

**IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA**

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

Plaintiffs, *

VS *

CIVIL ACTION FILE NO. *

**CATHY COX, *
SECRETARY OF STATE OF GEORGIA ***

**SONNY PERDUE, *
GOVERNOR OF GEORGIA ***

GEORGIA STATE ELECTION BOARD, *

Defendants. *

COMPLAINT

Come now the Plaintiffs, above-named, and show this Honorable Court the following:

INTRODUCTION

1.

Plaintiffs are electors of the State of Georgia opposed to Georgia’s use of Diebold Touch-Screen voting machines, hereinafter “DVMS”, as currently used and configured. Said DVMS are being used throughout the State of Georgia in its elections and referenda in derogation of Plaintiffs’ legal and constitutional rights to have verifiable, auditable, and recount-capable election results available to them, to election officials, and to the public so as to properly safeguard the integrity, credibility, and reliability of the electoral process.

JURISDICTION and VENUE

2.

This case arises under the Constitution and the laws of the State of Georgia. This Court has jurisdiction based upon O.C.G.A. §9-4-1 *et sequitur* to grant both declaratory and injunctive relief.

Venue, under O.C.G.A. § 9-10-30, is appropriate in Fulton County as at least one of the Defendants against whom substantial relief is prayed has his principal residence there.

PLAINTIFFS

3.

Plaintiff Garland Favorito is an elector of the State of Georgia and a resident of Fulton County. He is an independent computer consultant and serves as Elections Director of the Constitution Party, a registered political body under the laws of the State of Georgia.

4.

Plaintiff Mark Sawyer is an elector of the State of Georgia and a resident of DeKalb County. He is a curriculum coordinator and board member of Defenders of Democracy, hereinafter “DOD”, an unincorporated organization that represents approximately 2000 concerned citizens who want to restore the integrity of elections in Georgia.

5.

Plaintiff Ricardo Davis is an elector of the State of Georgia and a resident of Cherokee County. He is a business systems computer analyst and current Chairman for the Constitution Party of Georgia, a registered political body under the laws of the State of Georgia.

6.

Plaintiff Al Herman is an elector of the State of Georgia and a resident of DeKalb County. He owns and operates a video production business, is a former write-in candidate for the U.S. House Of Representative Seat for the 7th Congressional District of Georgia. He is Treasurer of the Georgia Green Party, a political body under the laws of Georgia.

7.

Plaintiff Frieda Smith is an elector of the State of Georgia and a resident of Cobb County.

8.

Plaintiff Kathryn Weitzel is an elector of the State of Georgia and a resident of Cobb County. She is a waitress and homemaker and co-founder of the Libertarian Action Network.

9.

Plaintiff Adam Shapiro is an elector of the State of Georgia and a resident of the City of Atlanta in Fulton County. He is a visually impaired voter and co-chair of the Georgia Green Party, a political body under the laws of Georgia.

10.

Plaintiff Cathie Calabro is an elector of the State of Georgia and a resident of the City of Atlanta in Fulton County. She has been a life long Democratic Party campaign worker and is a writer, editor and scholar.

DEFENDANTS

11.

Defendant Cathy Cox is the Secretary of State of Georgia, in which capacity she is responsible for the orderly and accurate administration of the electoral processes of the State of Georgia. She is an Election Officer under the provisions of 42 U.S.1973e and is responsible under the Official Code of Georgia Annotated to uphold the laws of Georgia in regards to its electoral processes. She is sued in her capacity as Secretary of State as well as in her capacity as Chairperson of the State Election Board.

12.

Defendant Sonny Perdue is the Governor of Georgia, and as such is responsible for the proper enforcement of the laws of Georgia and is likewise chargeable with the duty to protect and defend the laws and Constitutions of the State of Georgia.

13.

Defendant Georgia State Election Board is an official state board created under the provisions of O.C.G.A. § 21-2-30. Among its other duties, it is responsible to supervise and coordinate the work of the office of the Secretary of State, and to formulate, adopt and promulgate such rules and regulations consistent with law as will be conducive to the fair, legal, and orderly conduct of primaries and elections.

GENERAL OVERVIEW

14.

With the consent and knowledge of Defendant State Election Board and the General Assembly of Georgia, Defendant Cox, in her official capacity as Secretary of State, promoted and implemented electronic voting by the use of Diebold Touch Screen Voting Machines [DVMS] throughout Georgia beginning in 2002. Virtually all election day voting in Georgia as well as most early voting is now done by DVMS. Absentee ballots and some early voting are done via paper ballots.

15.

During the voting machine evaluation and selection process, public comments were solicited. From the response to these solicitations, Defendants and/or their subordinates received numerous easily verifiable warnings that the problems and shortcomings hereinafter set forth concerning the proposed usage of DVMS were reasonably to be anticipated with the adoption of the DVMS system.

16.

Notwithstanding such warnings, and ignoring other verifiable voting systems on the market, the Defendants:

- A. Adopted the use of DVMS;
- B. Entered into a contract to acquire and distribute same, and to replace the voting systems of Georgia with such DVMS at the cost to the taxpayers of Georgia of more than 54 Million dollars;
- C. Did not implement procedures necessary to preserve the audit controls, verifiability, and recount capabilities comparable to those of optical scan and punch card systems that were in place in Georgia at the time of the DVMS purchase.

17.

The Defendants could have evaluated and selected electronic voting machines¹ which produce votes that can be verified, audited, and recounted or the Defendants could have continued to use optical scan punch card equipment that produces votes that can be verified, audited, and recounted.

COUNT ONE

The Definition of “Ballot” Set By O.C.G.A. § 21-2-280 is Unconstitutional

18.

Each and every allegation set forth each of the foregoing paragraphs of this Complaint is incorporated by reference herein.

19.

Article II, Section 1, Paragraph 1 of the Georgia Constitution provides as follows:

Method of Voting

Elections by the people will be conducted by secret ballot and shall be conducted in accordance with procedures required by law.

¹ For the purposes of this lawsuit it should be understood that ‘DVMS’ refers to the Diebold voting system adopted by the State of Georgia whereas ‘DRE’ as used in statutory language refers to electronic voting machines generically.

20.

O.C.G.A. § 21-2-280 states as follows:

All primaries and elections in this state shall be conducted by ballot, except when voting machines are used as provided by law.

21.

O.C.G.A. § 21-2-280 attempts to exclude elections conducted by the use of voting machines from the Constitutional requirement that the election be conducted by secret ballot. This exclusion conflicts with Article II, Section 1, Paragraph 1 of the Georgia Constitution. State law cannot legally provide for exceptions to the Georgia Constitution, which requires that elections must be conducted by secret ballot.

22.

O.C.G.A. § 21-2-280 further states: *“A ballot may be electronic or printed paper”*.

23.

The aforesaid code section’s attempt to redefine the term *“ballot”* to include an electronic record *if only electronic is being relied upon* is also unconstitutional in that an electronic record breaks the custody and control that voters have typically enjoyed over their own ballots and that the framers of the Constitution would obviously expect. Such redefinition of the term *ballot* deprives the voters of their heretofore generally accepted rights and privileges as follows:

- A. The voter cannot touch or even see his own alleged electronic record that has been defined as a “ballot”;
- B. The voter cannot verify that his ballot selections were recorded correctly because he cannot see the selections as allegedly recorded or tabulated in the vote counting process;
- C. The voter cannot confirm that a ballot was ever actually cast because he has no access to the electronic record that the Georgia Code claims is a ballot;
- D. The DVMS procedures only produce and tally alleged voting machine totals and do not provide for any manual count of any ballots;
- E. Election results cannot be audited because no tangible external physical evidence of individual voter intent is ever produced;
- F. Elections cannot be recounted because only reprints of previous unverifiable results are possible with the current machines and implementation.

24.

The Constitution was framed in an era of paper ballots. Current, widely referenced definitions of ballot that are historically applicable and would have been generally accepted at the time the Constitution was framed are:

- A. A ball, ticket, paper, or the like by which one votes and which gives no indication of who the voter is.²
- B. A sheet of paper or a card used to cast or register a vote, especially a secret one³.
- C. A document listing the alternatives that is used in voting.⁴

Each of the foregoing definitions indicate that a *ballot* provides direct, physical evidence of voter intent that the voter can see, cast, and count as necessary. The characteristics of an electronic record are inconsistent with these generally accepted definitions.

25.

The characteristics of a standard ballot referenced in the Georgia Constitution are so unlike those of an electronic computer record that it creates a further conflict between the current unconstitutional definition of a ballot in the Georgia Election Code and the obvious intent that the framers of the constitution implied by the term “ballot”.

26.

Plaintiffs are entitled to have the Court declare that the attempted redefinition of the term ballot in O.C.G.A. § 21-2-280 violates the terms of the Georgia Constitution.

COUNT TWO

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

27.

Each and every allegation set forth in each of the foregoing paragraphs of this Complaint is incorporated by reference herein.

28.

Prior to the 2002 Georgia DVMS implementation, approximately 83% of Georgia election day voters used optical scan and punch card equipment to cast ballots that could be verified and/or audited by the people or their representatives. The 2002 DVMS implementation broke the traditional chain of

² Webster’s Dictionary

³ American Heritage

⁴ Word Net

custody between the election day voter and his ballot, thus reducing the percentage of non-absentee ballots that could be verified, and/or audited by the people from approximately 83% to 0%.

29.

Under the current DVMS implementation:

- A. The DVMS chooses ballot selections for the voter and places them in an internal electronic record that the voter is never allowed see and is not able to see;
- B. The DVMS does not permit voters to directly cast their ballots but instead claims to cast the ballot for the voter without providing any protection for the voter to physically confirm that the ballot was ever cast,
- C. The DVMS produces totals of the votes for each candidate or referendum issue without allowing involvement by people in counting any votes or auditing the counts.

30.

At the time the framers of the Georgia Constitution included the phrase *elections by the people*, there was a standard bond between the people and their ballots because the traditional chain of custody was in place throughout most of Georgia. The framers of the Georgia Constitution expected that:

- A. The People would directly choose their own candidate selections and verify the selections on their ballots;
- B. The People would directly and physically cast their ballots to ensure that the votes on the ballots cannot be manipulated; and
- C. The People could be involved in counting the ballots to determine election results.

31.

The current implementation of the DVMS method of voting in Georgia is in violation of Article II, Section 1, Paragraph 1 of the Georgia Constitution in that people have been removed from the three key elements of the electoral process, to wit, choosing the candidates, casting the ballots, and counting the results. The DVMS implementation is incapable of providing the voter or election officials with tangible, recorded evidence of individualized voter intent and thus deprives the people from conducting credible elections by unconstitutionally delegating critical election functions to machine processes that cannot be verified or audited by the people or their representatives.

32.

O.C.G.A.21-2-379.11 (b) states in pertinent part:

“All proceedings at the tabulation center shall be open to the view of the public but no person except one employed and designated for the purpose by the superintendent of the superintendent’s authorized deputy shall touch any ballot, any DRE (see footnote 1) unit or the tabulating center.”

33.

The transfer of the rights and duties of counting election results from the people or their representatives to others, to wit, private company programmers using secret proprietary source codes and aftermarket “patches”, has resulted in the erection of a shroud of secrecy around the vote counting process. Plaintiffs contend that on several occasions, since the implementation of DVMS, observers have been refused the right to view counting at the county tabulation centers. Refusal to allow such observers to view counting processes at the tabulation centers is a violation of the aforesaid law.

34.

O.C.G.A. 21-2-584 provides in pertinent part:

“If any manager refuses or willfully fails to administer the oath to the poll officer in the manner required by this chapter, or if any poll officer shall knowingly act without being first duly sworn, or if any person shall sign the written form of oath without being duly sworn, or if any manager or any other person authorized to administer oaths shall certify that any such person was sworn when he or she was not, he or she shall be guilty of a misdemeanor.”

35.

The transfer of the rights and duties of counting election results from the people or their representatives to others (i.e. programmers) has resulted in access to election results by unelected and unsworn individuals or companies. The source code for the DVMS is a proprietary code created, manipulated, and controlled by Diebold employees or others of the Diebold Company’s choosing with no common elector review, comprehension, or verification, either before, during, or after the election process. Diebold representatives have repeatedly been utilized on election nights since 2002 to assist various counties within the State of Georgia to produce election results.

36.

O.C.G.A. 21-2-99 provides in pertinent part:

(a) The election superintendent shall provide adequate training to all poll officers and poll workers regarding the use of voting equipment, voting procedures, all aspects of state and federal law applicable to conducting elections, and the poll officers' or poll workers' duties in connection therewith prior to each general primary and general election and each special primary and special election; provided, however, such training shall not be required for a special election held between the date of the general primary and the general election. Upon successful completion of such instruction, the superintendent shall give to each poll officer and poll worker a certificate to the effect that such person has been found qualified to conduct such primary or election with the particular type of voting equipment in use in that jurisdiction. Additionally, the superintendent shall notify the Secretary of State on forms to be provided by the Secretary of State of the date when such instruction was held and the number of persons attending and completing such instruction. For the purpose of giving such instructions, the superintendent shall call such meeting or meetings of poll officers and poll workers as shall be necessary. Each poll officer shall, upon notice, attend such meeting or meetings called for his or her instruction.

(b) No poll officer or poll worker shall serve at any primary or election unless he or she shall have received instructions, as described in subsection (a) of this Code section; shall have been found qualified to perform his or her duties in connection with the type of voting equipment to be used in that jurisdiction; and shall have received a certificate to that effect from the superintendent; provided, however, that this shall not prevent the appointment of a poll officer or poll worker to fill a vacancy arising on the day of a primary or election or on the preceding day.

37.

Diebold representatives do not take the required oath to serve during elections nor do they receive the required certificate even though their activities included electronically connecting to county servers for real-time monitoring of election results, repeatedly transmitting inaccurate county results, and handling voting machines that contained memory cards with completed absentee ballots.

38.

O.C.G.A. § 21-2-94 provides in pertinent part:

“The following shall be the form of the oath to be taken by each manager: I, _____, do swear (or affirm) that I will as manager duly attend the ensuing election (or primary) during the continuance thereof, that I will not admit any person to vote, except such as I shall firmly believe to be registered and entitled to vote at such election (or primary), according to the laws of this state, that I will not vexatiously delay or refuse to permit any person to vote whom I shall believe to be entitled to vote as aforesaid, that I will use my best endeavors to prevent any fraud, deceit, or abuse in carrying on the same, that I will make a true and perfect return of the said election (or primary), and that I will at all times truly, impartially, and faithfully perform my duties therein to the best of my judgment and ability.”

39.

The transfer of the rights and duties of counting election results from the people to others has also resulted in an unlawful delegation of administration responsibilities to Diebold representatives who are not sworn to uphold the election laws of Georgia. Participating in the conduct of an election without being properly sworn to the oath of office is a violation of O.C.G.A. § 21-2-584.

COUNT THREE

The Current DVMS Implementation Does Not Comply With O.C.G.A. § 21-2-379.1

40.

Each and every allegation set forth in each of the foregoing paragraphs of this Complaint is incorporated by reference herein.

41.

In support of the proposed change to electronic voting, the General Assembly passed O.C.G.A. § 21-2-379.1, *Requirements for Use of Electronic Voting Systems*, which states:

No direct electronic recording voting system shall be adopted or used unless it shall at the time satisfy the following requirements:

within which paragraph (8) reads as follows:

It [any electronic voting machine] shall when properly operated record correctly and accurately every vote cast.

42.

Electronic voting using DVMS was implemented by Defendant Cox without a procedure to ensure that the machines can “record correctly and accurately every vote cast” on the days of elections when said machines are actually used as required by law. Defendant Cox implemented no procedure to test or audit the alleged results and tallies after elections.

43.

The current procedures that call for machine certifications in lieu of election night audits are unlawful because O.C.G.A. § 21-2-379.1 requires that the machines record correctly and accurately every vote cast *at the time of use*.

44.

Academic, institutional, and official state-commissioned reports from throughout the country have exposed serious design and security defects that have led to the rejection, decertification, halt of deployment, or legislative action to replace the DVMS systems in the states of Nevada⁵, California⁶, Ohio⁷ and Maryland⁸. Each of these states concluded in official capacities that machines and procedures similar to those used in Georgia are dangerous to the integrity of the elective process.

45.

United States Supreme Court decisions have consistently recognized the right of citizens to have their votes counted and to have those rights protected. In *Reynolds v. Sims*, 377 U.S. 533 it stated: "It has been repeatedly recognized that all qualified voters have a constitutionally protected right to vote . . . and to have their votes counted". In *United States v. Mosley*, 238 U.S. 383, the Court wrote: [it is] "as equally unquestionable that the right to have one's vote counted is as open to protection . . . as the right to put a ballot in a box".

46.

Diebold representatives, Defendant Cox, and others representing the office of Defendant Cox have acknowledged that uncertified electronic “patches” were made to the DVMS *after* said DVMS were certified for the 2002 elections and prior to those elections. Diebold representatives and Defendant Cox. contended that those patches were limited to the operating system of the DVMS.

47.

5 <http://sos.state.nv.us/press/voting%20machine%20security.pdf> and <http://sos.state.nv.us/press/121003.htm>

6 http://www.ss.ca.gov/elections/open_source_report.pdf

7 <http://www.sos.state.oh.us/sos/hava/compuware112103.pdf>

8 http://www.raba.com/press/TA_Report_AccuVote.pdf and

http://www.dbm.maryland.gov/dbm_publishing/public_content/dbm_search/technology/toc_voting_system_report/votingsystemreportfinal.pdf

O.C.G.A. 21-2-379-2 (f). states in pertinent part:

“When a direct electronic recording voting system has been so approved, no improvement or change that does not impair its accuracy, efficiency or capacity shall render necessary a reexamination or reapproval of such system or of its kind”

48.

Operating system patches can affect efficiency, accuracy or capacity of the DVMS and thus render a reexamination necessary as required by law. Defendant Cox and vendor, Diebold, conducted no such reexamination after the uncertified patches were installed on the DVMS and therefore, violated O.C.G.A. 21-2-379-2 (f). Such violations are capable of repeated future occurrences.

49.

As a result of this violation of law, the DVMS were never properly certified for the 2002 elections. No records exist in the Office of the Secretary of State regarding a certification letter certifying the software version used on election days for the 2002 Elections.

50.

For the aforesaid reasons, Plaintiffs are entitled to have the Court declare that the Defendants are unable reliably to comply with the verification requirements of O.C.G.A. 21-2-379.1 (8) or with their obligations to certify election results under the provisions of O.C.G.A. 21-2-499 (b) and/or U.S. § 42 U.S. 1973e, or to protect the rights of the people to honest and open elections guaranteed them by the Georgia Constitution. The Plaintiffs are entitled to have Defendants enjoined from using the DVMS in its present configurations.

COUNT FOUR

The DVMS, As Configured, Deny Candidates and their Supporters Their Rights to Fair Recountings of Votes in Close Elections

51.

Each and every allegation set forth in each of the foregoing paragraphs of this Complaint is incorporated by reference herein.

52.

The Georgia Election Code provides conditions by which a candidate *“shall have the right to a recount of the votes cast”*. For example, O.C.G.A. 21-2-495 (c) provides in pertinent part:

“...any such candidate or candidates receiving a sufficient number of votes so that the difference between his or her vote and that of a candidate declared nominated, elected or eligible for a runoff is not more than 1 percent of the total votes cast, within a period of two business days following the certification of the election results, shall have the right to a recount of the votes cast if such request is made in writing by the losing candidate.”

53.

The existing DVMS implementation is capable only of recounting the original alleged electronic records that were initially reported by the DVMS machines and do not provide direct physical evidence of individualized voter intent of votes directly and physically cast by voters. The electronic records relied upon during the recounting process are mere allegations or summations of the DVMS machines. The original vote-casting reported by the machine was never actually visible to the voter so the voter had no way to verify whether or not his selections were accurately recorded by the DVMS in the first place.

54.

Direct, physical evidence of voter intent is essential to the integrity of the election process, and it is necessary for poll officials to be able to maintain custody over the records of voter intent and that such records be kept safely in a ballot box or other safekeeping device prior to tallying, and for the people to maintain custody over the process of counting and recounting votes as well as the occasional auditing of machine performance to provide evidence of integrity and reliability as well as to detect and prevent election fraud.

55.

Plaintiffs are entitled to have the court enjoin the use of the current DVMS implementation and to mandate that other systems of vote capture and preservation be instituted or reinstated so that recounts provided for by O.C.G.A. 21-2-495 (c) but actually occur.

COUNT FIVE

Use of DMVS Denies Equal Protection for Electronic Voters vs. Absentee/Pre-election Voters

56.

The allegations set forth in all of the foregoing paragraphs of this Complaint are incorporated by reference herein.

57.

Article 1 Section 1 Paragraph 2 of the Georgia Constitution provides that:

No person shall be denied the equal protection of the laws.

58.

Absentee and many pre-election Ballots have the obvious characteristics of a ballot that the framers of the Georgia Constitution intended. Such ballots provide that:

- A. The voter can see the selections that are on the ballot;
- B. The voter can cast the ballot at designate receiving locations if the voter chooses;
- C. The people of Georgia, including officials sworn to uphold the laws of the state, can physically count the ballots;
- D. The ballots represent direct physical evidence of voter intent and are retained for recount purposes which they are fully capable of fulfilling

59.

While voters who cast absentee or *written* pre-election ballots are afforded these protections, while voters who cast votes on regular election days in Georgia must cast their votes on the DVMS and thereby are not afforded any of these privileges under the current laws of the state and cannot reliably hope that they enjoy equality of treatment either in elections or recounts with those whose votes have been preserved by physical means.

60.

Plaintiffs are entitled to have the Court declare that use of DVMS in its current form violates the Georgia Constitution's equal protection guarantees of those voters using DVMS vis-à-vis the selections made by those who vote by written ballots and to mandate that the Defendants implement a system or systems which will adequately safeguard the rights of the users of voting machines and assure that as to elections and recounts that they shall stand on an equal footing with those who have voted by using standard ballots.

COUNT SIX

Georgia's Audit Trail Pilot Project to Comply with Voting Accuracy and Correctness Law Cannot Safeguard the Rights of the People or Provide Assurances Against Future DVMS Failures

61.

Each and every allegation set forth in each of the foregoing Paragraphs is incorporated by reference herein.

62.

Because the General Assembly was worried about the same issues raised in this Complaint, it passed O.C.G.A. § 21-2-379.12 which provides as in pertinent part as follows:

The Secretary of State shall implement a pilot program providing for the use of direct recording electronic (DRE) voting equipment equipped and configured with an elector verified, permanent paper record of the votes cast by each elector on each DRE unit in one precinct each in the Counties of Cobb, Bibb, and Camden in the 2006 November general election and any runoff from such election.”

63.

For the purpose of the three-precinct pilot project, the Elections Division of the office of the Secretary of State has chosen to purchase and implement a newer version of the Diebold AccuVote series machines that are currently used throughout Georgia. That model that is frequently referred to as the AccuVote TSX, that the Elections Division intends to implement in the pilot precincts for the 2006 elections do not produce individually separated ballots but instead roll all alleged election results captured by the voting machine into a sealed canister.

64.

During the 2006 House Government Affairs Committee hearings for SB500 and HB790, SB500 author Sen. Bill Stevens and Elections Director Kathy Rogers expressed concern that it could take at least 33 hours and possibly up to 66 hours for a precinct to hand count even a single race on election night with the selected technology. Consequently, the law enacted as a result of the passage of SB500, O.C.G.A.21-2-379.12 (c), provides in pertinent part that:

“...the Secretary of State shall cause a complete manual audit to be performed on each DRE unit used in the pilot project for voting within 30 days following the 2006 November general election and within 30 days of any runoff of such election.”

65.

O.C.G.A. 21-2-499 (b) provides in pertinent part that:

“Not later than 5:00 P.M. on the fourteenth day following the date on which such election was conducted, the Secretary of State shall certify the votes cast for all candidates described in Subparagraph (A) of paragraph (4) of Code Section 21-2-497 and upon all question voted for by the electors of more than one county and shall no later than that same timed

*lay the returns for presidential electors before the Governor.” And that:
“The Governor shall certify the slates of presidential electors no later
than 5:00 P.M. on the fifteenth day following the date on which such
election was conducted.”*

66.

The testimony referenced in the foregoing Paragraphs regarding the selected technology renders it impossible for the Elections Division to determine that the voting machines did “*record correctly and accurately every vote cast*” when the technology was used on Election day or the evening thereof. Furthermore, the newly implemented law allows the manual audit for accuracy to be completed *after* election results are certified as described in the foregoing Paragraph.

67.

Even if the altered DVMS used in the pilot project can show they accurately recorded votes, the project cannot be relied upon by the State of Georgia to bolster any contention that the DVMS machines were reliable in the past, are reliable in the current election cycle, or henceforth will be so reliable as to assure Plaintiffs, the Court, and the people of Georgia that the concerns set forth in this entire Complaint are without merit or legal justification.

68.

Plaintiffs are entitled to have the Court declare that the so-called pilot project mandated by O.C.G.A. § 21-2-379.12 can in no way be relied upon to validate or legalize the use of the DVMS as currently implemented and that the pilot project’s and any future election’s use of the DVMS roll-up system is itself is violative of the prompt certification and reporting of vote results required by O.C.G.A. 21-2-499 (b) and similar prompt-reporting statutes.

COUNT SEVEN

The Audit Trail Pilot Project, Unconstitutionally Undermines the Affected Voters’ Rights To a Secret Ballot

69.

Each and every allegation set forth in each of the foregoing paragraphs of this Complaint is incorporated by reference herein.

70.

The Georgia Constitution's explicit guarantee of a secret ballot necessarily includes the requirement that a recapitulation of voter activity cannot indicate for whom a given voter voted.

71.

The new Diebold Accuvote TS machines with printed roll-up vote/ballot tabulation cannot fulfill said Constitutional requirement of a secret ballot because the machines list voter results in the sequence that the voters came into the polling place, thus giving indication of who the voter might be and how he voted.

72.

Determining the identity of the voter could be even easier once recently-purchased electronic poll books that can record date and time of voter appearance are implemented in Georgia. No assurances can be obtained that such information is not captured because the vendor, Diebold, has already contended in election-related cases that the data structures of their products are of a proprietary nature and cannot be revealed to the general public.

73.

Plaintiffs are entitled to have the Court declare the so-called pilot project unconstitutional and to enjoin the state or its political subdivisions from using DREs that make printed sequential records of individual voting choices.

COUNT EIGHT

Mandamus

74.

The allegations set forth in the foregoing paragraphs of this Complaint are incorporated by reference herein.

75.

Plaintiffs are entitled to relief by mandamus as provided for by O.C.G.A. § 9-6-24 which reads:

Where the question is one of public right and the object is to procure the enforcement of a public duty, no legal or special interest need be shown, but it shall be sufficient that a plaintiff is interested in having the laws executed and the duty in question enforced.

76.

The Court has full and complete power to fashion mandate relief by virtue of O.C.G.A. § 9-6-20, which reads:

Enforcement of official duty; inadequacy of legal remedy

All official duties should be faithfully performed; and whenever, from any cause, a defect of legal justice would ensue from a failure to perform or from improper performance, the writ of mandamus may issue to compel a due performance, if there is no other specific legal remedy for the legal rights.

WHEREFORE Plaintiffs pray:

- a) That summons and process issue;
- b) That the Court inquire into the issues of this case;

DECLARATORY RELIEF SOUGHT

- c) That the Court use its legal authority to declare the following:
 - 1. That the current implementation of Diebold AccuVote TS (R6) voting machines cannot meet the requirements of O.C.G.A. § 21-2-379.1 (8) since the machines provide no practical means for verification to ensure that they did “*record correctly and accurately every vote cast*” when they are used on Election Day
 - 2. That the current system of use of Diebold Equipment (DVMS) does not adequately provide direct physical evidence of voter intent;
 - 3. That the current system of use of Diebold System (DVMS) does not adequately insure the right of candidates and the voting public to a recount where such is allowed by law;
 - 4. That the current system of use of Diebold (DVMS) does not provide a means to audit the veracity or otherwise physically recount votes cast so as to assure the integrity of the electoral process;
 - 5. That O.C.G.A.-21.2.280 is unconstitutional and is in violation of Article II, Section 1, Paragraph 1 of the Georgia Constitution in its attempt to redefine the Constitutional meaning of a ballot to an internal electronic record that the voter cannot see or touch, that neither the voter nor a voter registrar can verify was cast, and that provides no direct physical evidence of voter intent which can be relied upon at a recount;
 - 6. That the current use of the Diebold AccuVote TS (R6) voting machines is unconstitutional in that such use violates Article II, Section 1, Paragraph 1 of the Georgia Constitution in that it is unable to produce a ballot that the voter

can see or touch, that the voter can verify was cast, or that provides direct physical evidence of voter intent as to elections or recounts;

7. That voters who cast electronic records during an election on the currently employed Diebold AccuVote TS (R6) voting machines are denied equal protection under the Georgia Constitution relative to those votes cast by absentee ballots and/or early written ballots that can easily be verified, audited, and recounted;
8. That the planned implementation of the Diebold AccuVote TSX voting machines for the 3 precinct pilot cannot meet the requirements of O.C.G.A. § 21-2-379.1 (8) since the machines provide no practical means for verification to ensure that they did “*record correctly and accurately every vote cast*” at the time they are used on Election Day;
9. That the pilot project can in no way be determinative of past, present or future DVMS accuracy;
10. That the planned implementation of the Diebold AccuVote TSX voting machines for the precinct pilot cannot meet the ballot secrecy requirements of the Georgia Constitution since the machines produce voter results in a paper roll that represents the exact sequence in which the voters cast their ballots;
11. That any computer codes and devices used in DRE’s should be available for inspection upon reasonable request and not be held as proprietary information or infringe upon other relevant rights of the public to inspect and know the public business.

INJUNCTIVE RELIEF SOUGHT

- d) That should the Court find and declare that the DVMS voting machines and their system of employment is violative of state statutory or constitutional protections that it:
 1. Enjoin the State of Georgia from using any electronic voting systems that do not produce simultaneous, individualized, physical printouts or non-sequential memoranda of direct voter intent;
 2. Enjoin the State of Georgia from using any electronic voting systems unless and until procedures are implemented for the precincts to verify that the machines used actually counted votes correctly on election night prior to the posting of election results;

3. Enjoin the Defendants from destroying any materials (including documents, software, data,) relating to the primaries and elections of 2002, 2004, and 2006 until the disposition of this case is complete.
4. Enjoin the State of Georgia from purchasing any additional electronic voting equipment that does not comply with Georgia statutory and Constitutional requirements.
5. Enjoin the State of Georgia from using any electronic voting systems that have secret source codes and/or electronic “patches” that are not available for reasonable public scrutiny before, during, and after elections.

MANDATE RELIEF SOUGHT

e) That should the Court, find and declare the DVMS voting machines and their system of employment is violative of state statutory or constitutional protections that it:

1. Require that the Office of Secretary of State implement procedures to ensure that any voting machines used in Georgia “*record correctly and accurately every vote cast*” at the time they are used on election days as required by O.C.G.A. § 21-2-379.1 (8), and:
 - a. Mandate that for a ballot to be designated as an official ballot in Georgia, that ballot must be viewable to the voter, physically verifiable by the voter as being cast, and retained as direct physical evidence of voter intent for audit and recount purposes;
 - b. Require public, manual vote counting of official ballots in at least one contested race or referendum selected publicly and randomly at each precinct and conducted by the precinct on election night immediately after the polls close and before precinct results are posted;
 - c. Require posting of any discrepancies found between machine counts and manual counts at the precinct prior to the publication of results and include those discrepancies as part of the official election results and posting of those discrepancies on any county web sites that contain election results;
 - d. Require procedures where a candidate or ten electors can petition for an automatic recount at no charge to the candidate or other parties involved if discrepancies span precinct boundaries.

- e. Mandate that the State of Georgia make available to the public upon reasonable request any and all source code used to operate voting machines, county tabulation servers, and the state tabulation center.
2. Direct that any and all relief granted in these prayers be fashioned to ensure that the need of all visually impaired voters, as well as voters with other disabilities, to continue to vote independently with any special equipment that may be necessary to achieve the relief sought.
 3. Require Defendants to turn over any and all relevant materials to the Court or its authority so the Court can determine whether any person or persons did willfully neglect his, her, or their duties during the 2002 implementation and subsequently of DVMS voting in Georgia.
- e) Award reasonable attorneys fees to Plaintiffs for the prosecution of this action;
 - f) That the Court order that a jury trial be had as to any contested facts;
 - g) That the Court grant such other and further relief as it may deem appropriate.

Respectfully submitted,

Law Office of Walker Chandler

Walker Chandler, Attorney for Plaintiffs
Georgia Bar. No. 120675

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Zebulon, Georgia 30295
(770) 567-3882
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IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

GARLAND FAVORITO, MARK SAWYER, *
RICARDO DAVIS, AL HERMAN, FREIDA *
SMITH, KATHRYN WEITZEL, ADAM *
SHAPIRO, and CATHIE CALABRO, *
Plaintiffs, *

vs. * **CIVIL ACTION FILE NO.**

CATHY COX, *
SECRETARY OF STATE OF GEORGIA *
SONNY PERDUE, *
GOVERNOR OF GEORGIA *
GEORGIA STATE ELECTION BOARD, *
Defendants. *

ACKNOWLEDGEMENT OF SERVICE

I, **Dennis R. Dunn**, Deputy Attorney General of the State of Georgia hereby acknowledge service of a copy of the Complaint and Summons by and on behalf of each of the following named Defendants, to wit:

- Cathy Cox, Secretary of State of the State of Georgia
- Sonny Perdue, Governor of the State of Georgia
- State Election Board, State of Georgia

I also hereby acknowledge that I have received the copy of the Complaint that is to be served on the Office of the Attorney General as required by O.C.G.A. § 9-4-7

This _____ day of July, 2006.

Dennis R. Dunn
Deputy Attorney General

Sworn to and subscribed before me
This ____ of July, 2006.

Notary Public

**IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA**

GARLAND FAVORITO, MARK SAWYER, *
RICARDO DAVIS, AL HERMAN, FREIDA *
SMITH, KATHRYN WEITZEL, ADAM *
SHAPIRO and CATHIE CALABRO, *

Plaintiffs, *

VS *

* **CIVIL ACTION FILE NO.**

CATHY COX, *
SECRETARY OF STATE OF GEORGIA *

SONNY PERDUE, *
GOVERNOR OF GEORGIA *

GEORGIA STATE ELECTION BOARD, *

Defendants. *

VERIFICATION

Upon oath duly deposed, I hereby state upon oath that the facts and allegations contained in the foregoing Complaint are true and correct to the best of my knowledge and belief.

This ____ day of July, 2006.

Sworn to and subscribed before me
the day and year above written.

Sworn to and subscribed before me
the day and year above written.

Notary Public

Notary Public

My Commission expires:_____.

My Commission expires:_____.

Sworn to and subscribed before me
the day and year above written.

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