IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

GARLAND FAVORITO, MARK SWAYER RICARDO DAVIS, AL HERMAN, FRIEDA SMITH, KATHRYN WEITZEL, ADAM SHAPIRO, and CATHIE CALABRO,

Plaintiffs,

v.

KAREN HANDEL, Secretary of State, SONNY PERDUE, Governor of the State of Georgia, GEORGIA STATE ELECTION BOARD,

Defendants.

CIVIL ACTION FILE NO.
2006CV119719

BRIEF IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

COME NOW Secretary of State Karen Handel, Governor Sonny Perdue, and the Georgia State Election Board, each Defendants herein only in their official capacity ("Defendants"), and, show that they are entitled to summary judgment as a matter of law on each and all of the thirteen counts in Plaintiffs' Complaint. The undisputable facts and the governing law show that Plaintiffs' myriad attempts to enjoin Georgia's election system and laws are without merit for the reasons discussed below and in the supporting documents filed herewith.

SUMMARY

Summary judgment is warranted if a party can show that there is no genuine issue of material fact as to a claim and thus that he or she is entitled to judgment on that claim as a matter of law. O.C.G.A. § 9-11-56. In the present case the parties agreed to file cross motions for summary judgment; Defendants show that each of the Plaintiffs' claims is without merit.

Speaking first generally, the Complaint -- which (without intended disrespect to Plaintiffs or their counsel) can fairly be described as a "shotgun attack" on Georgia's electronic touchscreen voting system (as the Complaint has been amended four times and now includes thirteen different attempts to challenge the system) -- includes claims that are patently meritless. The Plaintiffs rely on Georgia constitutional "historical meaning" which, respectfully, they invent (*see* Counts One and Two); they claim that certifying machines the night before an election is not "at the time of an election" but certifying machines must be done effectively while the machines are used (*see* Count Three); they ignore the fact that electronic results are not the only results recounted (Count Four); they ignore the fact that voters can vote a paper ballot in Georgia if they want to prior to the election and voters do not need to use touch screen systems at all if they do not wish to (*see* Counts Five, Twelve, and Thirteen) and they pretend that giving voters a choice creates a classification system violating the equal protection clause (Count Five); they seek declaratory judgment as to statutory law that is repealed (*see* Counts Six, Seven, and Eight); they seek mandamus as to patently discretionary duties – duties which have in fact been carried out (see Count Eight); and they claim that contracts are invalid to which they were not party (and so they lack standing), contracts which were properly executed and provided for by law and which have, anyway, long since been completed (Counts Ten and Eleven).[1]

The proper and professional way for Defendants to address Plaintiffs' Counts, however, is to treat each one with respect and address each one, one by one, detailing in specifics why it is meritless. The short summary above is too short to do justice to this, and Defendants have taken

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[1] Plaintiffs have withdrawn Count Nine. Counts Twelve and Thirteen (due process) were added at the close of discovery and, on assurances of counsel that no additional materials or information relate to them, no discovery was conducted as to them. Defendants believe they are likely redundant of Count Five or assert that Plaintiffs have a right to vote on a certain type of equipment, both of which are incorrect.

the liberty of filing their Theory of Recovery as a separate document which lays out in detail, but in outline format, each of the issues Defendants have with each count.

One thing that the Plaintiffs do not dispute, however, is that the Secretary of State was given the authority by the General Assembly to determine and implement the voting system in Georgia. Since the only possibly applicable Georgia constitutional provision is whether a secret ballot is maintained, Ga. Const. Art. II, Sec. I. Para. I (which otherwise expressly delegates the power to lawmakers); the touchscreen system indisputably does that, the critical question in this case should be whether the Secretary of State had a rational basis for the decision she made on voting equipment. The evidence shows overwhelmingly that she did. While no one contends that touchscreen voting is perfect – no system is perfect, and Defendants constantly seek to improve the system – the evidence shows it is as good or better than *any* voting system Georgia has ever had. Defendants are entitled to judgment on the Complaint as a matter of law.

STATEMENT OF THE CASE

I. PROCEEDINGS BELOW

This case was initiated with a complaint filed by Plaintiffs in July 2006. [Complaint.] That Complaint, spanning 76 numbered paragraphs, asserted the following:

Count I:	"The definition of ballot set by O.C.G.A. § 21-2-280 is unconstitutional";
Count II:	"Use of DVMS Deprives The People from Conducting Elections by Unconstitutionally Delegating Critical Election Functions to Machine Processes that Cannot be Verified or Audited by the People";
Count III	"The current DVMS Implementation Does Not Comply with O.C.G.A. § 21-2-379.1"
Count IV:	"The DVMS, As Configured, Deny Candidates and their Supporters Their Rights to Fair Recounting of Votes in Close Elections"
Count V:	"Use of DVMS denies Equal Protection for Electronic Voters vs. Absentee/Pre-election voters"

Count VI: "Georgia's Audit Trail Pilot Project to comply with Voting Accuracy and Correctness Law Cannot Safeguard the Rights of the People to provide Assurances Against Future DVMS Failures";

Count VII: "The Audit Trail Pilot Project,[sic] Unconstitutionally Undermines the Affected Voters Rights to a Secret Ballot"; and

Count VIII: "Mandamus."

[*Id.*]

Defendants acccepted service by acknowledgment and answered, addressing in their Answer each paragraph of the Complaint in specifics. [Answer.] The Answer also asserts several affirmative defenses, including the impropriety of mandamus, injunction, and declaratory judgment (which applies to some of the claims), and an absence of standing (which applies to some of the claims). [*Id.* at pp. 1-2.]

The Complaint was then amended adding a Count Nine and a number of paragraphs and subparagraphs, which have been withdrawn. [*See* First Amendment to the Complaint; Deposition of Garland Favorito ("Favorito dep."), filed herewith, at p. 230 (stipulation of withdrawal of Count Nine).] It 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 asserting the following claims:

Count X: (Unlabeled but appears to claim that the touchscreen voting system in Georgia has been uncertified);

Count XI: (Unlabeled but appears to claim that an insufficient audit trail exists for the touchscreen voting system).

[Third Amendment to the Complaint.][2]

[2] The allegations of an amended complaint are deemed denied by operation of law, and they are not required to be answered. *Shields v. Gish*, 280 Ga. 556 (2006).

Discovery was extended multiple times in this case, with the Complaint being amended twice shortly before discovery expired. The final amendment called for the parties to file any motions for summary judgment on or by March 20, 2008. [January 2008 extension of discovery.] This motion is filed in accordance with that timetable.

II. STATEMENT OF FACTS

The following facts are undisputed and undisputable.

Eight years ago, in 2000, many people in the United States became concerned about the state of voting systems used in various States due to the extraordinary difficulties in determining the winner of the Presidential electoral vote in Florida. *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). 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.* some of what went on was described by the Supreme Court as follows:

> A monitor in Miami-Dade County testified at trial that he observed that three members of the county canvassing board applied different standards in defining a legal vote. 3 Tr. 497, 499 (Dec. 3, 2000). And testimony at trial also revealed that at least one county changed its evaluative standards during the counting process. Palm Beach County, for example, began the process with a 1990 guideline which precluded counting completely attached chads, switched to a rule that considered a vote to be legal if any light could be seen through a chad, changed back to the 1990 rule, and then abandoned any pretense of a *per se* rule, only to have a court order that the county consider dimpled chads legal. This is not a process with sufficient guarantees of equal treatment.

531 U.S. at 106-107. The machines used in Florida were punch card voting machines, lever machines, optiscan machines, and paper ballots. *Bush, supra*; *Palm Beach County Canvassing Bd., supra*; *Gore v. Harris, supra.*

In response Congress enacted the Help America Vote Act ("HAVA"). 42 U.S.C. § 15301 *et seq.* [*See also* Affidavit of Raymond O. Cobb ("Cobb aff."), filed herewith, ¶ 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 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.* Defendants' 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 began investigating how to improve its system (in fact, of course issues as to improvement are always considered, and Dr. Williams had been looking at related certification issues for Georgia since 1988). [*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[3]), an RFP was issued, bids were received and considered, and a contract was awarded to Global Management Systems, Inc., which later was purchased by Diebold Election Systems, Inc. (hereinafter collectively "Diebold").

[3] Plaintiffs acted throughout discovery as if any recommendations from such a Commission were somehow binding laws. The law creating the Twenty-first Century Voting Commission law was repealed by 2003 Ga. Laws, p. 517, § 29; any issues regarding it are moot.

[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 (general duties of Secretary of State), 2005 Op. Att'y Gen. 2005-3 (discussing allocation of duties and authority between Secretary of State and State Election Board (of which the Secretary of State is the chair)). [*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 was expressly authorized by the Georgia 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),[4] 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*.]

[4] The primary software used is a proprietary system customized for Georgia called the Global Election Management System ("GEMS"). GEMS is used for a variety of purposes including among other things preparing ballots, displaying ballots, tabulating votes, and preparing and displaying reports and summaries of vote results. [Cobb aff. at ¶ 4.] As used at the local level this software is only distributed in an executable format, and it cannot be altered at the local level. [Cobb. dep. at p. 16.]

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 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 Plaintiffs repeatedly floated at the depositions in the case and in written discovery – is a chimera. That is because the person doing it in advance could 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 Plaintiffs have 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 discovered 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 Plaintiffs have expressly disclaimed any government conspiracy as to voting in Georgia. [Plaintiffs' Responses to Defendants' First Interrogatories at ¶¶ 5, 6 (originals to be filed by Plaintiffs).]

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) (specifically for electronic voting: "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"). 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 Plaintiffs repeatedly raised the fact at the depositions, and in some written discovery, that this suit is the culmination of a long standing effort by the Plaintiffs – notably Mr. Favorito, the lead Plaintiff who testified on behalf of the other Plaintiffs – to oppose Georgia's electronic touchscreen voting system.[5] [*See, e.g.,* Barnes dep. at pp. 10-14 (see also exhibits attached to the

[5] Defendants seek to have this case decided on the merits, not on the Plaintiffs' particular beliefs. The Court should be aware, however, that at the depositions Plaintiffs, not Defendants, raised the issue of whether lead Plaintiff, Mr. Favorito is a "conspiracy theorist." [*See, e.g.,* Williams dep. at 31; Barnes dep. at pp. 10; Favorito dep. at p. 48.] Defendants initially questioned the relevance of this line of inquiry, and Plaintiffs argued its relevance. [Williams dep. at pp. 31-32.] At Mr. Favorito's deposition Mr. Favorito again raised the issue [Favorito dep. at p. 48], and it was revealed in cross-examination that in addition to his views of nefarious, conspiracy type conduct in electronic voting, he has also written extensively on his views of an FBI cover-up and government complicity as to the 9-11 attacks on the World Trade Center, that he believes that the death of former Clinton White House aid Vince Foster was covered up, the Clinton's possibly involved, and not a suicide, and so forth. [*See* Favorito dep. at 48-72.] Mr. Favorito has, in fact, written not only numerous internet missives on the subject but a book entitled *Our*

deposition); Williams dep. at 31-35 (see also exhibits attached to the deposition); Deposition of Garland Favorito ("Favorito dep.") at pp. 48-72; *see also* Favorito dep. at pp. 5-6 (stipulation that Mr. Favorito's testimony applied to and was binding on all Plaintiffs).] This is not the first case in Georgia where this has arisen. *See Smith v. DeKalb County*, 288 Ga. App. 574 (2007)

The Plaintiffs 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 in law or fact. This is a case where there is no merit to the Plaintiffs' claims as shown by the undisputable facts. Defendants are, therefore entitled to summary judgment.

STANDARD GOVERNING SUMMARY JUDGMENT

A party is entitled to summary judgment when all of the evidence properly considered by the court shows an absence of a genuine issue of material fact and the party is entitled to prevail as a matter of law. O.C.G.A. § 9-11-56; *Lau's Corp. v. Haskins*, 261 Ga. 491 (1991). A named defendant prevails at summary judgment by either "affirmatively disproving [plaintiff's] claim with his own evidence establishing the absence of any genuine issue of material fact or by showing from the affidavits, depositions and other documents in the record that there was an absence of evidence to support at least one essential element of [plaintiff's] claim." *Solomon v. Barnett*, 281 Ga. 130, 131 (2006). The facts and inferences are construed most favorably to the non-moving party. *Johnson v. Fayette County*, 280 Ga. 493 (2006). Once the movant meets his initial burden, the burden shifts to the non-movant to show that a triable issue remains. *Ward v. Morgan*, 280 Ga. 569 (2006).

Nation Betrayed which he says is about "the corruption of government officials and our mutually shared destruction, that kind of thing." [Favorito dep. at pp. 63, 67.]

ARGUMENT AND CITATION OF AUTHORITY

Plaintiffs' complaint has numerous claims. Defendants step through each of these claims, below, seriatim, and show that they are entitled to summary judgment based on the undisputed facts of record.

I. COUNT I IS MERITLESS: THE DEFINITIONS OF "BALLOT" CONTAINED IN THE GEORGIA CODE ARE VALID, AND ELECTRONIC VOTING DOES NOT VIOLATE THE GEORGIA CONSTITUTION

In Count One Plaintiffs claim, by their heading that the definition of "ballot' in O.C.G.A. § 21-2-280 is unconstitutional. [Complaint at p. 4.] Plaintiffs 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." [*Id.* At p. 5.] 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 on behalf of all Plaintiffs [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 Plaintiffs' 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 (which is very slightly misquoted in the Complaint) 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.

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 Plaintiffs' 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. As stated in *Hollowell v. Jove*, 247 Ga. 678 (1981)

> where a constitutional provision or statute is plain and susceptible of but one natural and reasonable construction, the court has no authority to place a different construction upon it, but must construe it according to its terms. [Cits.]. In other words the language being plain, and not leading to absurd or wholly impracticable consequences, it is the sole evidence of the ultimate legislative intent. [Cits.]

247 Ga. at 681 (quoting *Rayle Electric Membership Corp. v. Cook*, 195 Ga. 734, 735 (1943); *Caminetti v. United States*, 242 U.S. 470, 490 (1917)).

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. That does not mean the vote outcome cannot be determined: it clearly can, more

[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.]

accurately than ever, and it can be audited and verified to determine it is correct. [*See* Statement of Facts, above, discussing this at length.]

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 Plaintiffs, 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 cannot be established from a punchcard. *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) *rev. by Bush, supra* (same).

If the Plaintiffs are claiming that what they seek is a paper receipt of some kind showing their vote which they can take with them – and nothing in their Complaint says this – then they are seeking to *change* voting procedures that have existed since, well, since humans began voting. Voting on paper does not give the voter a receipt: the vote is dropped in a box; likewise voting by a ball (which is dropped in a yes or no box or a candidate box) does not give one a receipt. Lever machine voting, punchcard voting, optiscan voting, voting by a show of hands: none of these give a voter a receipt showing how he or she voted.

And one can see why this is: if one had a receipt, it could be discovered by and reveal to others how one voted, violating the secrecy of the ballot, a secrecy which is guaranteed by the Constitution. 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 Plaintiffs. 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.

Similarly, the notion of a "chain of custody of a ballot" put forth by Plaintiffs has no basis in law. It is, moreover, factually wrong. In Georgia voters using touch screen machines have a physical, tangible card which they place in the machine and on which they record their votes. [Cobb aff. at ¶ 6.] There is no less "chain of custody" today then there was in the past.

At the core of Plaintiffs' Count One, however, 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. The Plaintiffs have picked out the first sentence of § 21-2-280 which states that "All primaries and elections in this State shall be completed by ballot except when voting machines are used as provided by law." But that reference to use of "machines" predates electronic voting – the machines used are punchcard

machines and lever machines -- and the word "ballot" as used there means a "paper ballot" which is defined in O.C.G.A. § 21-2-2. Code section 21-2-280 also 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."

As stated in *Bennett v. Wheatley*, 154 Ga. 591 (1922), and has been repeated many times since, "[i]n cases of doubt, the doubt should be resolved in favor of the constitutional validity of legislation; and if a reasonable construction can be placed upon a statute which will preserve its constitutionality, it is the duty of the courts to adopt such construction, and not declare the statute unconstitutional." Likewise, it is well established that "[a] statute is presumed to be valid and constitutional until the contrary appears. . . ." *Williams v. Ragsdale*, 205 Ga. 274, 277 (1949). "It is the duty of courts, to put such a construction upon statutes, if possible, as to uphold them and carry them into effect," *Lamons v. Yarbrough*, 206 Ga. 50 (1949), and "[t]hat construction which will uphold a statute in whole and in every part is to be preferred." *Exum v. City of Valdosta*, 246 Ga. 169 (1980). When the Constitution refers to a "secret ballot" it is referring to maintaining the secrecy of an elector's vote. It is not saying that a piece of paper must be given to the elector, as the Plaintiffs contend. Code section 21-2-280's first sentence is not purporting to eliminate the secrecy of the ballot; what it is referring to in its first use of the word "ballot" is a paper ballot as opposed to other kinds of ballots, and, as noted above there are several kinds of ballots and definitions for them provided in the election Code.

To lay this issue to the side: Defendants 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. The Defendants are entitled to summary judgment on Count I.

II. COUNT II IS MERITLESS: THE ELECTRONIC TOUCHSCREEN VOTING SYSTEM DOES NOT DEPRIVE CITIZENS OF THEIR RIGHT TO HOLD ELECTIONS

In Count II the Plaintiffs abandon referring to specific constitutional language for their claim – though the testimony of Mr. Favorito makes clear that they are claiming a violation of the Georgia Constitution [Favorito Dep. at pp. 140-142.] – and instead predicate their claim on what they believe to be a historical intent by the Constitution not to allow electronic voting. [Complaint ¶ 30.]

There is nothing in the Constitution that supports this reading. To the contrary, 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).

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 then goes 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*.]

Count II is unsupported by any law or fact and should be dismissed or judgment awarded on it to the Defendants.

III. COUNT III IS MERITLESS: ELECTRONIC VOTING AS IMPLEMENTED IN GEORGIA COMPLIES WITH ALL RELEVANT GOVERNING STATUTES

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, <u>when properly operated</u>, record correctly and accurately every vote cast.

O.C.G.A. § 21-2-379.1(8) (emphasis added).

The Plaintiffs' 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.,* Complaint at ¶¶ 42-50.] Neither the law nor any fact supports Plaintiffs' 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.

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.

Defendants are entitled to summary judgment on Count Three of the Complaint.

IV. COUNT IV IS MERITLESS: 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. [Complaint at ¶¶ 52-54.] The Plaintiffs 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 Plaintiffs, recounts are not simply a rerunning of the electronic voting totals.

Second, Plaintiffs 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 Plaintiffs 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. §§ 21-2-493 (recounts); 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. Plaintiffs' Count Four is meritless.

V. COUNT V IS MERITLESS: ALLOWING VOTERS TO CHOOSE WHETHER THEY WISH TO VOTE ON PAPER BALLOT ABSENTEE OR AT THE POLLS ON TOUCHSCREENS DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE

One of the central omissions in the Plaintiffs' case is that they ignore that voters in Georgia have a choice and choose not to use touchscreen voting if they wish. Voters in Georgia can vote on paper via an absentee ballot. *See* O.C.G.A. § 21-2-380 *et. seq.* (conveniently located in the Code adjacent to the touchscreen voting provisions, their alternative). 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.

Thus, despite all of Plaintiffs' claims about issues and features they do not like about electronic voting, they are not required to use it to vote. No one in Georgia is.

Instead of placating the Plaintiffs, however, they claim this violates equal protection. This is wrong as a matter of law for two reasons.

First, the voluntary decision to elect one option or another, when all options are equally open to everyone – and the choice to vote touchscreen or mail-in absentee ballot is equally available to all electors – does not violate the equal protection clauses of the Georgia or United State Constitutions.

Second, even if two classes were created, such a distinction is supported by a rational basis and is therefore valid. *Cf. 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.'" *Clingman v. Beaver*, 544 U.S. 581, 586 (2005); *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 1997).

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 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.]

The fundamental conceit of Plaintiffs' equal protection challenge is that having options supposedly deprives people of rights. that, without intending disrespect, is absurd. And, indeed, that leads to a fifth and final reason why Plaintiffs' equal protection claim is meritless: the presence of an option does not injure them. It does not injure anybody. As just by the Supreme Court of Georgia in *Mason v. Home Depot U.S.A., Inc.*, 2008 Ga. LEXIS 249 (decided March 10, 2008) , and reiterating a vast amount of prior law:

> Standing to challenge a statute on constitutional grounds in Georgia depends on a showing the plaintiff was injured in some way by the operation of the statute or that the statute has an adverse impact on the plaintiff's rights. *Tennille v. State*, 279 Ga. 884, 885 (2005); *Agan v. State*, 272 Ga. 540 (1) (2000); *State of Ga. v. Jackson*, 269 Ga. 308 (1) (1998); *Ambles v. State*, 259 Ga. 406 (1) (1989).

Mason at *5.

The Plaintiffs' equal protection claim is meritless and should be dismissed.

VI. COUNT VI IS MERITLESS: THE 2006 PILOT PROJECT NO LONGER EXISTS AND THIS CLAIM IS PATENTLY MOOT

In Count VI of the Complaint, as in Count VII, Plaintiffs 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 Plaintiffs' 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 Plaintiffs' 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.

VII. COUNT VII IS MERITLESS: THE 2006 PILOT PROJECT NO LONGER EXISTS AND THIS CLAIM IS PATENTLY MOOT

Count Seven 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.

VIII. COUNT VIII IS MERITLESS: MANDAMUS DOES NOT LIE AS DEFENDANTS HAVE NOT FAILED TO PERFORM A MANDATORY DUTY

Mandamus only lies as a 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 Defendants have refused to perform in the present case. The Plaintiffs may not like the law; they may think that the law is unconstitutional; but they have no evidence that the Defendants are not complying with the law or refusing to perform some act. Indeed, the very nature of their claims would belie such a contention, since they have sued the Defendants in their official capacities – all of which capacities are very different in scope (making any single act they did not do an odd thing to contemplate – what could it be?), and, indeed, mandamus only lies against officials fro their wrongful conduct in a personal capacity. It lies for their refusal to follow the law. *Harper v. State Bd. of Pardons and Paroles*, 260 Ga. 132, 133 (1990).

IX. PLAINTIFFS HAVE STIPULATED ON THE RECORD THAT COUNT IX IS DISMISSED

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

X. COUNT X IS MERITLESS: THE FACTS ARE UNDISPUTEABLE THAT ALL CERTIFICATIONS HAVE BEEN PERFORMED BY LAW

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. The evidence shows that all machines have been and

currently are certified. The testimony regarding this – 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.]

One issue – and the only issue – that has occurred with certification arose several years ago with the Microsoft operating system used by the touchscreens. An operating system bug caused some of the screens to occassionally freeze, although no votes were lost during this process. This bug was fixed with a patch downloaded from Microsoft. The patch did not affect the accuracy, efficiency or capacity of the machines. It was certified on an emergency basis as the Secretary of State is permitted to designate, and then recertified afterwards. It had no effect on any election or vote. [*See* Williams dep. at pp. 55-58.]

The statutes cited by Plaintiffs do not show any violation of law by the Defendants. 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