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,	*	**CIVIL ACTION FILE NO.**
vs.	*	**2006CV119719**
KAREN HANDEL, SECRETARY OF STATE OF GEORGIA	*	
SONNY PERDUE, GOVERNOR OF GEORGIA	*	
GEORGIA STATE ELECTION BOARD,	*	
DEFENDANTS.	*	

PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

COME NOW, the Plaintiffs, by and through the undersigned counsel and file this their response to the Defendant's Motion For Summary Judgment in the above-styled case and show that for the reasons set forth below they are entitle to judgment as a matter of law.

In support of this Motion, Plaintiffs rely upon the Complaint with its Exhibits filed with the Court, upon the Brief in Support of Plaintiffs' Motion for Summary Judgment, Plaintiffs' dispute of the Undisputed Facts alleged by the Defendants in their allegations of such supposed facts heretofore asserted .

WHEREFORE, Plaintiffs request that the Court rule in their favor all matters at issue.

Respectfully submitted,

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BRIEF IN RESPONSE TO DEFENDANTS' MOTION TO DISMISS

Plaintiffs respond to the Defendant's brief by making the following comments relative to the general argumentative portions of the defendants' brief as they appeared in his Motion.

Plaintiffs first show that the Defendants' principal Constitutional arguments with regard to Plaintiffs' Counts Five, Twelve and Thirteen are based upon the Defendants' misapplication of the standards of review that are called for when fundamental rights are at issue.

All references to page numbers appearing in brackets refer to Defendant's Motion unless otherwise noted..

Defendants scoff at Plaintiffs' reliance on the "historical meaning" of ballots.[Pg2]

Perhaps in such scoffing Defendants should have said that according to them a ballot is not what the public normally thinks of as a ballot, but is whatever the General Assembly says is a ballot. That is, after all, the essence of their argument. Democracy can be defined out of existence. It should be remembered by all parties that Georgia's voting machines (DVMS) are nothing more than glorified, programmable adding machines.

Now the people of Georgia are asked to accept an entirely new definition of "ballot". The Defendants contend that the ballot is not a physical object but a *process* that includes: "the image that the voter sees, the process that the voter uses to touch the screen, the equipment on which the screen is touched, and the electronic media that's involved from that point through the PCMCIA card all the way up through the uploading into the county server where the votes are tabulated." (Cobb depo: pg 11 ln 8). Such a contention has led to the consequences set forth in the Complaint and cited by the Defendants in *Rayle Electric Membership Corp v. Cook* 195 Ga. 734, 735 (1943) and other cases cited by the Defendants.

Defendants allege that the Plaintiffs ignore that paper ballots can be and are used. [Pg.2]

Plaintitffs are well aware of that fact and show how different classes are thus created, to wit: those using verifiable paper ballots can have their votes overwhelmed by the votes cast on election days by a mass of voters using government adding machines (DVMS) unless and until all Georgia voters refuses to use the touchscreen, paperless voter-tallying machines in current use.

Defendant say that Plaintiffs *pretend* that giving voters choices on how to vote violates the Equal Protection Clause.[Pg.2]

Plaintiffs pretend nothing. It is a fact that there are clearly two classes of voters—those who use paper ballots and those who use the unauditable, unverifiable, paperless touchscreen machines.

Defendants allege that the touchscreen system "indisputably" maintains the secret ballot. [Pg.3]

The rollup paper recordation systems used in the 2006 pilot project—afterthought add-ons by Diebold that sequentially record votes—clearly do not protect the secrecy of the ballot: thus the validity of Plaintiffs' Count 7, complaining of the use of pilot projects devices that did not comply with Article II, Section 1, Paragraph 1 of the Georgia Constitution. Furthermore, insofar as anyone of the public knows or could possibly know, ballot secrecy is now a thing of the past, hidden in the software recesses of government-controlled machines to which the public henceforth will have no access such the public is called upon to trust not only the current administration, but all future administrations controlling such machines.

Defendants assert that the critical issue in the case is whether the Secretary of State had a rational basis for the decision she made on voting equipment. [Pg.3]

If a rational basis test is all that is necessary to install an unconstitutional voting system and have its reported "results" control our elections, then we can all go home.

Defendants' assertion that any voter can use a

paper absentee ballot is a mischaracterization. [Pg 14]

Clearly on Election Days, those wishing to vote are not entitled to request and/or use a paper ballot. O.C.G.A.§21-2-380 (b). The plain language of this section requires those wishing to use paper ballots to request them no later than the Friday of the week preceding Election Day.

Defendants characterization of Plaintiff Favorito is irrelevant [Pg15]

During his deposition, Plaintiff Favorito mentioned the authenticated Emails where he had written to Professor Williams in early February, 2002 to explain that the voting machines under evaluation had no external audit trail to verify the votes. In the testimony referenced by the Defendants, Mr. Favorito simply noted that rather than to address his concern, Prof.. Williams referred to Mr. Favorito as a "conspiracy theorist" in a statewide electronic newsletter.

In an attempt to bolster his attack to claim that Mr. Favorito was some sort of conspiracy theorist or nut, Counsel presented Mr. Favorito with a series of articles totally irrelevant in that they have nothing to do with the subject matter of voting in Georgia.

. For a response to other relevant mischaracterizations of Plaintiffs motives, see Plaintiffs dispute of Defendants Fact 28.

Defendants allege that Plaintiffs seek a "paper trail" as a remedy to the unconstitutional lack of a secret ballot in DRE system [Pg17]

Plaintiffs do not seek a "paper trail" in their suit, as alleged by Defendants. This misrepresentation of the content of the Plaintiff's suit occurs more than once in this brief. Plaintiffs are "technology neutral" in calling for whatever remedy to the lack of a constitutional secret ballot the court deems appropriate. Positive plaintiff references to expressions such as "paper trail" or "punch card ballots" are *always* in the context of contrasting paper evidence-based technologies from systems lacking any voter-verified evidence for the conduct of recounts, audits and election challenges. Such references are never to be mistaken for endorsements of those particular technologies.

Defendants erase the historical record in their definition of "the fundamental purpose of a secret ballot." [Pg18]

Defendants erase much of the history of American elections by suggesting that the "fundamental purpose of a secret ballot" is (merely) to assure that the content of a voter's vote "is not disclosed or discoverable." The *true* fundamental purpose of the secret ballot can be found only by asking the question—"why secrecy?" The historical answer is that the secret ballot was widely adopted in the 19th century (Georgia, 1908) to rescue the legitimacy of elections. The secret ballot helped accomplish this by eliminating the corruption and unfairness associated with the so-called "partisan ballot," which permitted the recorded choices of voters to be publicly monitored in partisan ways. Democratic legitimacy, in other words, is the *true* fundamental purpose of the secret ballot—legitimacy that is undermined by the un-auditable election results of Georgia's ballot-less DRE system.

Defendants claim that "vote outcome" can be determined "more accurately than ever" with Georgia's DRE system. [Pg18-19]

Not only is no evidence provided to support this claim, but in fact no such evidence is conceivable with Georgia's un-auditable DRE system. Studies showing low "undervote" and "overvote" rates tell us nothing about the accuracy of votes counted on the system. Any reference to the auditability of Georgia's system in this brief or in any of the depositions will always be to a software-generated process; there is no independent audit capability in Georgia's system with which to assess the accuracy of the system's tabulations.

Defendants make an "apples and oranges" comparison when they claim that DREs provide "more opportunity to review a ballot than previously existed" [Pg19]

The ability to "confirm," "review," and "change" selections on a DRE is meaningful only if the chain of custody between voter, ballot box and public tabulation is preserved, as it is with paper-based systems. In fact, the DRE breaks that chain once the selections disappear from the screen, make their way into the invisible confines of the

system, and reemerge as software-processed, un-auditable electronic tabulations. The advantages of manipulating selections on the screen are surely negated by the *incurable uncertainty* as to whether those selections will be accurately reflected in the system's final electronic tabulations.

Defendants allege it to be an "indisputable fact" that voters using touchscreen voting machines "know how they voted and can verify this when voting." [Pg 19]

One of the main points of this case is that although voters know how they are voting, neither they nor those charged with reporting vote results can be assured that votes are being properly reported by the touchscreen machines. Also there are procedures for getting new ballots or punchcards if an original is wrongly marked or punched. As Defendants know, the problems of Florida's recounting of votes addressed in *Bush v. Gore* went to Equal Protection and systematic fairness issues, Florida law prior to the election having been clear as to the fate of wrongly punched ballots.

Defendants intentionally misstate the goals of Plaintiffs when they say that Plaintiffs want *receipts* to be issued to voters at the time of voting. [Pg. 19]

No such claim or demand has been made. A receipt would be a printed slip or record that the voter could take away with him. Only a printed ballot is requested—a ballot that could be referred to for the purposes of recounts and audits

Plaintiffs are not ignoring the permission granted by O.C.G.A. § 21-2-280 to admit the use of electronic ballots [Pg.19]; they are challenging it.

The Georgia Constitution requires that elections be conducted by ballot. O.C.G.A. 21-2-280 attempts to exempt voting machines from the constitutional requirement to conduct elections by ballot:: "*All primaries and elections in this state shall be conducted by ballot, except when voting machines are used as provided by law.* O.C.G.A. 21-2-280 further states that "*A ballot may be electronic or printed paper."* Electronic ballots do not

provide federal or state equal protection and federal due process for Georgia's Election Day voters vs. Georgia's absentee voters as explained for Counts 5, 12 and 13 in the Plaintiffs Motion for Summary Judgment. The Defendant's response, although lengthy, does not address this core Plaintiff argument.

No state law can override the provisions of the Georgia Constitution. Plaintiffs are entitled to have the Court rule that elections conducted by the use of voting machines which rely *exclusively* on the use of electronic ballots are unconstitutional.

Defendants erroneously claim that Plaintiffs "would like a return to punch card systems."[Pg19]

In the referenced testimony Plaintiff Favorito simply pointed out the punch card systems like optical scan systems and DRE systems with voter verified paper ballots (VVPAT) all produce directly created evidence of voter intent. He explicitly stated in the deposition that the Plaintiffs are not advocating a specific solution and that the plaintiffs have supported a variety of solution including the addition of Voter Verified Paper Audit Trail (VVPAT) equipment to the existing DVMS.

Nowhere in the suit or in the Favorito deposition is such an assertion made.

Defendants erroneously claim that the case of *Bush v. Gore* "arose precisely because voter intent cannot be established from a punchcard." [Pg19]

See Plaintiff's response to Defendant's Statement of Undisputed Facts, where this same historical misrepresentation is addressed. Litigation in Florida 2000 was about legal circumvention of Florida procedures for recounting ballots.

Defendants erroneously claim that Plaintiff's understanding of "chain of custody of the ballot" is "factually wrong." [Pg20]

The voter's physical handling of the DRE encoder card, as described by Defendants, is irrelevant to the chain of custody, since the votes are not kept on that card, but are kept in the DRE machine. That's why there is no security risk in casually leaving the card with the precinct worker as the voter leaves the precinct. The votes are in the machine, and the cards are wiped clean and reusable. Defendants apparently fail to

understand that chain of custody is over the evidence of voter intent—not a blank encoder card. But then evidence of voter intent is a foreign concept to anyone who would defend the current system.

Defendants' claim that the DVMS maintains voter chain of custody over the ballot is incorrect and contradicted by their own expert witness [Pg. 20]

The Defendant's argument that voter has proper chain of custody over his ballot simply because the voter had possession of a PCMCIA card on which the votes were allegedly cast is absurd when considering that the votes on the card are not known to the voter. The voter obviously cannot see these electronic bits as Mr. Cobb explained (pg 13, ln 9). The voter is only able to establish custody over the votes that appeared on the touchscreen and these votes disappear at the time the ballot is cast thus breaking the chain of custody.

Defendants provide no constitutional defense of an unsupportable definition of "ballot." [Pg21]

Aside from several undefended assertions that ballots can be "electronic" (eg. O.C.G.A. 21-2-280), Georgia election law contains just one attempted "definition" of a ballot, which Defendants hold in high esteem: "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" (*Ga.Comp. R. & Regs.* 182-12-02(1)(a)). This definition, however, turns out to be unsupportable. While the definition works as a description of a blank, unmarked ballot, the constitutional guarantee is to a secret ballot that (presumably) contains a record of voter intent—why else would it need to be secret? On the other hand, if by a lax interpretation (see *Williams v. Ragsdale* 205 Ga. 274, 277 (1949)) the court interpolates the meaning of a "record of voter intent" into the definition, now we have the "absurd" (see *Hollowell v Jove*, 247 Ga. 678 (1981) result of multiple ballots for every voter, as there are redundant, parallel data records of all votes cast on Georgia's DRE system. Either way, Defendants have failed to provide a constitutionally acceptable definition of "ballot" from Georgia's election laws and regulations.

Defendants erroneously allege that Plaintiff's contend that "a piece of paper must be given to the elector." [Pg21]

Nowhere in the Plaintiff's suit or in the Favorito deposition is such an assertion made. The point is not that the elector is "given" a piece of paper, but that the system's vote tabulations are recountable, auditable, and contestable with evidence of voter intent directly verified by the voter, as is the case with the secret ballot required by the Constitution. "Evidence" produced by system software does not meet this requirement.

Electronic voting machines with a Voter Verified Paper Audit Trail (VVPAT) could have been implemented in Georgia and do not require the elector to have a piece of paper. As the Defendants well know, these machines allow the voter to verify the ballot behind plexiglass or other types of clear shields without requiring the voter to take possession of the ballot. The Diebold AccuVote TSX that the Defendants implemented for the 2006 Audit Trail pilot in Georgia had just such a shield even though it as unable to produce individual voter verified paper ballots.

As to Count II, Plaintiffs are not "predicat[*ing*] their claim on what they believe to be the historical intent of the Constitution not to allow electronic voting." [Pg. 22]

The Defendants have admitted that under current law allowing electronic ballots and implementing an electronic system that supplants human oversight in the name of speed and efficiency, the people have been removed from verifying the three key elements of the Election Day electoral process, to wit, choosing the candidate selections on their ballot, casting the ballots, and counting the results.

First, the defendants have admitted the obvious that Election Day voters cannot see the selections that are stored on the memory cards or internally in the voting machine. When asked the question: " And is it not true that the voter himself cannot see at the time that he votes whether or not the information that he has tried to put in on the touch screen has been properly recorded on the card? The state's expert witness, Mr. Cobb, admitted: "That is correct. The voter cannot see the electronic bits." (Cobb Depo, pg 13, ln 5)

Secondly, the Defendants have admitted that even the state's expert witness does

not know the format of the records of votes cast once they are stored. Therefore, neither he nor any election official, nor any voter can determine if a ballot was actually cast as the touchscreen indicated. When asked: "Mr. Cobb, do you know the format of the records of votes cast as stored in the electronic voting machines implemented in '02?" he replied: "No, I do not." When asked: "Do you know the format of the records of votes cast as stored in the memory cards used by those voting machines?" he replied: "I do not." When asked: "Do you know the format of the records of votes cast as stored or compiled by the servers in the servers?" he replied: "No." (*Ibid.* pg 18, ln 12)

Thirdly, as a result of these admissions, election officials have no means to audit the totals that are produced by the machine on Election Day. Like the state's expert witness, election officials have no way of knowing the format of the votes stored. In addition, no directly created evidence of voter intent that was verified by the voter, is ever retained for election officials to provide recounts, investigate discrepancies, detect fraud or resolve contested elections. Without such a tangible physical ballot, no official has a mechanism to verify that totals produced by the voting equipment on Election Day are in fact, correct.

Plaintiffs are contending that in specifying elections by the people there must be a protection of the basic functions of voting that are reserved for the people to perform including direct creation of their ballot, viewing and verification of selections on the actual ballot that will be placed into the custody of election officials, verification of the direct physical casting of the ballot when it is placed into custody of the elections officials and counting or auditing of the vote counts on the ballot to include the public viewing of all counting, auditing and accumulation processes.

Defendants claim that the Plaintiff are not challenging the reasonableness of the General Assembly's choice of voting methods [Pg.22]

A challenge to the reasonableness of the system installed is inherent in this challenge to the constitutionality and legality of the selected system. Any system of vote accumulation that cannot be independently and externally audited is *per se* unreasonable.

Plaintiffs are not contending in essence that Diebold is conducting elections in Georgia. [Pg. 23]

However, Plaintiffs do show the court that various software components used in the GEMS process are deemed *proprietary* and are not subject to discovery and testing by outsiders wishing to test their integrity, such term meaning *owned by Diebold.*

Defendants' claims that the touchscreen system is the best system ever used in Georgia are disingenuous .[Pg. 23]

Plaintiffs' Count 3 seeks to have the court declare that the existing DVMS and voting procedures cannot comply with O.C.G.A. 21-2-379.1 (8). The law requires that at the time a DRE system is used it must record correctly and accurately every vote cast. The Defendant's claim that the system is monitored to assure that there are no flaws to prevent voters from being able to vote for who they wanted. This is false as it applies to actual votes cast on an Election Day. No procedure has ever been implemented to determine whether or not the **actual** votes that were cast by qualified voters when the system was used on an Election Day were recorded correctly and accurately as cast. Furthermore, it is impossible to implement such an aforesaid procedure because the DVMS have no capability to produce an independent audit trail of each vote cast which could be used to determine the accuracy and correctness of the votes that were cast on the DVMS during an actual election. Professor Williams has already admitted that if a portion of one candidate's vote totals are recorded for his opponent it could not be detected on Election Day. (Williams Deposition, pg 44, ln 22)

The Defendants solely rely on testing and certifications performed using **dummy** data prior to an election or dummy data in parallel with an election. Professor Williams has admitted in deposition that the DVMS could operate differently in test mode than during an election. (*ibid*., pg 66 ln 21) Professor Williams has also admitted that he has no dispute with the Election Assistance Commission Security and Transparency Subcommittee's draft conclusion stating that the National Institute of Standards and Testing and the aforesaid committee "do not know how to write testable requirements to satisfy that the software in a DRE is correct." (*ibid*., pg 72 ln 8) Professor Williams has even admitted that there is an unpublished way to defraud an election (*ibid* pg 71, ln 20).

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

Plaintiffs are entitled to have the Court enjoin the use of Georgia's Diebold AccuVote TS-R6 voting machines in their current configuration and to mandate that other systems of vote capture and preservation be instituted or reinstituted so that the Defendants can reliably comply with the verification requirements of O.C.G.A._21.2.379.1 (8)

Defendants' claims that Plaintiffs are guilty of latches is meritless. [pg. 24]

Plaintiff Favorito notified the proper authorities when the machines were under evaluation that they did not have external audit trail that could be used to verify the correctness of the recorded votes as shown in the Email exhibits authenticated by Mr. Barnes and Mr. Williams at their depositions. Plaintiff Favorito trusted elections officials to act on these concerns and was limited in any further action while working out of town through most of 2004. In the 2004 session, Plaintiff Favorito, Plaintiff Sawyer and others attempted to resolve the accuracy and correctness auditing concerns through legislative bills and did so again in 2006. Weeks after these attempts did not succeed in a producing a permanent solution, the Plaintiffs filed suit. No loss of evidence has occurred that would affect the Defendant's ability to defend the allegations in this count.

Defendants' contention that the voting system was put in place by a broad consensus and careful examination is unsupported and misleading at best [Pg. 24]

The broad consensus that covers the law, state legislators, Georgia government officials and the general public, as documented in Plaintiffs' dispute of Defendants' Statement of Fact 28, preferred a voting system with external audit capability and ballots that could be retained for variety of critical election integrity purposes as explained in Plaintiffs Counts 5 and 12 . Furthermore, any careful examination of the voting system during pilot procurement, certification or final acquisition would have revealed that it violated the law requirement and independent audit trail of each vote cast.

The Defendants' own witnesses prove the validly of Count Four

The state's expert witness, Ray Cobb, has admitted that he knows of no recount of electronic votes in Georgia that has ever produced a count different than the original vote count (Cobb Deposition, Pg 24, ln 12). Professor Williams has further admitted that any recounts of electronic votes in Georgia "will give you the exact same answer on a recount as they do on the original count…" (Williams Deposition, pg 46, ln 21).

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

Mr. Cobb further explained that the difference in scope between a re-accumulation of electronic votes and a recount of ballots occurs because only a portion of the voting process is actually recounted when electronic votes are re-accumulated. He admitted that when electronic votes are re-accumulated under current procedures: "The recount starts with the PCMCIA card". (Cobb, pg 42, ln13) Mr. Cobb also admitted that with optical scan equipment: "In a recount they would rescan the ballot. It starts with the ballot rather than the card." *(ibid*, pg 43, ln 1). Thus, under current Georgia election procedures, the recording process of the electronic votes that were verified by the voter are not and cannot be recounted.

Had the Defendant's procured electronic voting machines with an independent audit trail of each vote cast as required by law in 2001, the independent audit trail, such as a voter verified paper ballot, could have been retained and a full recount of electronic voting ballots could be conducted in accordance with O.C.G.A. 21-2-495. This approach was recommended to the Secretary of State's office by the chief of Fulton County Board of Registration of Elections in an August 24 letter (Exhibit D) and by Senator Paul in the March 13, 2002 State Local Government Operations Committee hearing (Exhibit L) as explained in the Plaintiff's dispute of Defendant's Fact #28.

Defendants' argument that Plaintiffs' claims depend on perverting the operation of the machines and their software is false and contradicted by their own witness. [Pg. 24]

Professor Williams has admitted in deposition that the GEMS database, which resides on the tabulation servers and stores the totals of both the optical scan and electronic votes, can be altered without leaving a record and therefore, cannot detect or prevent fraudulent manipulation of the votes (pg 64, ln 21). Such an alteration can be made by a non-technical person and has nothing to do with the software of the DVMS.

Defendants argument that all voting options are equally open to everyone is incorrect. [Pg. 26]

The Defendant's argument that any Georgia voter who wants the protections that should have been afforded to him on Election Day, can vote via absentee ballot fails to acknowledge that such a voter incurs the undue burden that requires the voter to have predefined knowledge of who can provide an absentee ballot, where the ballot can be obtained, how the ballot must be obtained and when the ballot must be obtained as well as when it must be filed. The Plaintiffs have not challenged the current absentee ballot process but only that demanding such pre-defined knowledge from an Election Day voter who seeks equal protection has an obvious adverse impact on the voter's rights as reiterated by a vast amount of prior law including the recent Supreme Court of Georgia decision, *Mason vs, Home Depot U,S,A, Inc*. Ga. LEXIS 249

Defendants apply the incorrect level of Constitutional scrutiny as acts and decisions of the Defendants in adopting the touchscreen system [Pg. 26}

Where a fundamental right is implicated, the applicable standard of review is not *rational basis*, but rather is *strict scrutiny*. The appropriate standard is when a fundamental right is at issue the law or act contested will be presumed invalid and the burden will be upon the state to come forward and show that the act or law is necessary or narrowly tailored to effectuate a compelling state interest. *Ambles v. State*, 259 Ga. 406, 407 (1989).

Defendants characterizations of Plaintiffs' Equal Protection argument of Count Five as being absurd is inappropriate. [Pg. 27]

Plaintiffs reiterate their argument made above that there are two classes of voters: advance and absentee voting on paper in the first class, the mass of Election Day voters using DREs in the second. The votes of the first can be totally watered out by the votes of the second. The votes of the second cannot be verified as being accurate on either election days or thereafter. Specifically, the votes of the second class do not provide equal protection in regards to ballot verification, recounts, discrepancy investigation, fraud detection and contested election resolution as explained in Counts 5 and 12 of the Plaintiffs Motion for Summary Judgment. This situation is hardly fair to either class.

Statutes such as O.C.G.A. 21-2-493 (b), O.C.G.A. 21-2-493 (d), O.C.G.A. 21-2-493 (h) O.C.G.A. 21-2-495 (b), O.C.G.A. 21-2-495 (c) and other statues requiring a recanvass of votes to be almost meaningless unless the recanvassing of votes of the second class begins with a form of voter verifiable paper ballot that has been retained and can provide equal protection afforded with currently used optical scan ballots.

Far from being opposed to broader usage of absentee ballots, Plaintiffs celebrate that development. However, the larger number of absentee voters is entirely irrelevant to the unequal classes of protection provided by DRE versus absentee voting systems in Georgia. Even if absentee voting restrictions were to be reintroduced, the same classes of

unequal protection would remain. More or less restrictive access to absentee ballots has no bearing on Plaintiffs' suit whatsoever.

Defendants argument that Plaintiffs are challenging voting options because they deprive people of rights is incorrect .[Pg. 27]

The Plaintiffs contend that the current options offered in Georgia are unequal. Had the Defendants implemented direct recording electronic DRE voting with an independent audit trail of each vote cast, as required by law, the options offered could reasonably be considered as equal.

Defendants claim that the patch applied in 2002 could not affect anything and was subsequently certified is unsupported and refuted by their own witness.[Pg. 30]

Professor Williams has admitted that:

- A software patch was applied to the electronic voting systems in 2002 (Williams Depo, pg 59 ln 14),
- Such a patch could affect "most anything" and should have been recertified (*ibid*, pg 59 ln 21),
- The re-certification was not performed (*ibid*,pg 59 , ln 16),
- He believes the failure to recertify such a patch is a violation of law (*ibid*, pg 59 , ln 23)

Defendants attempt to shift the responsibility for the current condition of Georgia voting from the former Secretary of State to the General Assembly is irresponsible [Pg. 32]

While the General Assembly passed legislation to begin the procurement and testing of electronic voting machines in Georgia, the General Assembly explicitly protected the rights of the citizens by ensuring that "such system have an independent audit trail of each vote cast" O.C.G.A. 21-2-301 (b) as explained in Count 10 of the Plaintiffs Complaint. Mr. Cobb has admitted the obvious, that voting machines have no

such capability. The former Secretary violated this law in 2001 and 2002 and led to the unreasonable, absurd and impractical conditions under which elections are now conducted in Georgia. The Defendants cannot dispute this violation of law and claim only that the point is moot in their motion to dismiss.

WHEREFORE Plaintiffs having made this their **PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ,** respectfully request the Court to dismiss the Defendants' Motion for Summary Judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have on the date written below served upon Senior Assistant Attorney General, Stefan Ritter, Counsel for the Defendants, a true and correct copy of the foregoing **PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT** by U.S. with proper postage affixed so as to ensure delivery to:

STEFAN RITTER, Senior Assistant Attorney General
40 Capitol Square, SW
Atlanta, GA 30334-1300

This 21st day of April,2008.

_____

Walker L. Chandler