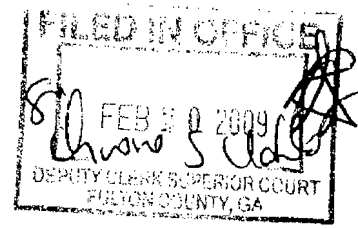
C

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA



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

v.

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

CIVIL ACTION
FILE NO. 2006CV119719
Judge Michael D. Johnson

FINAL ORDER

This matter came before the Court on Plaintiffs' Motion for Partial Summary Judgment on Counts IV, VII, X, XII, and XIII of its Complaint and Defendants' Motion for Summary Judgment. After consideration of the briefs on file as well as oral argument from the parties the Court finds as follows:

STATEMENT OF FACTS

In response to the voting issues in the 2000 presidential election, Congress enacted the Help America Vote Act ("HAVA") 42 U.S.C. § 15301 *et seq.*, which expressly authorized the federal government to make payments to States to replace their outdated voting systems. HAVA created the Election Assistance Commission ("EAC") and a formal Technical Guidelines Development Committee ("TGDC") to, inter alia, set

guidelines and provide assistance for the implementation of a new voting system across the nation.

During the 2000 Presidential election Georgia experienced voting problems similar to that of the state of Florida, though Georgia's voting issues were not widely publicized. Thereafter, a study was commissioned and as a consequence of the study, Global Management Systems, Inc., subsequently purchased by Diebold Electronic Systems, Inc., was awarded a contract to implement a uniform touch screen voting system for the state of Georgia. As a result of these initiatives, Georgia became the first state to implement a uniform system of touch screen voting in the nation. Georgia's system of touch screen voting machines, aside from being the first of its kind in the nation, is unique due to the creation of an independent monitoring system for the voting system - the Center for Election Systems at Kennesaw State University (hereinafter "CES"). Although CES has many functions, its main charge was overseeing the implementation and use of touch screen voting machines.

From the outset, Georgia's guidelines dictated that no touch screen voting systems were eligible for purchase unless they met strict federal certification requirements. The voting machine systems were tested and then recertified by State officials. Following testing, certification and purchase, the units were again tested before distribution to local jurisdictions where they underwent an additional form of testing called "acceptance testing". Thereafter, the voting machines were housed and secured pursuant to the guidelines set forth by EAC and TGDC. Moreover, prior to every election, each voting machine is again tested to ensure that there have been no unofficial alterations to or tampering with the voting machine.

On Election Day CES also conducts random testing of the voting machines and, following the election, each voter's ballot can be displayed and printed. The touch screen voting machines also have a paper printout (internal to each machine) which records the votes cast. The paper trail created by each voting machine allows their results to be physically audited, as does the electronic information from CES servers, voter cards and PCMCIA cards.

CONCLUSIONS OF LAW

1. Summary Judgment Standard

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, 405 S.E.2d 474 (1991). A named defendant prevails at summary judgment by either affirmatively disproving [Plaintiffs'] 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 Plaintiffs claim. The facts and inferences are construed most favorably to the non-moving party. *Johnson v. Fayette County*, 280 Ga. 193, 625 S.E.2d 35 (2006). Once the movant meets his initial burden, the burden shifts to the non-movant to show that a triable issue remains. *Ward v. Morgall*, 280 Ga. 569, 629 S.E.2d 230 (2006).

Count One

"Elections by the people shall be by secret ballot and be conducted in accordance with *procedures provided by law*." Ga. CONST. Art. II, Sec. I, Para. I (emphasis added). "All primaries and elections in this state shall be conducted by ballot, except when voting

machines are used as provided by law. A ballot may be electronic or printed on paper." O.C.G.A. § 21-2-280 (emphasis added). "Ballot means official ballot or paper ballot and shall include the instrument, whether paper, mechanical, or electronic, by which an elector casts his or her vote." O.C.G.A. § 21-2-2(1) (emphasis added).

"Direct recording electronic" or DRE voting equipment means a computer driven unit for casting and counting votes on which an elector touches a video screen or a button adjacent to a video screen to cast his or her vote." O.C.G.A. § 21-2-2(40). "Official ballot means a ballot, whether paper, mechanical, or electronic, which is furnished by the superintendent or governing authority in accordance with Code Section 21-2-280, including ballots read by optical scanning tabulators." O.C.G.A. § 21-2-2(18)(emphasis added).

The statutory rule of construction *in pari materia* requires all statutes relating to the same subject-matter to be construed together and harmonized wherever possible. *See Cobb County v. City of Smyrna*, 270 Ga. App. 771, 606 S.E.2d 667 (2004); *Baum v. Moore*, 230 Ga. App. 255, 257, 496 S.E.2d 307 (1998).

Count One of Plaintiffs' Complaint (hereinafter "Complaint") is without merit. As regards to Count One of the Complaint, Plaintiffs Garland Favorito, Mark Sawyer, Ricardo Davis, Al Herman, Frieda Smith, Kathryn Weitzel, Adam Shapiro and Cathie Calabro (hereinafter "Plaintiffs") contend that the definition of "ballot" as stated in O.C.G.A §§ 21-2-280 is unconstitutional for two primary reasons. First, Plaintiffs argue that "O.C.G.A. §§ 21-2-280, by allowing for the use of electronic touch screen voting machines, violates the constitutional requirement that an election be conducted by secret ballot. Next, Plaintiffs allege that the definition of a ballot as "electronic" in O.C.G.A. §§ 21-2-280 is unconstitutional because an electronic record "breaks the

custody and control that voters have typically enjoyed over their own ballots and that the framers of the Georgia Constitution would obviously expect." [Plaintiffs' Compl. ¶ 225].

Regarding Plaintiffs' first allegation, the evidence adduced clearly demonstrates that all votes cast on Georgia DREs are done in a manner consistent with the constitutional requirement that the votes cast must be done by secret ballot. Some of the most relevant evidence proffered regarding this matter came from Ray Cobb, the Director of CES, who stated under oath, in his deposition, that the identity of the individual voter is not ascertainable after submitting their voter access card. Moreover, Plaintiffs have failed to provide any specific examples of a voter's identity being revealed, at any point during the voting process, when the touch screen voting machine system has been in use. Furthermore, O.C.G.A. § 21-2-280 must be read in harmony with the other definitions of ballot described in the Georgia Code. *See Cobb County v. City of Smyrna*, 270 Ga. App. 711, 606 S.E.2d 667 (2004); *Batten v. Moore*, 230 Ga. App. 255, 257, 496 S.E.2d 330, (1998). Given this mandate, it is clear that neither O.C.G.A. § 21-2-280 nor any of Georgia's electoral laws create an exception to the constitutional requirement for a secret ballot as a result of the utilization of the touch screen voting system; O.C.G.A. § 21-2-280 merely provides for an alternative, electronic means to cast a vote.

Along these lines, the Georgia legislature, which is responsible for enacting laws that ensure that the constitutional requirement that elections shall be conducted by secret ballot is met, has the authority to select and implement the most effective and reliable voting method that is consistent with the Georgia Constitution. The legislature's implementation of O.C.G.A. § 21-2-280 was simply a step in that direction.

There is simply no evidence in the record that indicates that Georgia's DRE system violates a voter's constitutional right to a secret ballot.

Plaintiff's contentions regarding what the "framers of the Georgia Constitution" thought a ballot was is also problematic and counter to their argument. Electronic voting existed, though not in its current form, in 1983 when the current Georgia Constitution was ratified and enacted. Thus, many of the aforementioned definitions of a ballot presuppose the existence of computers or some form of electronic media. As long as the laws governing voting comport with the Constitution of the State of Georgia, as ratified and enacted as of 1983, Plaintiffs' argument regarding the thoughts of the "framers of the Georgia Constitution" in 1908, are irrelevant.

Yet, even if one chooses to ignores the fact that the current constitution for the state of Georgia was enacted in 1983, Plaintiffs' contention that the definition of a ballot as "electronic" somehow negates the "custody and control that that voters have typically enjoyed over their own ballots and that the framers of the Georgia Constitution 'would obviously expect'" remains problematic. The evidence presented in the record is clear that there is no less "custody and control" over one's ballot now as there was in 1908. After confirming their selections on the DRE screen, the vote is recorded on the electronic storage device as well as the voter access card. The voter then takes his or her voter access card and gives it to an election official. Additionally, while Plaintiffs attempt to buttress their argument with the assertion that only a paper trail or some other non-electronic ballot is consistent with the intent of the framers' of the Georgia Constitution, they seem to forget that Georgia allows voters to vote by absentee ballot, a paper ballot, for any reason, thereby, adhering to the intent of the framers as espoused

by Plaintiffs. Therefore, Plaintiffs are not entitled to relief under Count One of their complaint.

Count Two

Plaintiffs' have failed to proffer evidence such that they should survive Defendants' Motion for Summary Judgment as to Count Two of Plaintiffs' Complaint. Here, Plaintiffs allege that, "[t]he current implementation of the DVMS method of voting in Georgia is in violation of Article II, Section 1, Paragraph 1 of the Georgia Constitution because the people have been removed from three key elements of the electoral process: choosing the candidates, casting ballots, and counting the results." [Compl. at 7]. This argument, similar to Plaintiffs' contentions in Count One, is groundless because it is based upon Plaintiffs' conception of what the framers of the 1908 Georgia Constitution envisioned regarding the electoral process, despite the preemption of the 1908 Constitution by the 1983 Constitution, which is the basis and foundation for the current voting laws.

Yet, assuming for argument sake that the 1908 Constitution for the State of Georgia controlled, Plaintiffs' argument still lacks foundation. Plaintiffs', concerns that the current system "chooses ballot selections for the voter and places them in an internal electronic record that the voter is never allowed to see [sic] and is not able to see" [Compl. at ¶ 41], is not supported by the evidence. To the contrary, the voter selects the candidate(s) they wish to support and thereafter confirms their choice(s) on the DRE screen prior to handing their voter access card to an election official. There simply is no evidence that the voting machines make selections for the voter or instead of the voter. The fact that a voter cannot actually see the electronic record within the machine does not mean that the vote was not accurately recorded or not recorded at all.

The machines have an internal storage unit that can be audited in order to confirm the ballots cast. Furthermore, the record is void of any evidence even suggesting that there is a transfer of the rights and duties related to counting election results, from the people to Diebold employees. Thus this argument too is completely unsubstantiated.

Count Three

Similar to Counts One and Two, other than offer mere allegations, Plaintiffs have failed to provide any evidence that supports their claim that the current DRE system do not comply with the dictates of O.C.G.A. § 21-2-379.1 also known as the General Requirements as to Direct Recording Electronic Voting Systems. Additionally, as a result of the Plaintiffs' delay in bringing this action, the doctrine of laches acts as a bar to Plaintiffs' claims.

Plaintiffs' allege, inter alia, that the current DRE systems do not comply with O.C.G.A. § 21-2-379.1. However, the evidence in the record, such as the testimony of former Secretary of State Cathy Cox, demonstrates that the current DREs are, in fact, in compliance with the directives of O.C.G.A. § 21-2-379.1.1. Moreover, Plaintiffs did not raise their concerns regarding this issue in a timely manner, thus it is now barred.

To establish the defense of laches the party asserting the defense would have to show that there was an inexcusable delay as well as prejudice as a result of the delay. *Grant v. Fourth Nat. Bank of Columbus*, 229 Ga. 855, 868, 194 S.E.2d 913 (1972). Further, the question of laches is addressed to the sound discretion of the trial court, and on appeal the exercise of that discretion shall not be disturbed unless it is so clearly wrong as to amount to an abuse of discretion. *Filippen Alliance for Community Empowerment, Inc. v. Brannan*, 261 Ga. App. 1, 601 S.E.2d 100 (2004), reconsideration denied, (Apr. 20, 2004) and cert. denied, (Sept. 13, 2004).

> 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)

The voting system currently in place was approved for use in Georgia six years ago, in 2002. Plaintiffs have failed to demonstrate why a challenge to the system's validity was not and could not have been brought sooner. The length of delay places an unnecessary burden on the State to properly defend this action given that many of the original documents that were created during the adoption of the system may no longer be available. *See Plyman v. Glynn County*, 276 Ga. 426, 578 S..E.2d 124 (2003). As such, the Court finds that the doctrine of laches is applicable.

Count Four

As for Count Four, Plaintiffs' contend that the current DRE system prevents an accurate recounting of votes in contested elections. Here again, Plaintiff's have failed to provide evidence of even a single specific instance where there has been an actual inconsistency between the ballots cast and the subsequent recount. Plaintiffs merely allege the possibility of inconsistency, as a reason for invalidating the DRE system. However, without specific examples of inconsistencies in various electoral recounts, Plaintiffs' contentions are merely hypothetical and cannot serve as a basis for declaratory relief. *See Quality Foods, Inc. v. Smithberg*, 288 Ga. App. 47, 653 S.E.2d 486 (2007); *City of Atlanta v. Southern States Police Benev. Ass'n of Georgia*, 276 Ga. App. 446, 623 S.E.2d 557 (2005).

Count Five, Twelve and Thirteen

Since Counts Five, Twelve and Thirteen deal with similar issues of law, the Court will address all three simultaneously. Plaintiffs allege, in Count Five that Georgia's electronic voting system violates the equal protection clause of the Georgia Constitution, creating a classification between voters who utilize absentee ballots pursuant to O.C.G.A. §§ 21-2-381 and O.C.G.A. § 21-2-385 and those voters that prefer to vote via the DORE voting machines. "Under the equal protection clauses of the constitutions of both the United States and Georgia, the government is required to treat similarly situated individuals in a similar manner. Where a suspect classification is not involved, however, a legislative classification scheme need only survive the rational basis test." *Nichols v. Gross*, 282 Ga. 811, 653 S.E. 2d 717 (2007) (emphasis added).

Further, the Georgia Supreme Court has acknowledged that the Equal Protection Clause in Georgia's Constitution is "substantially equivalent" to the Equal Protection Clause in the Fourteenth Amendment of the U.S. Constitution. *See, McDaniel v. Thomas*, 248 Ga. 632, 638, 285 S.E.2d 156, 161 (1981); *see also, Henry v. State*, 263 Ga. 117, 118, 431 S.E.2d 369, 371 (1993) (stating that the equal protection clause of the Georgia Constitution is substantially equivalent to the equal protection clause of the Fourteenth Amendment of the U.S. Constitution); *Grissom v. Gleason*, 262 Ga. 372, 376, 418 S.E.2d 27, 29 (1992) ("Since the adoption of the 1983 Georgia Constitution, we have reiterated that the protection of the equal protection clause in the 1983 Georgia Constitution and the United States Constitution is coextensive.") Accordingly, the analysis of an equal protection claim based upon the Georgia Constitution will undergo the same analysis as one brought under the United States Constitution. *See McDaniel v. Thomas*, 248 Ga. 632, 638, 285 S.E.2d 156, 161 (1981).

In *McDaniel* the Supreme Court of Georgia utilized the following equal protection analysis in its decision:

> There are three standards generally accepted for determining constitutionality under the Equal Protection Provisions of both the U.S. and State Constitutions: (1) The rational relationship test; (2) the intermediate level of scrutiny; and (3) the strict judicial scrutiny standard. Under the rational relationship test a statutory classification is presumed valid and will comport with constitutional standards as long as it bears a reasonable relationship to a legitimate governmental purpose. The intermediate level of judicial scrutiny requires a classification be substantially related to an important governmental objective. *See Craig v. Boren*, 429 U.S. 190, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976). Under the strict judicial scrutiny standard, which is employed when a classification involves socially stigmatic inequalities such as those based on race ... the governmental classification will fall unless the government demonstrates that the classification is necessarily related to a compelling governmental objective. *See San Antonio School District v. Rodriguez*, 411 U.S. 1, 93 S. Ct. 1278, 36 L.Ed.2d 16 (1973). Application of the strict scrutiny test means that the classification is not entitled to the usual presumption of validity and that the State bears the burden of proving that the classification system has been structured with "precision and is "tailored" narrowly to serve legitimate objectives and that it has selected the less drastic means for effectuating its objectives. *San Antonio School District v. Rodriguez*, supra, [411 U.S.] at 16-17."

McDaniel v. Thomas, 248 Ga. 632, 638, 285 S.E.2d 156, 161 (1981) (citing *See San Antonio School District v. Rodriguez*, 411 U.S. 1 (1973)) (emphasis added).

In *San Antonio School District v. Rodriguez*, the U.S. Supreme Court stated that, "[The] test for strict judicial scrutiny of a state's laws is reserved for cases involving laws which operate to the disadvantage of suspect classes or interfere with the exercise of fundamental rights and liberties explicitly or implicitly protected by the Constitution. *San Antonio School District v. Rodriguez*, 411 U.S. 1, 17, (1976) (emphasis added). The Fourteenth Amendment to the Constitution as well as voluminous federal jurisprudence

have established that classifications based on race and color, alienage, religion, and national origin are inherently suspect for purpose of judicial scrutiny.[1] *See* U.S. CONST. amend. XIV; *Nyquist v. Mauclet*, 432 U.S. 1, 97 (1977); *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 96 1976); *Cochran v. Pinchak*, 401 F.3d 184 (3d Cir. 2005); *Johnson v. Quander*, 370 F. Supp. 2d 79 (D.D.C. 2005); *Catholic Charities of Maine Inc. v. City of Portland*, 304 F. Supp. 2d 77 (D. Me. 2004).

Intermediate scrutiny is applied to quasi suspect classifications. A quasi suspect classification includes classifications based upon gender and distinctions drawn between legitimate and illegitimate children. *See United States v. Virginia*, 518 U.S. 515 (1996); *Clark v. Jeter*, 486 U.S. 456 (1988). When a State creates a statutory classification based upon a quasi suspect class the Court will hold the classification as unconstitutional unless it is substantially related to an important government interest. *See Craig v. Boren*, 429 U.S. 190, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976) (emphasis added).

Rational basis scrutiny applies to all other State based classifications not already mentioned, including but not limited to: poverty, wealth, age, mental retardation, necessities of life as well as social and economic issues. The burden shifts to Plaintiffs to show that the law is not rationally related to any legitimate State interest when rational basis review is deemed the appropriate standard of review. In other words, if there is a rational basis to support the State law creating the classification then the law will pass judicial scrutiny. *See McDaniel v. Thomas*, 248 Ga. 632, 638 285 S.E.2d 156, 161 (1981) (citing *See San Antonio School District v. Rodriguez*, 411 U.S. 1, 93 (1973)).

---

[1] The above citation list is not intended to be exhaustive. The various levels of judicial scrutiny within Equal Protection analysis is basic component of Constitutional law. The Court's sole purpose in reviewing these matters is to address some of the confusion with regard to the applicability of the various levels of scrutiny it perceived from reviewing the Plaintiffs' Motion for Summary Judgment as well as various counts in the Complaint.

In light of the aforementioned analysis, Plaintiffs' equal protection claim would be subjected to a rational basis review. First, Plaintiffs are not claiming to be part of a suspect classification, quasi or otherwise. Without a suspect or quasi suspect classification involved in this matter the appropriate standard of review is the rational basis standard. Secondly, the "classification" that Plaintiff allege is a violation of their equal protection rights cannot appropriately be termed as a State enforced classification, suspect or otherwise. As a consequence, Plaintiffs' claim that the strict scrutiny standard is the applicable standard is inaccurate. More importantly, the argument that the State has imposed a classification between voters who utilize absentee ballots and those that decide to vote via the DRE voting machines is completely without merit.

Plaintiffs, as well as any other Georgia voter, have the option of casting an absentee ballot or using the touch screen electronic voting machines on election day. Under Georgia law, every eligible voter in Georgia can make a decision to vote utilizing absentee ballots.

The fact that Georgia authorizes voters to choose between two different methods of voting does not mean that the State has created a classification between voters. A violation of one's equal protection rights occurs when the State treats similarly situated individuals differently. *See Nichols v. Gross*, 282 Ga. 811, 656 S.E. 2d 411 (2001). Georgia citizens, not the State, decide which method they will utilize to cast their vote in any Georgia election. Theoretically, every Georgia citizen could vote either by absentee ballot or by utilizing the touch screen voting system; thus, Plaintiffs' contention that there is some State based classification between voters is false.

Likewise, Plaintiffs' argument that the current system classifies some citizens who use the electronic machines along with absentee voters because some citizens are

unaware of the absentee ballot option, is also without merit. The State does not and has not censored information about the various voting options from any group of people. Every potential voter can access information so as to become informed of the different methods of voting that are available in Georgia. Put simply, there is no State based classification in this case and Plaintiffs' equal protection claim fails as a matter of law.

As for Count Twelve of Plaintiffs' Fifth Amendment to the Complaint, Plaintiffs allege that Georgia's electronic voting system violates due process, however, Plaintiffs make this point by utilizing an equal protection analysis. Although the difference in the argument made in Count Five of Plaintiffs' Complaint and Count Twelve of Plaintiffs' Fifth Amendment to Complaint is subtle, both fail for the same reason. Count Twelve of Plaintiffs' Fifth Amendment to the Complaint fails because Plaintiffs have not demonstrated that they are part of a suspect class that has been unequally treated by the State. As in Count Five of Plaintiffs' Complaint, the Court is not persuaded by Plaintiffs' contention that there is a classification between Election Day voters and absentee voters.

Even assuming, arguendo, that there was a State enforced classification between voters, because the classification is not a suspect classification or quasi suspect classification, the appropriate standard of review is the rational basis standard of review. The issue that remains is whether there is any rational basis to support Georgia's decision to adopt the current DRE system. Well established federal precedent has held that the State has broad discretion to prescribe the times, places and manner of holding elections. *See Clingman v. Beaver*, 544 U.S. 581, 586 (2005); *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997). Moreover, given the issues that Georgia has encountered with previous voting methods, the Court finds that there is a

rationale basis for the State's implementation of touch screen voting machines. As such, Count Twelve of Plaintiffs' Fifth Amendment to Complaint fails as a matter of law.

In Count Thirteen of Plaintiffs' Fifth Amendment to Complaint and Plaintiffs' Motion for Partial Summary Judgment on Counts 5, 7, 10 and 13 ("hereinafter Plaintiffs' Motion"), Plaintiffs claim that the electronic voting machines violate their fundamental right to vote. Plaintiffs however, have not provided any evidence that their right to vote has been or is currently being impaired or denied in some way due to the use of Georgia's DREs. "Standing to challenge a statute on constitutional grounds in Georgia depends on a showing that 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." *Wilson v. Home Depot U.S.A., Inc.*, 283 Ga. 271, 272, 658 S.E.2d 603 (2008).

Plaintiffs cite *Brown v. Lawrence*, 204 Ga. 788, 51 S.E.2d 651 (1949) to support their position that they are entitled to declaratory judgment. The *Brown* court explicitly states that "[t]he principle of a declaratory judgment is that it declares existing law on an existing state of facts and plaintiff's danger or dilemma must be present, not contingent on happening of hypothetical future events." *Brown*, 204 Ga. 791 (emphasis added). After thoroughly reviewing the record in this matter, it is clear that Plaintiffs' arguments are based primarily on hypothetical situations which cannot be utilized as a basis for Plaintiffs' claims. *Id.* at 791.

Plaintiffs also suggest in contrast that voter intent was more readily discernible in the 2000 presidential election because of the use of paper ballots or "hanging chads," that allowed voting officials to physically examine them for voter intent. It is important to note, however, that the issues involved in determining voter intent from the paper ballots in the 2000 presidential election is evidence that paper ballots are not necessarily

more accurate or reliable in determining voter intent. Indeed, the voting issues surrounding the 2000 presidential election were the impetus behind HAVA (Help America Vote Act) passed by Congress.

Contrary to Plaintiffs' contentions, a voter who utilizes the electronic voting machines can verify that the ballot they cast was consistent with their intent. Mr. Cobb described a voter's ability to verify their vote on the day of the election in his deposition stating, "[a]fter 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.*" Cobb aff. ¶6. (emphasis added). Each vote is then recorded on the flash card that the voter receives after that particular voter's identification is verified. Unlike paper ballots, there are two sources that record the ballot of a touch screen voter, allowing voter intent to be independently verified. There is nothing about the current Georgia touch screen voting machine system that leaves a voter's right to vote in jeopardy or a state of uncertainty.

Plaintiffs' last speculative argument, regarding these counts, that the Georgia electoral process can somehow be manipulated by Diebold employees is also completely without merit. On page 62 of Plaintiffs' Motion for Partial Summary Judgment, they state the following:

> The paper ballot user can visually verify that the proper candidates were marked and ensure the ballot is placed in the ballot box. This different treatment prevents the electronic voter from verifying his intent and verifying his votes are properly placed in the public custody of the election officials. This places the electronic voter in the capricious position of having to completely trust nongovernmental employees, e.g. Diebold employees with his vote and a 'take our word for it' approach of elections officials. Common sense tells us that these are usually the individuals responsible for election fraud or tampering. Yet, we have removed the best safeguard of the

> fundamental right to vote insofar as we have separated citizens from physical possession and public custody of their vote, and have entrusted that unverified vote to a computer.

Plaintiffs' Motion for Partial Summary Judgment, ¶ 62 (emphasis added).

The deposition testimony from Ray Cobb makes clear that a touch screen voter can verify his or her selections. Each vote is recorded on both the PCMCIA card as well as the machine itself. There is no reason to assume that the PCMCIA card that the voter gives to the election officials after they confirm their selections will somehow be different than what they selected on the screen. The fact that the touch screen voter does not have a paper ballot, in hand, or some other type of ballot where the voter can actually look at and see his or her vote as they physically hand it to an election official does not mean that a touch screen voter's ballot is more susceptible to fraud. Additionally, because a voter examines and gives a paper ballot to an election official does not mean that paper ballots are less susceptible to fraud. Plaintiffs' concerns that a touch screen voter would have to rely on a 'take our word for it approach' is no different in the case of paper ballots; all voters rely on the integrity of election officials to ensure that their votes are accurately counted.

In addition, the touch screen voting machines are not connected to the internet and thus are not subject to viruses or Trojans. In order to manipulate the ballot a hacker would need knowledge of the layout of the ballot that could not possibly be in their possession. Defense witness Dr. Brittain Williams, member of the Technical Guidelines Development Committee ("TGDC") created under HAVA, stated that while it may be possible to alter the GEMS (Georgia Election Management System) with Microsoft Access, he is unaware of any method of doing so. Plaintiffs' suggestion that a touch screen voter's ballot is in jeopardy because it is possible that a hacker may be

clever enough to alter a particular voting machine is pure speculation and thus, without merit. Indeed, there has been no evidence of any fraudulent activity since Georgia began using touch screen voting machines and Plaintiffs' belief that Diebold employees or any other election officials may tamper with the touch screen voting machines in order to manipulate the outcome of an election is simply unfounded. Therefore, for the above reasons, Plaintiffs' Count 8 must fail.

Counts Six and Seven

In Counts Six and Seven of the Complaint, Plaintiffs challenge the 2006 Georgia Audit Trail Pilot Project (hereinafter "Pilot Project"). However, Counts Six and Seven are not justiciable controversies given that the law that established the Pilot Project has been repealed. "[A] case is moot when 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. A case that contains an issue that is capable of repetition yet evades review is not moot." *See, Collins v. Lombard Corporation*, 270 Ga. 120, 508 S.E.2d 673 (1998). Because the laws establishing these projects have been repealed, the issues that Plaintiffs assert are now moot and are hereby dismissed. *See Collins v. Lombard Corporation*, 270 Ga. 120, 508 S.E.2d 673 (1998).

Count Eight

Plaintiffs' Count Eight of the Complaint requests that the Court issue a Writ of Mandamus against Defendants; this request fails as a matter of law. A writ of mandamus will not issue unless there exists a legal duty that is required to be performed; the burden is upon the party seeking mandamus to show the existence of such a legal duty. *See* O.C.G.A. § 9-6-20 *et seq*; *Forsyth County v. White*, 272 Ga. 615, 532 S.E.2d 392 (2000).

> Before a defendant may be compelled by mandamus to perform some act or acts, the plaintiff must establish that: (1) the defendant is under a definite and legally binding public duty to perform some act or acts (2) the duty pertains to a specific act or acts the performance of which can be enforced by the court, if required (3) the defendant has failed or refused to perform that act or acts, without valid justification.

Fourth Street Baptist Church of Columbus v. Board of Registrars, 253 Ga. 368, 320 S.E.2d 543 (1984).

Where the duty of public officers to perform specific acts is clear, well defined, and imposed by law, and when no element of discretion is involved in the performance thereof, the writ of mandamus will issue to compel their performance. *See Forsyth County*, 272 Ga. at 620. It is well established under Georgia law that mandamus does not lie to compel a general course of conduct; there must be a specific act that an official refuses to perform. *See Willis v. Department of Revenue*, 255 Ga. 649, 650 340 S.E.2d 591, 594 (1986); *McClure v. Hightower*, 237 Ga. 157, 227 S.E.2d 47 (1976). Likewise, the writ of mandamus does not reach the office; but is a personal action against the official. *Harper State Bd. of Pardons and Paroles*, 260 Ga. 132, 133, 390 S.E.2d 592 (1990).

In the case at hand, Plaintiffs have failed to meet the requirements for the issuance of a writ of mandamus. Plaintiffs sued Defendants in their official capacity, not as individuals who failed to perform some nondiscretionary act while in office. Plaintiffs' choice of relief is contrary to the purpose of a writ of mandamus, which is to compel individuals, serving in their official capacity, to follow the law. *See Harper*, 260 Ga. at 133. More importantly, Plaintiffs have once again failed to present any evidence of specific acts evidencing that Defendants have either failed or refused to perform a definite and unambiguous duty mandated by the law. *See Fourth Street Baptist Church of*

Columbus, 253 Ga. 368, 320 S.E.2d 543 (1984). Accordingly, Count Eight of Plaintiffs' Complaint is without merit.

Count Nine

Count Nine of the Complaint was voluntarily dismissed by Plaintiff Garland Favorito. [Favorito dep at. 230]. Therefore, the Court will not address the merits of Count Nine and accepts the stipulation of dismissal entered into by the parties.

Count Ten

In Count Ten of Plaintiffs' Third Amendment to the Complaint Plaintiffs allege that the touch screen voting system in Georgia is uncertified. At oral argument in this matter, Defendant provided filed copies of the certifications in dispute. The certifications provided by Defendant directly rebut Plaintiffs' declaration that the current touch screen voting machines are not certified in accordance with Georgia law. In light of this evidence, combined with Plaintiffs failure to offer any evidence in rebuttal, Plaintiffs are not entitled to relief on this count.

Count Eleven

In Count Eleven of the Complaint, Plaintiffs allege that the touch screen voting machines cannot produce an independent audit trail. The facts, however, contradict Plaintiffs' contentions. Ray Cobb testified as follows:

> Q: Back on the record, do you agree that the machines that are currently in use that were installed in '02 don't have a capability of producing an independent paper audit trail of every ballot cast?
> A. You need to define what you mean by independent paper audit trail.
> Q. An independent would be a separate piece of paper that represents each ballot cast.
> A I do not agree because the system can produce that.
> Q. The system can produce that if called on to do so.
> A. Correct.

Ray Cobb's testimony is unequivocal; Georgia's current touch screen voting machines have the capability of producing an independent audit trail. Further, without belaboring this point, Mr. Cobb was just one of several witnesses that substantiated the fact that the touch screen voting machines do have the capability of producing an independent audit trail. In addition to the above challenge, Plaintiffs again confront the legality of the 2001 Georgia Audit Trail Pilot Project. This contention was addressed by the Court when responding to Plaintiffs' Counts Six and Seven; this therefore obviates the need to focus on this issue further.

For all of the aforementioned reasons the Court **HEREBY GRANTS DEFENDANTS' MOTION FOR SUMMARY JUDGMENT IN ITS ENTIRETY.**

So Ordered this 20th day of February, 2009.

MICHAEL D. JOHNSON, JUDGE
FULTON COUNTY SUPERIOR COURT
ATLANTA JUDICIAL CIRCUIT

Stefan Ritter
Office of the Attorney General
40 Capitol Square, S.W.
Atlanta, Georgia 30334-1300

Walker Chandler
15 Jackson St.
P.O. Box 1
Zebulon, GA 30295