counts I, II, III, IV, VI, VII, VIII, IX, X, and XI and Appellees were Properly Awarded Summary Judgment on These Claims

A. Count I is Meritless because the Definition of Ballot Contained in the Georgia Code and Electronic Voting Does Not Somehow Violate the Georgia Constitution by its Use of Ballots

In Count One Appellants claimed that the definition of "ballot' in O.C.G.A. § 21-2-280 is unconstitutional. [R. pp. 29-31.] Appellants also complain that making a ballot electronic "breaks the custody and control that voters have traditionally had over their own ballots and that the framers of the Constitution would obviously expect." [R. at p. 30.] They claim that a voter "cannot touch or see his own alleged electronic record" and that a voter cannot confirm how he voted, etc. [*Id.*] At his deposition (where Mr. Favorito testified as lead Plaintiff on behalf of all Appellants [Favorito dep. at pp. 5-6]), Mr. Favorito characterized this claim that an electronic ballot does not meant the definition of a ballot, based on his view of what the "founders" thought a ballot was in "1908." [*Id.* at p. 76, 77] In Appellants' view this could be cured (apparently consistently with the founder's

intent") by having a "paper trail." [*Id.* at pp. 79-81.]

The Georgia Constitution provides, again quoting it:

> **Method of Voting.** Elections by the people shall be by secret ballot and shall be conducted in accordance with procedures provided by law.

Ga. Const. Art. II, Sec. I, Para. I.

The current Georgia Constitution was enacted in 1983, not 1908 and not by "founders" of Georgia (who first came to Georgia in the Eighteenth Century). In 1983 computers existed, electronic media existed, and, in fact, electronic voting existed though not by touchscreen terminal (at that time votes were downloaded by various methods of voting directly into a computer database). [*Cf.* Cobb. dep. at p. 20.]

The language of the Constitution is not ambiguous, however, and does not require reliance on the Appellants' view (which has no evidentiary support) of "history." The rule is well established interpreting laws, that where the language of a law is clear and does not lead to an unreasonable or absurd result, it is the sole evidence of the ultimate legislative intent. *Johnson v. Fayette County*, 280 Ga. at 495.

The Georgia Constitution requires a secret ballot and expressly provides that the conduct of elections may be as provided by law, i.e. as determined by the General Assembly through statute or by the legal determinations of its delegate –

here the Secretary of State and the State Elections Board. *See* O.C.G.A. §§ 21-2-50, 21-2-50.2, 21-2-300, 21-2-379.2; *see also* §§ 21-2-30 *et seq.* (State Election Board).

The facts are undisputed that voters' ballots are kept secret.[6] [Cobb. aff. at ¶ 6.] How an individual voter has voted is not disclosed or discoverable, which is the fundamental purpose of a secret ballot.

It is also an undisputable fact that voters know how they voted and can verify this when voting. They step through the ballot when voting and then are given the chance to confirm all their selections, review them, and change them, even going back through the ballot. [*See* Cobb aff.; Cox. dep., discussed in Statement of Facts, above.] This is *more* opportunity to review a ballot than previously existed. For instance, with a punch card once the vote is punched it cannot be undone, even if the voter realizes the mistake. The Appellants, however, would like a return to the punch card systems which caused the voting debacle in Florida in 2000. [Favorito dep. at pp. 147-150.] In their view "punch cards produce direct physical evidence of voter intent." [Favorito dep. at 148.] That view is out of touch with the reality of the *Bush v. Gore* litigation where what can fairly be described a national crisis in voting arose precise because voter intent

[6] Indeed, for some voters, such as the visually impaired, touchscreen voting is the first time that they have been truly able to have a secret ballot. This is because the touchscreen machines allow the ballot to be read to them and so they do not need assistance and do not need to reveal how they are voting. [*See* Cobb. aff. at ¶ 9.]

cannot be established from a punchcard. *Bush v. Gore*, 531 U.S. 98 (2000) (describing the situation).

The Court should note that if one had a paper receipt showing how they voted, it could be used to reveal to others how one voted, violating the secrecy of the ballot. Ga. Const. Art. II, Sec. I, Para. I. It would also lead to malicious misuse, as those seeking to disrupt the system could claim that they voted a different way via falsely created receipts. [Cox dep. at 34-36.] It would allow people to try to get paid for voting for a certain candidate – and candidates to pay them – based on their receipts, both of which are plainly improper. [*Id.*]

The authority to determine whether "paper receipts" are appropriate or note, however, is not the Appellants. The Constitution plainly says that procedures in elections are as provided for by law, and the law gives the General Assembly and the Secretary of State the authority to make this determination. O.C.G.A. §§ 21-2-50.2, 21-2-300, 21-2-379.2. The Secretary of State has articulated cogent reasons for her determination, and thus that decision is proper.

Finally, at the core of Appellants' Count I is a failure to address the actual statutory language concerning a "ballot" and what it is. The definition of "ballot is contained in numerous places in the election Code with different meanings dependent on context. *See, e.g.,* O.C.G.A. §§ 21-2-2(2), 21-2-2(18), 21-2-280; 21-2-379.4. Code section 21-2-280 expressly says that "ballots may be electronic or

printed on paper" and other provisions of the law describe ballots for electronic voting. Most specific of these to touchscreen voting is Ga. Comp. R. & Regs. 182-1-12-.02(1)(a) (which is specifically designed for electronic voting) and states that: "Ballot shall mean the offices, candidates, and questions, to be submitted to the voters at a primary, election, or runoff for each county or municipality."

To lay this issue to the side: Appellees have not contended and have never been of the position that a "ballot" of some kind is not required for voting. The law properly provides for what a ballot is, and the procedures used in the State are consistent with that. Appellees were entitled to summary judgment on Count I.

B. Count II is Meritless Since Touchscreen Voting Does not Deprive Citizens of their Right to Hold Elections (as Plaintiffs Alleged)

In Count II the Appellants again predicated their claim on what they believe to be a historical intent by the Constitution not to allow electronic voting. [R. at p. 32] There is nothing in the Constitution that supports this reading. Again, the express language of the Constitution states:

> **Method of Voting.** Elections by the people shall be by secret ballot and shall be conducted in accordance with procedures provided by law.

Ga. Const. Art. II, Sec. I, Para. I (emphasis added).

Again, the Constitution plainly and on its face delegates the authority as to how elections are conducted to lawmakers – the General Assembly and by proxy the Secretary of State and State Election Board. *See* O.C.G.A. §§ 21-2-50, 21-2-

50.2, 21-2-300, 21-2-379.2; *see also* §§ 21-2-30 *et seq.* The reasonableness of the requirements they set has not been challenged here, nor could it: while reasonable people may differ as to what the best method is, the law is upheld if it is supported by any rational basis, which it is. *Cf. Ga. Dep't of Human Res. v. Sweat*, 276 Ga. 627, 628-29 (2003); *Columbus-Muscogee County Consol. Gov't v. CM Tax Equalization, Inc.*, 276 Ga. 332, 338 (2003). As discussed in great detail in the Statement of Facts, above, the electronic voting system was put in place by a broad consensus and a careful examination of the situation following the 2000 election debacle and the recognition of the shortcomings of other types of voting systems.

The Complaint went on to claim, in essence, that Diebold is conducting the elections in Georgia. Such an assertion is unsupported by any evidence, and, indeed, is flatly false. As testified at length and without dispute by Dr. Brittain Williams, Raymond Cobb, Michael Barnes, and former Secretary of State Cathy Cox, the State of Georgia conducts these elections through the Secretary of State's Office and through many local governments and with the assistance of the KSU Center for Election Studies, an independent organization. [Williams dep. *passim*; Cobb dep. and affidavit, *passim*; Barnes dep., *passim*; Cox dep., *passim*.]

In their brief Appellants have now re-written Count II to be about "custody and control" of one's ballot and disputes as to the meaning of "ballot," which they claim must be a piece of paper. These arguments were pled in the Complaint

Count I, not Count II, and are addressed above under Count I. They also claim – in a statement that is patently incorrect – that voters can no longer see their ballot. Of course, voters do review their ballots on screen (if they vote touchscreen) and, indeed, unlike the past can correct errors if they make any. Voters have never been allowed to leave the polling place with their ballot in hand.

Count II was unsupported by any law or fact.

C. Count III is Meritless Since Electronic Voting complies with All Implementing Statutes and Regulations

The undisputed evidence of record shows that the touchscreen voting system is the most reliable voting system Georgia has ever had. [*See, e.g.*, Cobb aff. at ¶ 9; *see also* Statement of Facts, *supra*, discussing this at length.] As the facts show, the State is aware of no instances, zero, where the touchscreen voting system contains a flaw that has prevented voters from being able to vote for who they wanted. [*Id.*] It is repeatedly monitored to assure that this is the case. [*Id.*]

Code section 21-2-379.1 states that no direct recording voting system shall be adopted or used unless "(8) It shall, when properly operated, record correctly and accurately every vote cast." O.C.G.A. § 21-2-379.1(8) (emphasis added).

The Appellants' claims of possible fraud, vote tampering, fake ballots, and so forth all depend on perverting the operation of the machines and their software so they do not operate properly. [*See, e.g.*, R. at pp. 35-37.] Neither the law nor any fact supports Appellants' contention in Count Three. As stated by the

witnesses at depositions, no instance of failing to record votes when the machines are properly operating or even of successful tampering with the machines in Georgia has ever been discovered, despite repeated investigation into this issue.

Appellants recitation of the evidence is incomplete at best (*see* Appellees' brief in response to Appellants motion for summary judgment, below), but it is also irrelevant. What Appellants claim in their brief is not a legal or constitutional violation.

It should also be noted that the system in place in Georgia was approved and came into place six years ago. Attempting to challenge that approval now is too late as a matter of law. *Plyman v. Glynn County*, 276 Ga. 426 (2003). This is particularly so when, as in *Plyman* and is true here substantial public investment and reliance has built up on the settled law, and there is no reason why a legal challenge to the legal validity of the adoption of the system could not have been made earlier, and many of the documents regarding the adoption of the system no longer exist. As stated in *Plyman*, finding laches applies to a 42 day delay that affected an election matter:

> Whether laches should apply depends on a consideration of the particular circumstances, including the length of the delay in the claimant's assertion of rights, the sufficiency of the excuse for the delay, the loss of evidence on disputed matters, the opportunity for the claimant to have acted sooner. . . . These factors are relevant because laches is not merely a question of time, but principally a matter of inequity in permitting the claim to be enforced. *Hall v. Trubey*, 269 Ga. 197 (498 S.E.2d 258) (1998); *Troup v. Loden*, 266

> Ga. 650, 651 (1) (469 S.E.2d 664) (1996); *Yablon v. Metropolitan Life Ins. Co.*, 200 Ga. 693, 708 (2) (38 S.E.2d 534) (1946). But lapse of time is an important element and in itself may be telling on the question of inequity. *Cooper v. Aycock*, supra at 666 (1).

276 Ga. at 427.

Appellees were entitled to summary judgment on Count Three of the Complaint.

D. Count IV is Meritless because Elections are Properly Recounted in Georgia

The graveman of Count Four of the Complaint is that supposedly elections cannot be recounted in Georgia if they are in dispute because this simply rehashes what has already been counted. [R. at pp. 37-38.] The Appellants' argument overlooks several undisputed facts, as well as the key law:

First, recounts in Georgia involve recounting absentee ballots and provisional ballots as well as touchscreen ballots. So as a matter of undisputable fact, although ignored by the Appellants, recounts are <u>not</u> simply a rerunning of the electronic voting totals.

Second, Appellants overlook the fact that even the electronic totals are re-run from scratch. [Cobb. dep.; Barnes dep.] If there were fraud on an individual machine doing so could catch it. It also examines for user error by election workers which might not recur on a recount.

Third, if the Appellants complaint is that the electronic voting machines are *too* reliable, and so do end up with the same result – because is the result – that is no claim against or infirmity in the system. But that is very much akin to what they are claiming.

And, fourth, the recount procedures are set by law, which law also provides for the touchscreen voting system. *Cf.* Ga. Const. Art. II, Sec. I, Para. I (election procedures set by law); O.C.G.A. § 21-2-520 *et seq.* (contested election procedures) These provisions of the law are construed *in pari materia Swims v. Fulton County*, 267 Ga. 94, 96 (1996). There is not a single word of the recount provisions that is violated or contradicted by the use of touchscreen voting equipment. Appellants' Count IV was meritless.

E. Count VI is Meritless Since It is Moot as the Law No Longer Exists

In Count VI of the Complaint, as in Count VII, Appellants claim that a Pilot Project to test a system of recording votes violates their rights. There are a host of reasons why that claim is meritless, but only one need be addressed here. The Appellants' claim relates to a 2006 law establishing a pilot project that has since been repealed. 2006 Ga. L. 557, § 2. there is nothing to enjoin, even if the Appellants' claims had been meritorious to start with, which they were not.

In *Collins v. Lombard Corp*., 270 Ga. 120 (1998), the Supreme Court of Georgia addressed some of the principles of mootness. A case is moot, when, as

here, "its resolution would amount to the determination of an abstract question not arising upon existing facts or rights, and that mootness is a mandatory ground for dismissal." 270 Ga. at 121. "[D]ismissal of moot cases is mandatory." *Id.* at 122. In so ruling *Collins* reversed a decision by the Court of Appeals establishing a new exception to the mootness doctrine. Applying that exception would have allowed speculative cases to go forward. There is similarly no evidence of any kind whatsoever that a pilot project identical (or even similar to) the 2006 Pilot Project will occur again. There is nothing to enjoin. Likewise, declaratory judgment is not available based on a contingency. *Atlanta Cas. Co. v. Fountain*, 262 Ga. 16, 17 (1992).

Since the issues as to the Pilot Project are moot, Count VI is meritless and should be dismissed.

F. Count VII is Likewise Moot (It Involves the Same Non-existent Law)

Count VII of the Complaint also involves the 2006 Pilot Project. for the same reasons as articulated for Count VI, above, it is moot and should be enjoined.

G. Count VIII is Meritless because Mandamus is Not an Appropriate Remedy Herein

Mandamus only lies as a proper remedy when an official is called upon to perform a non-discretionary act. *See* O.C.G.A. § 9-6-20 *et seq.* Mandamus does not lie to compel public officials to perform discretionary acts. *Dickerson v.*

Augusta-Richmond County Comm'n, 271 Ga. 612, 613 (1999). In this regard, the requirement to perform must be clear. *Landsford v. Cook*, 252 Ga. 414, 415 (1984). And the law is well established that mandamus does not lie to compel a general course of conduct; it only lies to compel officials to engage in a specific action which they are required to perform by law and are refusing to do. *Willis v. Georgia Dep't of Rev.*, 255 Ga. 649, 650 (1986).

There is no non-discretionary specific duty that the Appellees have refused to perform in the present case. The Appellants may not like the law; they may think that the law is unconstitutional; but they have no evidence that the Appellees are not complying with the law or refusing to perform some act. Count VIII of the Complaint was properly dismissed.

H. Count IX is Meritless Since It Was Abandoned

During the deposition of Plaintiff Garland Favorito the Appellants stipulated that they would not pursue Count IX of the Complaint. [Favorito dep at p. 230.] That Count is therefore no longer actionable.

I. Count X is Meritless Since the Machines were Properly Certified (as Shown of Record)

Count X (found in the Third amendment to the Complaint) asserts a host of things about certification of Georgia's voting machines by the Secretary of State, all of which are refuted by the undisputed record in this case. But the evidence of record shows, directly refuting Appellants' contentions in this regard, that the

machines and the processes they used were properly certified. [R. at pp. 291-292.] Indeed, copies of the certifications were file with the trial court. (*See id.*)

There was also testimony regarding this, which – although all deponents touched on it – came primarily from Dr. Brittain Williams, who is on the EAC Technical Guidelines Development Committee, which is established by federal statute and establishes testing and certification protocols, among other things. [Williams dep., *passim*.] He testified that Georgia's machines must be federally certified before they are purchased at all, and that they are again tested for State certification. All of the machines used in Georgia have passed this. [*Id.*] Once individual machines are received they also undergo a detailed process known as "acceptance testing." Then at the time of an election, the machines and electronic media are again tested. During the election parallel testing occurs which samples the voting and function of the machines from random precincts. The machines generate an audit trail that is electronic; they also generate a paper audit trail. Within these trails there are multiple ways to test the effectiveness and proper function of the machines. [*See* Statement of Facts detailing the above.]

The statutes cited by Appellants do not show any violation of law by the Appellees. Code section 21-2-379.2 is the authority of the Secretary of State to certify machines when vendors submit them. It has provisions relating to how vendors submit machines (or more accurately systems) for review and certification.

Subsection 21-2-379.2(f) indeed, makes clear that additional submission is not required if an improvement or change does not impair the accuracy, efficiency or capacity of the machines. Code section 21-2-368 relates to optiscan machines, not touchscreen voting machines. There is no failure of optiscan voting machines of any kind alleged in the Complaint.

Count X of the Complaint was meritless and should be dismissed.

J. Count XI is Meritless because, as with Counts VI and VII, it is Moot Since the Challenged Law and State Actions No Longer Exist

The 2001 Pilot Project, which forms the substance of Count XI, was a pilot project that predated the advent of touchscreen voting in Georgia. It imposed no duties on any of the Appellees that were continuing after the advent of touchscreen voting – and, indeed, all of its requirements were complied with. It is also no longer in existence and the law that gave rise to it repealed. 2003 Ga. L. 517. The issues regarding the Pilot Project have long since passed into history. Thus for the reasons discussed regarding Count VI and VII, above, the claims regarding this project are moot and were properly be dismissed.

The trial court, in this regard, also relied on the laches argument made by Appellees, below (see discussion regarding Count VI, above, stating this law). That is correct, but mootness is sufficient.

CONCLUSION

For the foregoing reasons the Appellees show that the trial court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This will certify that I have this day caused to be served a copy of the within and foregoing **APPELLEES' BRIEF** upon the Appellants by placing the same in the United States Mail, postage prepaid, addressed to:

WALKER CHANDLER, ESQ.
15 Jackson Street
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Zebulon, GA 30295

TODD A. HARDING, ESQ.
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This 29 day of June, 2009.

_____
STEFAN RITTER
Senior Assistant Attorney General