

**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. \***

**KAREN HANDEL, SECRETARY OF STATE OF GEORGIA \***  
**SONNY PERDUE, GOVERNOR OF GEORGIA \***  
**GEORGIA STATE ELECTION BOARD, \***  
**DEFENDANTS. \***

**CIVIL ACTION FILE NO.**

**2006CV119719**

**PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT**

**ON COUNTS 5, 7, 10, 12, AND 13 SUPPORTED BY A MEMORANDUM OF LAW.**

**COME NOW**, the Plaintiffs, by and through the undersigned counsel and, pursuant to O.C.G.A. § 9-11-56 *et seq.*, move the Court for Summary Judgment in Plaintiffs' favor as to all factual issues, claims, and causes of action set forth in the Counts aforementioned in the Complaint and its amendments on the grounds that there are no genuine issues of material fact concerning the allegations set forth in the aforementioned Counts and Plaintiffs are entitled 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 this motion with citations of authority, and upon other documents that are attached hereto as Exhibits and the record of this case.

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

Respectfully submitted this 18<sup>th</sup> day of March, 2008.

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**MEMORANDUM OF LAW WITH CITATIONS OF AUTHORITY IN SUPPORT OF  
PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

**I. INTRODUCTION.**

This memorandum will analyze the granting of a summary judgment in favor of the Plaintiffs on the grounds that certain election practices and procedures violate the applicable Georgia statutes, the Georgia Constitution, and the United States Constitution. The rule for summary judgment in Georgia is that there must be no genuine issue of material fact and the moving party must be entitled to a judgment as a matter of law. O. C. G. A. 9-11-56. The first issue addressed will be the violation of the Equal Protection clause of the State Constitution; the second issue examined by this memorandum will be the direct and flagrant violation of the body politics' enumerated constitutional right and guarantee to an election conducted by secret ballot. The third issue examined will be the improper certification of the voting machines. The fourth issue explores the violation of the 14<sup>th</sup> Amendment Equal Protection Clause contained in the United States Constitution; the final issue to be explored will be the violation of the 14<sup>th</sup> Amendment Due Process Clause contained in the United States Constitution. The conclusion will recap the overall analysis and provide a summary advocating the granting of a summary judgment in favor of the Plaintiffs.

**II. BACKGROUND.**

In the November 2000 Georgia election, approximately 82% of Georgians cast ballots on optical scan or punch card systems while roughly 17% cast their ballots on lever machines. In January of 2001, former Secretary of State Cathy Cox produced a report entitled "*The 2000 Election: A Wake Up Call for Change and Reform*". In February 2001, State Senator Jack Hill introduced SB213, which stated in pertinent part "...to authorize the Secretary of State to conduct a pilot project to test electronic recording voting systems during the 2001 municipal elections..." and "...to create the Twenty-first Century Voting Commission...". In March 2001, the State Senate and the Local Government Operations Committee (SLOGO), the State Senate, the House Governmental Affairs Committee, and the State House passed substitute or amended versions of the bill. The final bill was signed by the Governor as Act 166 of the Georgia Legislature on or about April 18, 2001 and it included the provision that: "Such voting systems shall be required to have an independent audit trail for each vote cast."

In June 2001, the Twenty-first Century Voting Commission authorized seven DRE vendors to participate in the pilot and the Office of Secretary of State entered into contracts with the six certified vendors to provide equipment and support for the pilots. The vendors were Diversified Dynamics, Election Systems & Software, Diebold (now Global Election Systems), Hart InterCivic, Shoup Voting Solutions, and Unilect. In December 2001, the 21st Century Voting Commission issued a report that documented pilot project experiences and made recommendations for the future. One such recommendation was that the machines "have an independent and paper ballot audit trail of every ballot cast". In January 2002, the Georgia Technology Authority issued a Request for a Proposal that was drafted by the Office of the Secretary of State. The proposal did not contain the 21st Century Voting Commission recommendation or the legal requirement for an independent audit trail of each vote cast.

On or about February of 2002, State Senator Jack Hill introduced SB414 in pertinent part "...to provide that the state shall provide a uniform system of direct recording electronic voting equipment for use by counties in the state by 2004..." On or about February 7, 2002, the Senate Rules Committee referred SB414 to the Senate Ethics Committee where SB414 bill sponsor, Jack Hill, was Vice Chairman. Between February 7, 2002, and April 12, 2002, the Ethics Committee, the State Senate, the House Governmental Affairs Committee, and the State House passed substitute or amended versions of the bill. On May 3, 2002, former Secretary of State Cathy Cox and former Georgia Technology Authority Director Larry Singer entered into a contract with Diebold to acquire and implement electronic voting machines at a cost of approximately 53.9 million dollars. On May 9, 2002, the Governor signed SB414 bill into law as Act 789 of the Georgia General Assembly, which removed the previously mentioned audit trail requirement. In November 2002, Georgia became the only state in the U.S. to conduct statewide elections on electronic voting machines. Since then, only Maryland has conducted statewide elections with electronic voting machines produced by a single vendor and that state is in the midst of legislative initiatives, judicial action, and public controversy similar to that in Georgia.

On March 4, 2004, vendors Avante and TruVote demonstrated their voter verified paper ballot audit trail (VVPAT) equipment to the Senate SLOGO Committee. On March 11, 2004, the Senate SLOGO Committee passed SB500, which stated in pertinent part "...to provide all electronic recording voting systems to produce a permanent paper record of the votes recorded on such systems for each voter; to provide that voters have an opportunity to verify such record

after voting; to provide that such paper records be retained for use in recounts and election challenge proceedings...”. The Georgia General Assembly took no further action on that bill. In March of 2006, the State Election Board voted to acquire Diebold electronic poll books at a cost of approximately seventeen (17) million dollars, roughly the same amount of money that the former Secretary had estimated would be needed to outfit existing voting machines with VVPAT printers if Diebold would support such an addition.

On or about February 1, 2006, State Senator Bill Stephens introduced another SB500 bill, LC 28 2814, which stated in pertinent part “...so as to require all electronic recording voting systems to produce a permanent paper record of the votes recorded on such systems for each voter; to provide that voters have an opportunity to verify such record after voting; to provide for certain storage devices for such systems; to provide that such paper records be retained for use in recounts and election challenge proceedings; to provide for procedures for voting on electronic recording voting systems; to provide for a pilot program during the 2006 November general election and any runoff therefrom in certain counties...” On or about February 9, 2006, the Senate SLOGO Committee adopted an amended version, LC 28 2884S. On or about February 22, 2006, the Senate Rules Committee withdrew a version of the bill from the calendar and recommitted it to the SLOGO Committee. On or about February 28, 2006, the version that was presented to the committee had been modified to be self repealing and read in pertinent part: “...so as to provide for a pilot program during the 2006 November general election and any runoff therefrom in certain counties; to require that all electronic recording voting systems used in such pilot project produce a permanent paper record of the votes recorded on such systems for each voter; to provide that such voters have an opportunity to verify such record after voting; to provide for certain storage devices for such systems; to provide that such paper records be retained for use in recounts and election challenge proceedings...”. The SLOGO committee adopted an amended version designated as LC 28 2953S.

On or about March 21, 2006, the House Governmental Affairs Committee voted to pass a committee substitute bill, LC 28 3088S, providing in pertinent part for a randomly selected, public precinct audit of one race. On March 24, 2006, the Drenner amendment, AM 28 0708, that sought to restore SB500 provisions by providing in pertinent part “...to require all electronic recording voting systems to produce a permanent paper record of the votes recorded on such systems for each voter;...” was defeated on the floor of the House by a vote of 91-63.

On or about March 27, 2006, the Senate disagreed with the House amended version of SB500 and a conference committee was established. On or about March 29, 2006, the Conference Committee voted to drop the precinct hand count language from the SB500 bill at the request of the author, State Senator Stephens. On March 31, 2005, the General Assembly passed SB500 by a vote of 49-1 in the Senate and 151-0 in the House. The Governor signed the self repealing bill into law as Act 646 on April 28, 2006.

In July of 2006, a group of Plaintiffs brought this Complaint alleging five counts of legal, constitutional or other voting rights violations against the current method of voting that was implemented in 2002 and two additional counts against the 2006 pilot. After the 2006 elections, the Plaintiffs sought to join additional candidates to help ensure that the Plaintiffs had appropriate standing. During discovery, the Plaintiffs determined that the violations they alleged were likely a result of the machines being acquired illegally. They also uncovered evidence that voting machines were improperly certified for a variety of reasons including the lack of certification reports. The Plaintiffs then requested to amend the suit a second time to add counts that challenge the legality of the acquisition and certification. While preparing this Motion for Summary Judgment, the attorneys for the Plaintiffs identified potential federal violations of due process and equal protection. The Plaintiffs then amended their suit a third time to add Counts 12 and 13.

### **III. STATEMENT OF UNDISPUTED FACTS.**

For the purpose of summary judgment only, Plaintiffs present the following undisputed material facts:

- 1). Defendants' expert witness Ray Cobb admitted that when electronic votes are recanvassed, the recount starts with the PCMCIA card. (Cobb Depo. at pg. 42, Ln. 13).
- 2). Defendants' expert witness Ray Cobb admitted that with optical scan equipment during a recount they would rescan the paper ballots. Such recount starts with the ballot rather than the card. (Cobb Depo. at pg. 43, Ln. 1).
- 3). Defendants' expert witness Ray Cobb admitted that the voter cannot see the file or the data purportedly stored as his vote in order to verify whether his vote was properly recorded upon the card. (Cobb Depo. at pg. 13, Ln. 5).

- 4). Defendant Cox admitted that her office chose the Direct Recording Electronic voting machine (hereafter DRE) used in the 2006 audit trail pilot project. (Cox Depo. at pg. 19, Ln. 18).
- 5). The Voter Verified Paper Audit Trail Pilot Project Report produced by the Office of the Secretary of State admitted that the sequential printing of the VVPAT paper ballots does not guarantee voter anonymity as required by Georgia law with regard to the 2006 audit trail pilot. (Office Sec. of State, Voter Verified Paper Audit Trail Pilot Project Report, <http://sos.georgia.gov/elections/VVPAT.htm> [accessed July, 2007]).
- 6). Defendants' expert witness Ray Cobb admitted that the voting machines at issue do not have an independent audit trail separate and apart from the voting machine. (Cobb Depo. at pg. 33, Ln. 13).
- 7). Defendant Cox admitted that her election staff created the Request for Proposal that was issued by the Georgia Technology Authority for voting equipment after the 2001 pilot. (Cox Depo. at pg. 7, Ln. 18).
- 8). Defendants' witness Prof. Williams admitted that the alteration of the GEMS database would not leave a record. (Williams Depo. at pg. 64, Ln. 21).
- 9). Defense witness Prof. Williams admitted that the GEMS database that resides on the tabulation servers could be altered by use of Access. (Williams Depo. at pg. 64, Ln. 21).
- 10). Defendants' witness Prof. Williams admitted that the GEMS database servers do not prevent or detect fraudulent GEMS database alteration. (Williams Depo. at pg. 64, Ln. 21).
- 11). Defendants' expert witness Ray Cobb admitted that optical scan ballot can be manually counted and recounted (Cobb Depo. at pg. 19, Lns. 12-20).
- 12). Defense witness Prof. Williams admitted that if a voting machine recorded a portion of one candidate's votes for the other candidate, it would not be detected. (Williams Depo at pg. 44, Ln. 22).
- 13). Defense witness Prof. Williams admitted that a patch was installed in the voting machines before the 2002 election (Williams Depo. at pg. 59, Ln. 14).
- 14). Defense witness Prof. Williams admitted that the voting machines were not

recertified after the patch was applied and prior to the 2002 election. (Williams Depo. at pg. 59, Ln. 14).

- 15). Defense witness Prof. Williams admitted that a patch can do most anything including effect the efficiency of voting machines. (Williams Depo. at pg. 59, Ln. 21).
- 16). Defense witness Prof. Williams admitted that the addition of a patch to a voting machine requires it to be recertified. (Williams Depo. at pg. 59, Ln. 23).
- 17). Defense witness Prof. Williams admitted that he was personally responsible for the oversight of the voting machine certification for the Secretary of State's office. (Williams Depo. at pg. 10, Ln. 13).
- 18). Some absentee voters use paper ballots at election time throughout the State. (EXHIBIT "A").
- 19). Some provisional voters use paper ballots at election time throughout the State. (EXHIBIT "A").
- 20). Qualified voters who vote on election day throughout the State are required to use electronic voting machines (DRE) with no form of paper ballot produced at the time of voting. (EXHIBIT "A").

#### **IV. STANDARD OF REVIEW.**

##### **A. GENERAL STANDARD OF REVIEW.**

“To prevail at summary judgment under OCGA § 9-11-56, the moving party must demonstrate that there is no genuine issue of material fact and that the undisputed facts, viewed in the light most favorable to the nonmoving party, warrant judgment as a matter of law. O.C.G.A. § 9-11-56 (c). A defendant may do this by showing the court that the documents, affidavits, depositions and other evidence in the record reveal that there is no evidence sufficient to create a jury issue on at least one essential element of plaintiff's case. If there is no evidence sufficient to create a genuine issue as to an essential element of plaintiff's claim, that claim tumbles like a house of cards. All of the other disputes of fact are rendered immaterial. See Holiday Inns, Inc. v. Newton, 157 Ga. App. 436 (1981). A defendant who will not bear the burden of proof at trial need not affirmatively disprove the nonmoving party's case; instead, the burden on the moving party may be

discharged by pointing out by reference to the affidavits, depositions and other documents in the record that there is an absence of evidence to support the nonmoving party's case. If the moving party discharges this burden, the nonmoving party cannot rest on its pleadings, but rather must point to specific evidence giving rise to a triable issue. OCGA § 9-11-56 (e).” Lau’s Corp., Inc. v. Haskins, 261 Ga. 491, 491 (1991).

#### **B. GENUINE ISSUE OF MATERIAL FACT.**

While the party opposing motion for summary judgment is entitled to the benefit of all favorable inferences, if after this is done record still shows no genuine issue of a material fact, summary judgment for moving party is authorized. Gurley v. Ford Motor Credit Co., 163 Ga. App. 875 (1982). The Court of Appeals also held “Where evidence produced in a Motion for Summary Judgment entitles the party to judgment through piercing the allegations of the pleadings and showing that there is no genuine issue of material fact, the Summary Judgment Motion should be sustained.” Crawford v. McDonald, 125 Ga. App. 289 (1972). “Summary judgment should be granted only in cases where undisputed, plain, and palpable facts exist on which reasonable minds could not differ as to conclusion to be reached.” Indian Trail Village, Inc. v. Smith, 139 Ga. App. 691, (1976).

#### **C. CONSTITUTIONAL BURDEN ON STATE.**

With regard to Counts 5, 12, and 13, upon a threshold showing by the Plaintiffs that 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. See Roe v. Wade, 410 U. S. 113, 156 (1973); See Ambles v. State, 259 Ga. 406, 407 (1989). The State interest must be an actual objective.

#### **V. ARGUMENT.**

The Plaintiffs are entitled to summary judgment because the Defendants cannot show a dispute as to a genuine issue of material fact and the Plaintiffs are entitled to a judgment as a matter of law. The remainder of this section will examine the constitutionality of the law or acts

previously enumerated in the introduction. This will be accomplished by applying the relevant facts to the applicable law.

#### **A. SUMMARY JUDGMENT AS TO COUNT FIVE.**

Plaintiffs are entitled to prevail on the Motion for Summary Judgment with regard to Count Five of the Complaint. Plaintiffs show that there is no general issue of material fact regarding the Constitutional issues of equal protection and of Plaintiffs' fundamental right to vote. The rule for summary judgment in Georgia is that there must be no genuine issue of material fact and the moving party must be entitled to a judgment as a matter of law. O.C.G.A. 9-11-56.

At issue in Count Five are the Plaintiffs' fundamental right to vote and their fundamental right to equal protection. When a legislative or executive Act affecting a fundamental right is at issue, the State must show that the legislation or executive Act is necessary to effectuate a compelling state interest and this Court is required to review that Act or legislation under the strict scrutiny standard. Amble v. State, 259 Ga. 406, 1989. The remainder of this section will analyze 1) Voting as a fundamental right, 2) Classifications created by legislation, 3) Declaratory Relief, and 4) Injunctive relief with regard to these fundamental Constitutional rights at issue.

##### **1). VOTING IS A FUNDAMENTAL RIGHT.**

The Plaintiffs have a fundamental right to vote and have their votes counted. For a right to be fundamental it must be "objectively, "deeply rooted in this Nation's history and tradition," ("so rooted in the traditions and conscience of our people as to be ranked as fundamental"), and "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed" Washington v. Glucksberg, 521 U. S. 702, 721, 722 (1997). The remainder of this section will examine our Republic's history and traditions with regard to its legislative Acts and the Acts of the body politic in safeguarding the fundamental right to vote.

Since the inception of our Republic and free society, participation in representative government by way of voting has been a fundamental right and

liberty, deeply rooted in our Nation's history and tradition; it has been protected by the legislature, the judiciary, the States, and the body politic as the cornerstone of liberty and freedom in America.

In 1787, the U.S. Constitution was created and adopted by the States. Article II of this originally adopted Constitution established the electoral college system of voting, which was used in 1789 to elect George Washington as the first president of the United States of America. This system acknowledges the importance of the States and body politic in the election process. Since the adoption of the U.S. Constitution, there have been a total of twenty-seven amendments, ten (10) of which were ratified as the Bill of Rights in 1791, and forty-one percent (41%) of the remainder are related to the fundamental right to vote.

The Twelfth Amendment changed the Electoral College to institute a private, individual vote for each elector. "The Electors shall meet in their respective states and vote by ballot for President and Vice-President...they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President...and transmit sealed to the seat of the government of the United States, directed to the President of the Senate;--the President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted..." U.S. Const. amend XII, §1.

After the Civil War, when the definition of "citizen" changed dramatically with the abolition of slavery, the Congress felt it necessary to further safeguard this fundamental right by sending the following amendment to the States for ratification: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." U.S. Const. Amend. XV, §1. Even in 1870, the Congress and ratifying States felt that the fundamental right to vote was so essential to these newly admitted citizens, that they went through the lengthy process of amending the Constitution to confirm and solidify that fundamental right.

Moreover, the Supreme Court in 1886 held that racially motivated city ordinances that infringe upon the right to vote were an unconstitutional violation of Federal equal protection. The court specifically stated the following about the right to vote: “For the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself. There are many illustrations that might be given of this truth, which would make manifest that it was self-evident in the light of our system of jurisprudence. The case of the political franchise of voting is one. Though not regarded strictly as a natural right, but as a privilege merely conceded by society, according to its will, under certain conditions, nevertheless it is regarded as a fundamental political right, because [it is] preservative of all rights.” Yick Wo v. Hopkins, 118 U. S. 356, 370 (1886).

Additionally, in 1913, the legislature ratified two more amendments to the Constitution, one of which related to the fundamental right to vote, “The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof...” U.S. Const. amend XVII §1. Again, the Congress and ratifying States saw fit to provide the body politic with more direct participation in the election of their public officials. Shortly thereafter, the Supreme Court was presented with United States v. Mosley, in which two men in Oklahoma were conspiring to suppress the votes of qualified electors, all the voters of eleven precincts in Blaine County, Oklahoma, by omitting their votes from the count when returning the popular vote for the district’s Congressional representative. In response to this attempted denial of the fundamental right to vote, the Supreme Court held, “We regard it equally unquestionable that the right to have one’s vote counted is as open to protection by Congress as the right to put a ballot in a box.” United States v. Mosley, 238 U.S. 383, 386 (1915). Thus, the judiciary acknowledged the fundamental nature of the franchise.

Further, the Women's Suffrage movement was a long, hard struggle. The women of the United States spent many years protesting, demanding, and otherwise working towards no longer being denied the right to vote. Though individual states differed in their treatment of women, the outcry was not heeded on the national level until 1920, when the several States granted women the right to vote by ratifying the Nineteenth Amendment, which reads as follows: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex." U.S. Const. amend. XIX. Hence, the body politic and States speak again to the fundamental nature of the right to vote and fully participate in our representative republic.

In 1941, the Supreme Court again upheld the fundamental right to vote and to have one's vote counted when they stated, "Obviously included within the right to choose, secured by the Constitution, is the right of qualified voters within a state to cast their ballots and have them counted..." United States v. Classic, 313 U.S. 299, 313 (1941). This opinion was in response to Commissioners of Elections conducting a Democratic primary election in Louisiana for Congressional representative, willfully altering the results of the primary election by falsely counting and certifying the ballots to be returned to the State. Thus, the judiciary again upholds the franchise as fundamental.

The Congress, States, and body politic again ratify an amendment directly relating to the fundamental right to vote in 1961 with the ratification of the Twenty-Third Amendment, which granted Electors (votes in the electoral college) to the District of Columbia. Again, the republic acknowledged the citizens' fundamental right to vote and participate in the election process.

In 1962, the Supreme Court again reaffirmed and restated their previous opinions regarding the fundamental, protected right to vote when they received an appeal from the District Court for the Middle District of Tennessee. Baker v. Carr, was filed alleging that a 1901 statute apportioning the members of the state's General Assembly among the counties of the state deprived them of federally protected constitutional rights by virtue of

debasement of their votes. The District Court dismissed the case, stating it lacked jurisdiction of the subject matter and that there was no claim upon which relief could be granted. The Plaintiffs appealed to the Supreme Court, which held, “A citizen’s right to a vote free of arbitrary impairment by state action has been judicially recognized as a right secured by the Constitution, when such impairment resulted from dilution by false tally, cf. United States v. Classic, 313 U. S. 299, 61 S. Ct. 1031, 85 L. Ed. 1368; or by refusal to count votes from arbitrarily selected precincts, cf. United States v. Mosely, 283 U. S. 383, 35 S. Ct. 904, 59 L. Ed. 1355, or by a stuffing of the ballot box, cf. Siebold, 100 U. S. 371, 25 L. Ed. 717; United States v. Saylor, 322 U. S. 385, 64 S. Ct. 1101, 88 L. Ed. 1341.” Baker v. Carr, 369 U. S. 186, 209 (1962).

A Constitutional Amendment abolishing or barring the poll tax was ratified in 1964. The Twenty-Fourth Amendment stated, “The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax.” U.S. Const. amend. XXIV. Not only was this the sixth amendment since the ratification of the Bill of Rights that was directly related to the right to vote, but also it established that such a right was to be free from taxation, ensuring its accessibility to any U.S. citizen regardless of social station or financial ability.

Simultaneous with the ratifying of the Twenty-fourth Amendment, the judiciary confirmed voting as a fundamental right in two (2) landmark cases in 1964. A case from Georgia, on point with Baker v. Carr from Tennessee, came before the Supreme Court on appeal after dismissal from the Northern District of Georgia. Wesberry, Jr. et al. v. Sanders, et al. had at issue a 1931 Georgia statute apportioning congressional districts by county. Since the creation of said districts, population growth had created a disparity in the number of people represented by, and by extension, number of people voting

for, each Congressman. Plaintiffs and Appellants sought relief from the statute which they claimed deprived their right to have their votes counted with the same weight as the votes of other Georgians. The Supreme Court agreed and reversed the dismissal, stating, “No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.” Wesberry, Jr. et al. v. Sanders, et al., 376 U.S. 1, 17 (1964). Hence, the Court acknowledged the fundamental nature of the right to vote and that it is the very foundation of free society as all rights depend upon its security.

Also in 1964, the Supreme Court was presented with the case of Reynolds v. Sims, in which residents of the State of Alabama filed a case in the U.S. District Court for the Middle District of Alabama, protesting the apportionment of the Alabama Legislature. As in previous cases, the voters, raised a constitutionally protected matter – that they deserved to have their votes counted equally, and could not receive equal treatment and protection if the state was not divided by census results and population statistics rather than by county. When a three-judge panel in the District Court dismissed the case, Plaintiffs appealed to the Supreme Court, and the case subsequently became one of the most memorable pieces of case law confirming voting as a fundamental right. As it had repeatedly in the past, the Supreme Court agreed with the body politic that, “Undeniably the Constitution of the United States protects the right of all qualified citizens to vote, in state as well as in federal elections.” Reynolds v. Sims, 377 U.S. 533, 554 (1964). The Court further stated that, “The right to vote can neither be denied outright, Guinn v. United States, 238 U.S. 347, 35 S.Ct. 926, 59 L.Ed. 1340, Lane v. Wilson, 307 U.S. 268, 59 S.Ct. 872, 83 L.Ed. 1281, nor destroyed by alteration of ballots, see United States v. Classic, 313 U.S. 299, 315, 61 S.Ct. 1031, 1037, 85 L.Ed. 1368, nor diluted by ballot-box stuffing Ex parte Siebold, 100 U.S. 371, 25 L.Ed. 717, United States v. Saylor, 322 U.S. 385, 64 S.Ct. 1101, 88 L.Ed. 1341.” Reynolds v. Sims, 377 U.S. 533, 555 (1964). The opinion in Reynolds

explicitly states, “The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government. And the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.” Id. at 555. The Supreme Court reversed the dismissal and remanded Reynolds to the District Court because, “Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.” Id. at 561-562. The Supreme Court later stated in the same opinion that, “representative government is in essence self-government through the medium of elected representatives of the people, and each and every citizen has an inalienable right to full and effective participation in the political processes of his State’s legislative bodies. Most citizens can achieve this participation only as qualified voters...” Id. at 565. The Reynolds Court unequivocally stated that the right to vote is fundamental and is necessary for a free society to exist and thrive.

With the Vietnam War came a draft in which men ages 18 and older were being sent off to war, many never making it back to America. Many young men were not able to exercise their right to vote (though a small handful of states, Georgia among them, had already granted suffrage to citizens under the age of 21). Many of these young soldiers and others felt it unfair that they were recognized as being old enough to be forced to fight and die for their country, but not allowed to vote for who was heading the country and the military. In 1971, any States agreed with the ratification of the Twenty-Sixth Amendment, “The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any state on account of age.” U.S. Const. amend. XXVI.

At the turn of the century, there was a controversy in Florida with the dispute over votes in the 2000 Presidential election and a complaint was filed by the Democratic candidate in a circuit court in Florida contesting the certification of the results. The circuit court certified the matter to the Florida Supreme Court, and the Plaintiffs made an application for a writ of certiorari, which was granted. Upon reaching the Supreme Court of Florida, it was ruled that there must be a recount of all presidential votes in the state. The Republican candidate filed in the U.S. Supreme Court for an emergency stay of the mandate, based on the fact that the Florida Supreme Court had not included specific standards to implement its order, which did not satisfy the minimum requirement for non-arbitrary treatment of voters necessary under Equal Protection Clause. The ruling by the Supreme Court in Bush v. Gore was that there existed a violation of the Equal Protection Clause. In his opinion, Chief Justice Rehnquist stated, “When the state legislature vests the right to vote for President in its people, the right to vote as the legislature has prescribed is fundamental, and one source of its fundamental nature lies in the equal weight accorded to each vote and the equal dignity owed to each voter.” Bush v. Gore, 531 U.S. 98, 104 (2000). He went on to confirm that, “The right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise. Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person’s vote over that of another.” Id.

Hence, the right to vote is a fundamental right. It has been expanded and protected by the General Government, the States, and the body politic. The numerous Constitutional Amendments and court rulings show the right is deeply rooted in our nation’s history and tradition.

## **2). CLASSIFICATIONS CREATED BY LEGISLATION.**

The legislation that was enacted to implement DREs as the preferred method of voting in Georgia creates an impermissible classification. The legislation in question has created two distinct classes by requiring election

day voters to use DREs while requiring absentee and provisional voters to use an optically scanned form of paper ballots. The Plaintiffs believe that absentee and provisional voters are required to use types of paper ballots (Statement of Undisputed Facts at #18 & #19), while all other voters must use the electronic DREs that provide no such comparable paper ballot safeguard (Statement of Facts #20). This places the user of the electronic voting machine at a disadvantage because it is impossible to determine the voter's original intent from the GEMS database or to detect any fraudulent counting or redistributing of the votes cast (Statement of Undisputed Facts #8, #10, & #12). Additionally, it places the user of the electronic voting machine at a disadvantage by not allowing him to verify that his vote is accurately cast because the voter only verifies that the screen contains his votes and not that the votes are properly and accurately recorded on the database (Statement of Undisputed Facts #3). A paper ballot user may visually verify that the ballot has the proper votes and place the ballot in a tamperproof container thus ensuring that the votes on the ballot were properly placed into the public custody of the State per his intentions. Additionally, paper ballots may be hand counted if there is an optical scan machine not working properly or not recording properly (Statement of Undisputed Facts #11). DRE votes cannot be hand counted; one must rely on the stated output and a different method of counting cannot be used. Hence, voters required to use DREs are at a disadvantage by way of the classification placed upon them by the General Assembly.

### **3). DECLARATORY RELIEF.**

The Defendants' mandate of a uniform system of voting and the acquisition of the DREs currently in place to comply with that mandate adversely affects the Plaintiffs' fundamental right to vote. Plaintiffs are entitled to declaratory relief to safeguard their Due Process right guaranteed under by the Georgia Constitution, Art. I § I (1983) and the Plaintiffs' fundamental right to vote and to have that vote counted as guaranteed by Georgia Constitution, Art. 2, §1, ¶1. The Plaintiffs' are

entitled to have this Court declare that the use of DREs violates the guarantee of Substantive Due Process under the law because it directly threatens the voters using electronic voting machines and does not effectuate a compelling state interest.

The general rule in Georgia for the granting of declaratory relief is that the Plaintiffs must show the following: a). an actual case or controversy over a valuable right, b). the right is in imminent danger of infringement, c). the procedure must be adverse, and d). the declaration will resolve the case or controversy. Brown v. Lawrence, 204 Ga. 788 (1949). Additionally, because this controversy involves the fundamental right to vote, the State has the burden to prove that the use of DREs is necessary to effectuate a compelling State interest. Ambles v. State, 259 Ga. 383 (1989). The remainder of this section will discuss the application of the facts to the law.

**a). ACTUAL CASE OR CONTROVERSY.**

The Plaintiffs are entitled to have this Court find that there exists an actual case or controversy with regard to the deferential treatment of the votes of Plaintiffs and other Election Day voters in the State of Georgia and are entitled to have this Court declare that any such legislation creating such unequal treatment of votes and voters is unconstitutional.

“In Georgia, a plaintiff’s declaratory judgment action attacking the constitutionality of a statute presents a justiciable controversy.” Corey v. Jones, 484 F.Supp.616 (D.C. GA. 1980) In Count Five of the Complaint, Plaintiffs contend that some statutes dealing with recanvass and recount of votes from elections in this state are unconstitutional and fail to provide the Plaintiffs with equal protection as mandated in the State’s Constitution. Georgia Constitution. Art. I. § I. The right to vote and to have that vote counted is a fundamental right and any legislation which infringes upon that right must be reviewed by the Court with strict scrutiny.

The legislation requiring the use of DREs in their current configuration as well as the legislation governing the method of election recount fails to protect the Plaintiffs' fundamental right to vote... Specifically, Plaintiffs set before this Court that O.C.G.A. § 21-2-493(b), O.C.G.A. § 21-2-493(d), 21-2-493(h), O.C.G.A. § 21-2-495(b) and O.C.G.A. § 21-2-495(c) as well as other related statutes requiring a canvass of votes are unconstitutional in that a canvass of electronic votes does not offer the same protections to the votes, voters, and candidates as a recount of ballots.

A canvass of votes (recount of electronic votes) performed upon DREs uses no direct tangible evidence of voter intent that has custodial linkage with the voter and requires no direct physical evidence of voter intent to be retained for recounts and/or for investigations of discrepancies, fraud detection, and to compel the production of evidence for contested elections. A canvass of DRE votes "starts with the PCMIA card." (Statement of Undisputed Fact #1). The PCMIA card is card inside the DRE upon which votes are recorded. Defense witness Ray Cobb, agreed 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 touchscreen has been properly recorded on the card and he added "The voter cannot see the electronic bits." (Statement of Undisputed Fact #3). In a recount in which any form of paper or tangible indication of voter intent has been used by a voter to cast his vote, the paper or tangible object is kept, is verified by the voter as his actual intent, and can be analyzed individually to determine the actual intent of the voter when he cast his vote. (Statement of Undisputed Facts #2 and #11). A canvass from the DRE consists of reprinting the results that the machine says it has accumulated when the individual votes which make up those results have never been verified by the voter. Defense expert witness Ray Cobb admitted that the DREs at issue do not produce an

independent audit trail that is separate from the DRE (Statement of Undisputed Facts #6). If there is a recount in an election which uses a paper instrument, a total is not simply taken from the machine, they reread the paper and if necessary count those instruments by hand. (Statement of Undisputed Fact #11). There is no such opportunity for manual recount of votes cast using DREs because there is no tangible voter verified evidence of voter intent.

The Supreme Court of the United States has ruled that "...[O]ne source of [the right to vote's] fundamental nature lies in the equal weight accorded to each vote and equal dignity owed to each voter." Bush v. Gore, 531 U.S. 98, 104 (2000). Georgia in its patently different treatment of the votes of its electors fails to provide "equal dignity" to its electors and fails to accord "equal weight" to the individual votes of its electors.

There stands an actual case in controversy with regards to the Plaintiffs' Constitutional rights. The State cannot show that this infringement upon the rights of its citizens are necessary to preserve a any compelling State interest as required under Ambles v. State, 259 Ga. 383 (1989). There is no genuine issue of material fact with regard to this element with regard to Declaratory relief and the Plaintiff's are entitled to summary judgment.

**b). IMMINENT DANGER OF INFRINGEMENT.**

In the instant case, there has been and will continue to be an infringement of the peoples' right to have their votes given equal weight and to have their votes treated with equal dignity unless and until this Court declares that the unequal treatment of votes within the State creates a constitutional issue of equal protection for its Voters. In the current system, the votes of absentee voters and of provisional voters are treated differently than the votes of those voters who use DREs on election day. (Statement of Undisputed

Facts #1, #2, #3, #18, #19, & #20). This infringement occurs during every State and Federal Election in this State. The votes of provisional voters or the absentee voters can actually be reviewed to confirm a.) the intent of the voter by the voter himself at the time the vote was cast, and b.) to discern the intent of the voter by any election worker during a recount. DRE voters have no such consideration. No voter using a DRE has an opportunity to review any tangible object which he can verify as his intended vote and instead must rely on the bit manipulation of a machine and trust that his true intent has been recorded. (Statement of Undisputed Fact #3). The State has made no provision whatsoever to ensure that a DRE voter is given an opportunity to review the actual record that was placed into public custody of the elections officials to determine if the recorded bits actually reflect his intent. The State has made absolutely no provision to ensure that an Election Day voter's vote would be counted: 1) in the event of complete failure of the mandated DRE voting system; or 2) in the event of a claim or strong suspicion of electronic manipulation of the votes. Further, the Defendant's witness, Britain Williams, admitted that the GEMS server database could be altered by means of the software program Access, that any alteration of the database would not leave a record, and admitted that the GEMS server could not prevent or detect such fraudulent database alteration. (Statement of Undisputed Facts #8, #10, & #9) Professor Williams further admitted that if a DRE recorded a portion of one candidate's votes for the other candidate, it may not be detected. (Statement of Undisputed Facts # 12).

The failure of the State to protect its citizens' right to vote and to have that vote counted has been infringed upon by the mandated use of DREs. There is no genuine issue of material fact with regard to the immanency of danger of infringement upon Plaintiffs' right to

vote and Plaintiffs are entitled to Summary Judgment with regard to Count Five declaratory relief.

**c). PROCEDURE MUST BE ADVERSE.**

Any act or omission by any person of authority which undermines a right of the People is adverse to the People. The enactment of legislation requiring the use of DREs for Election Day voters in this State is adverse to the Plaintiffs' fundamental right to vote and to have that vote counted. The failure of the State to mandate a method by which an actual recount of ballots showing actual voter intent could be accomplished is adverse to the rights of its citizenry and the legislation requiring the use of DREs serves no compelling State interest. The use of the DREs in their current configuration is adverse because of the infringement upon the voting rights of the Plaintiffs. The Plaintiffs adequately represent the interest of those affected by the legislation. Further, the State has adequate representation and the antagonistic nature of the proceeding will also protect the interest of the parties and ensure that all the issues are fully and properly litigated.

**d). DECLARATION WILL RESOLVE CONFLICT.**

The declaration of the Court will resolve the conflict with regard to the right of voters to have their votes correctly and accurately counted. The Plaintiffs are entitled to have this Court declare that the use of DREs in their current configuration violates the guarantee of State Equal Protection under the law because it provides less protection for the voters using DREs who cast their ballot without verification and does not effectuate a compelling state interest. Thus, the declaration will in effect preserve the political process and safeguard the fundamental right the Plaintiffs seek to protect.

The Plaintiffs and the citizenry of the State of Georgia are entitled to have this Court declare that officials appointed or elected to protect the rights of the People must act with all diligence and fortitude to protect those rights. In this case, the Court must declare that each voter is entitled to equal protection of his fundamental right to vote and to have that vote counted; that the DREs which, in their current configuration, fail to provide a tangible, verified showing of the individual voter's intent do not provide that protection; and that, in the interest of all voters, any method of voting which cannot assure that this essential fundamental right is protected cannot be used in election in this State.

The Courts have ruled that declaratory judgment is proper when a). an actual case or controversy over a valuable right, b). the right is in imminent danger of infringement, c). the procedure must be adverse, and d). the declaration will resolve the case or controversy. Brown v. Lawrence, 204 Ga. 788 (1949). Plaintiffs have shown above that each of these elements have been met: the Plaintiffs have a fundamental right to vote and to have that vote counted, the Plaintiffs are entitled to have their right to vote protected equally, and that the required method of voting for election day voters does not afford that right. In the absence of any tangible proof that a voter's ballot was actually cast and that his intended vote was actually calculated as he intended, there can be no assurance that "every vote cast" has been counted "correctly and accurately" on the day of election. O.C.G.A. § 21-2-379.1 (8). The use of the mandated method of voting has placed the rights of the Plaintiffs and of all Georgia voters in jeopardy. There exists no genuine issue of material fact with regard to the declaratory judgment in this Court Five and the Plaintiffs are entitled to judgment.

#### **4). INJUNCTIVE RELIEF.**

The Defendants' mandate of a uniform system of voting and the acquisition of the DREs currently in place to comply with that mandate adversely affects the Plaintiffs' fundamental right to vote. Plaintiffs are entitled to have this Court enjoin the State from requiring the voters of this State to use any election or vote gathering process which put the fundamental right to vote at risk of infringement. Specifically, the Plaintiffs' are entitled to have this Court enjoin the State from requiring voters to use the DREs in their current configuration.

There is no genuine issue of material fact with regard to Plaintiffs' Count Five request for injunctive relief and Plaintiffs are entitled to Summary Judgment. The general rule in Georgia for the granting of injunctive relief is that the Plaintiff must show the following: a). threat of irreparable harm, and b). there is no other adequate remedy at law. Smith v. DeKalb County, et al., 288 Ga. App. 574, (2007). The remainder of this section will apply the law to the facts.

##### **a). THREAT OF IRREPARABLE HARM.**

The Plaintiffs' fundamental right to vote and have that vote counted is threatened with irreparable harm because of the statewide use of DREs set in place as a result of legislation mandating a uniform system of voting. For the "Threat of Irreparable Harm" element, the rule in Georgia is "...where there is a vital necessity to prevent a party from being damaged..." Smith v. DeKalb County, et al., 288 Ga. App. 574, 576 (2007). The Plaintiffs face numerous adverse effects from the use of DREs in Georgia elections which make it necessary for this Court to intervene in an effort to protect the Plaintiffs' rights.

The Plaintiffs' fundamental right to vote and have that vote counted is in direct issue. The Defendants' expert witness, Ray

Cobb, admitted that the recanvassing (recounting) of the electronic votes begins with the PCMCIA card (Statement of Undisputed Facts #1). Defense expert witness Ray Cobb admitted that the DREs at issue do not produce an independent audit trail that is separate from the DRE (Statement of Undisputed Facts #6). Additionally, Mr. Cobb admitted that paper ballots cast could be manually read if the optical scan machine was inoperable (Statement of Undisputed Facts #11) because there would be direct tangible evidence of voter intent. The voters using electronic voting machines are in jeopardy of losing their votes when a DRE malfunctions. This is a direct threat to the electronic voter and places his vote in peril because a complete crash of the system would prevent a count or recount of any vote calculations on that DRE. He will not have the benefit of a paper ballot that can be counted or recounted manually and his right to have his vote counted would be denied.

Further, Mr. Cobb admitted that the recount process on a DRE starts with the PCMCIA card (Statement of Undisputed Facts #1). Defense expert witness Ray Cobb admitted that the DREs at issue do not produce an independent audit trail that is separate from the DRE (Statement of Undisputed Facts #6). He also admitted that the paper ballot recount begins with the paper ballot (Statement of Undisputed Facts #2). Additionally, Mr. Cobb admitted that paper ballots cast could be manually read if the optical scan machine was inoperable (Statement of Undisputed Facts #11). The paper ballot may be physically examined, by the voter and by any poll worker assigned to count or to recount the vote upon the closing of the polls in order to ascertain each individual voter's original intent. The DRE recount process prohibits election officials from ascertaining the electronic voters' original intent. One cannot determine a voter's original intent from a database and the DREs provide no actual tangible evidence of voter verified intent. As the Court may recall,

in the recount of the 2000 Presidential election the ballots were hand-counted and examined for voter intent e. g. hanging chads. With DREs, it is impossible to determine voter intent because the DRE offers no tangible evidence of voter intent. It only allows the collection of a total of the purported collective votes cast for a particular candidate. This places the electronic voter in direct harm with regard to the counting and recounting of votes because his intentions cannot be garnered from the database and the voter has no assurance that the vote as he intended it is included in the totals as shown by the machine thereby depriving or diluting his vote.

Moreover, Mr. Cobb admitted that a voter cannot see if his vote is properly recorded upon the database (Statement of Undisputed Facts #3). The paper ballot user can visually verify that the proper candidates were marked and ensure the ballot is placed in the secured ballot box. This different treatment prevents the electronic voter from verifying his intent and from verifying his votes are properly placed in the public custody of the elections officials. This places the electronic voter in the capricious position of having to completely trust non-governmental employees, e. g. Diebold employees, with his vote and to trust a ‘take our word for it’ approach of elections officials. Common sense tells us that this method leaves our voting system open for a very credible threat of 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 whose software and processes have been deemed proprietary by the Courts, thus shielding the count of the vote from the eyes of the public because the tally of the vote is done internal to the machine and the eyes of the people can only view the printing of a tape

showing the internal calculations which amounts to the count of votes on the machine.

In addition, Mr. Williams has admitted that the GEMS database may be altered by use of Access (Statement of Undisputed Facts #9), a computer program readily available to the general public. He further admits that such alteration would not leave any record (Statement of Undisputed Facts #8). Williams also admits the DRE cannot prevent or detect such an alteration (Statement of Undisputed Facts #10). Moreover, he admits that if a DRE recorded a portion of one candidates vote for another candidate it would not be detected (Statement of Undisputed Facts #12). In today's computer age most citizens will not be able to detect any fraud upon a DRE. The process of providing the sealed CD ROM to the Grand Jury within twenty four months (24) of the election does little to safeguard the electronic voting machine users vote. This places the DRE user at the mercy of hackers because they are notorious for circumventing databases and wreaking havoc upon the system infiltrated. This DRE system places the DRE user in uncertainty and insecurity because as the State has already admitted these fraudulent activities cannot be detected and the average Grand Jury member does not have the knowledge necessary to properly investigate if fraud has occurred. Additionally, even if a Grand Jury member had the knowledge to examine the CD, the database source code is proprietary. This makes the CD presentation to the Grand Jury only a meaningless safeguard because the Grand Jury member would not have the source code to review the CD. This peril strikes at the very heart of liberty and freedom by placing the political process itself at issue and jeopardizing the fundamental right to have a say in a government purportedly by the People.

**b). NO OTHER ADEQUATE REMEDY AT LAW.**

The Plaintiffs have no other adequate remedy at law.

The rule is the granting of an injunction is proper when “a party...[is] left without an adequate remedy at law.” Smith v. DeKalb County, et al., 288 Ga. App. 574, 576 (2007). In the present case, the Plaintiffs lack an adequate remedy at law because the very process they would use to rectify the issue is the subject matter at issue e. g. the election process. This would require the Plaintiffs to use a tainted process to rectify itself. Moreover, a small number of voters cannot influence the vote in such a manner as to effectuate the change that is necessary. Further, the use of the political process may take years or decades to resolve the issue. Additionally, the Plaintiffs fundamental right to vote would be threatened and in jeopardy during the entire time period they would be waiting for the General Assembly to take action. The General Assembly’s \$54 Million Dollar initial expenditure on the current machines and millions of dollars of subsequent expenses will most likely hamper their efforts to expedite relief for the Plaintiffs. Therefore, the fundamental nature of the right at stake and the lack of any remedy at law that could quickly remedy the infringement of their fundamental right to vote, justifies this Court’s use of its discretion to grant the injunctive relief requested.

In summation, there is no genuine issue of material fact with regard to Count Five’s request for injunctive relief. Plaintiffs’ are entitled to have this Court issue an order enjoining the use of DREs, as currently configured in order to safeguard Plaintiffs’ fundamental right to vote and have that vote counted. The threat of irreparable harm is present at each and every election in which DREs are operated in their current configuration. The body politics’ fundamental right to vote is affected and threatened because voter intent cannot be established from the database;

additionally, the fundamental right to vote is threatened because of the inability of the State to prevent and detect fraud with regards to the DREs. Further, the State cannot show that the use of DREs is necessary to effectuate a compelling state interest. Hence, the Plaintiffs are entitled to have an injunction issue from this Court to prevent and enjoin the use of DREs under the current configuration in any and all elections in this State.

## **B. SUMMARY JUDGMENT AS TO COUNT SEVEN.**

The Plaintiffs and all electors of the State shall suffer irreparable harm if the right to vote by secret ballot is not protected and the Plaintiff's are entitled to have this Court enjoin the State from using any voting equipment which produces or has the capability to produce a sequential listing of votes as they are cast in order to protect Plaintiffs from future harm resulting from the dilution of the fundamental right to vote by secret ballot.

Plaintiffs are entitled to prevail on their Motion for Summary Judgment with regard to Count Seven of the Complaint. Plaintiff shows that there is no general issue of material fact regarding the statutory and constitutional requirement for secret ballot. The rule for summary judgment in Georgia is that there must be no genuine issue of material fact and the moving party must be entitled to judgment as a matter of law. O. C. G. A. 9-11-56. This Section of the brief will discuss the granting of injunctive relief with regard to the issue of secret ballots.

### **1). INJUNCTIVE RELIEF.**

The Plaintiffs and all electors of the State shall suffer irreparable harm if the right to vote by secret ballot is not protected; the general rule in Georgia for the granting of injunctive relief is that the Plaintiff must show the following: a). threat of irreparable harm, and b). there is no other adequate remedy at law. Smith v. DeKalb County, et al., 288 Ga. App. 574, (2007). The remainder of this section will examine the granting of injunctive relief to rectify the harm to the electorate.

**a). THREAT OF IRREPARABLE HARM.**

The voters of Georgia are under threat of irreparable harm if their right to vote by secret ballot is not protected. The benefits to the Plaintiffs in having this Court ensure the protection of that fundamental right would not be outweighed by harm to the other Parties by enjoining Defendants from using DREs which produce any sort of sequential list of each ballot cast. Ga. Const. Art. 2, §1, ¶1. The requirements of the secret ballot law are mandatory and apply to all elections in this State. Cox v. Williams, 216 Ga. 535, 537, (1961). The use of a printed roll showing the results of votes cast in the order of the vote is in violation of the secret ballot requirement. By using the voter logs which show the voter name and observing the time the voter was available to vote, it would be possible for someone with access to the rolls to determine how a particular voter chose to exercise his fundamental right (Statement of Undisputed Facts #5). The ‘Voter Verified Paper Audit Trail Project Report’ produced by the Office of the Secretary of State admitted that the sequential printing of the VVPAT paper ballots does not guarantee voter anonymity as required by Georgia law with regard to the 2006 audit trail pilot (Statement of Undisputed Facts #5). The state must be enjoined from use of that technology in any election in this State. In Nobles v. Osborne, 124 Ga. App. 454 (1971) the Court of Appeals found that as a general rule, anything which would allow the identification of a ballot of a particular elector would render the item or method of voting void. The Court further adopted the opinion of the attorney general saying with regard to the importance of the secret ballot, “...the strictest maintenance of a secret ballot is necessary since social, financial and other pressures can be so easily brought to bear...” upon voters. *Id.* The right to vote is a fundamental right, and, with an intent to protect that right, the body politic has added that specific command

that voting by secret ballot is mandatory to the State Constitution. Ga. Const. Art. 2, §1, ¶1. The use of sequential records of voter intent would be in derogation of that fundamental right and Plaintiffs are entitled to have this Court enjoin the State from employing any such method that could be used in an attempt to garner individual voter intent.

**b). NO OTHER ADEQUATE REMEDY AT LAW.**

There is no genuine issue of any material fact with regards to the secret ballot provision required by Georgia law. Plaintiff's are entitled to summary judgment and are entitled to have this Court enjoin the Defendants from using any voting equipment which produces or has the capability to produce a sequential listing of votes as they are cast in order to protect Plaintiffs from a future harm resulting from the chilling effect from failure to use secret ballots to protect the identity of individual voters.. The Plaintiffs are in imminent danger of having their right to secret ballot infringed upon and have no other adequate remedy at law to protect their constitutional right.

In Hunter v. George, 265 Ga. 573 (1995) the Court held that "The remedy by injunction is to prevent, prohibit or protect from future wrongs and does not afford a remedy for what is past. [Cits.]" [quoting Moorhead v. Luther, 219 Ga. 242, 244 (2), (1963)]. Plaintiffs have shown through the State's own report, *The Voter Verified Paper Audit Trail Project Report*, that the use of sequential rolls showing the results of ballots cast by electors cannot ensure voter anonymity. (Statement of Undisputed Facts #5). The Plaintiffs are entitled to have the Court prohibit the State from employing any method that could be used to determine individual voter intent for the DREs in order to protect the Plaintiffs and the voters of the State from the sort of future wrongs envisioned by the Hunter Court.

There is no genuine issue of any material fact with regards to the secret ballot provision required by Georgia law. Plaintiff's are entitled to summary judgment and are entitled to have this Court enjoin the Defendants from using any voting equipment which produces or has the capability to produce a sequential listing of votes as they are cast in order to protect Plaintiffs from a future harm resulting from the chilling effect from failure to use secret ballots to protect the identity of individual voters.

In summation, the Plaintiffs and all electors of the State shall suffer irreparable harm if the right to vote by secret ballot is not protected, and the Plaintiff's are entitled to have this Court enjoin the State from using any voting equipment which produces or has the capability to produce a sequential listing of votes as they are cast so that the Plaintiffs are protected from future harm resulting from the dilution of the fundamental right to vote by secret ballot.

### **C. SUMMARY JUDGMENT AS TO COUNT TEN.**

Plaintiffs are entitled to prevail on the Motion for Summary Judgment with regard to Count Ten of the Complaint. Plaintiff shows that there is no general issue of material fact regarding the statutory requirement for the certification of voting machines. The rule for summary judgment in Georgia is that there must be no genuine issue of material fact and the moving party must be entitled to a judgment as a matter of law. O. C. G. A. 9-11-56.

This Section of the brief will discuss the granting of declaratory relief and the granting of injunctive relief with regard to the issue of voting machine certification. The general rule in Georgia for the granting of declaratory relief is that the Plaintiff must show the following: a). an actual case or controversy over a valuable right, b). the right is in imminent danger of infringement, c). the procedure must be adverse, and d). the declaration will resolve the case or controversy. Brown v. Lawrence, 204 Ga. 788 (1949). In the following paragraphs, Plaintiff shows that there is no genuine

issue of material fact with regard to any one of the required elements for declaratory judgment nor is there any genuine issue of material fact with regard to the granting of injunctive relief with regard to the issue of voting machine certification as set forth hereafter.

**1). DECLARATORY RELIEF.**

**a). ACTUAL CASE OR CONTROVERSY.**

In the instant case, there arises an actual controversy with regard to the certification of voting machines (DREs) as required by O.C.G.A. § 21-2-379 et seq. The failure to provide certification of any voting machine, DRE or otherwise, subsequent to any “patch”, change or adjustment is an infringement upon the fundamental right to vote granted to citizens of this State by Ga. Const. Art. 2, §1, P II, is in derogation of the law of this State (O.C.G.A. § 21-2-379.1 et seq.), and is proper as an issue for declaratory judgment. In Brown v. Lawrence, 204 Ga. 788, (1949), the Supreme Court of Georgia held that “[r]ights status and other legal relation” may be the subject of a declaratory judgment.

The Plaintiffs and the citizenry of the State of Georgia are entitled to have this Court declare that officials appointed or elected to protect the rights of the People must act with all diligence and fortitude to protect those rights. The legislature has enacted O.C.G.A. § 21-2-379 et seq. with the intent to protect the rights of the citizens of this State. The Office of the Secretary of State through its appointed delegate(s) (Statement of Undisputed Facts #17) has chosen to ignore its statutory obligation by allowing the equipment manufacturer to add a software patch or patches to the equipment prior to the election and choosing to continue with the use of the machines in an election without certification or recertification of the machine. (Statement of Undisputed Facts #13,

#14, #15, & #16). The Plaintiffs are entitled to have their votes counted accurately and correctly without regard to the convenience of its officials or designates who are elected or appointed to protect their interests. There is no material issue with regard to this required element of declaratory judgment.

**b). IMMINENT DANGER OF INFRINGEMENT.**

In the instant case, there has already been an infringement of the people's right to vote and to have that vote counted. A patch was added to the Diebold DREs after the machines had been certified (Statement of Undisputed Facts # 13); after the addition of the "patch," the machines were not recertified prior to the elections. (Statement of Undisputed Facts # 14). Professor Williams admits that he was personally responsible for the process of voting machine certification (Statement of Undisputed Facts # 17). In this case there has already been an infringement which diluted the voting rights of the citizens of this State by not following certification procedures as outlined by the legislature for the protection of such rights and for assurance that the machines would correctly count each vote cast. The software patch, presumably installed to correct some problem with the operation of the machines, was never officially evaluated by any person representing the interests of the People of Georgia. Defense witness, Professor Britain Williams in his deposition admits that: "a patch can do most anything including affect the efficiency of the voting machines." (Statement of Undisputed Facts # 15); that a patch was installed in the voting machines before the 2002 election (Statement of Undisputed Facts # 13); that the machines were not recertified after said patches were applied (Statement of Undisputed Facts # 14); and that the addition of a patch to the voting machines requires it to be recertified (Statement of Undisputed Facts # 16);

that he was personally responsible for the oversight of the voting machine certification for the office of the Georgia Secretary of State (Statement of Undisputed Facts # 17).

The right of the people to vote and to have those votes counted correctly and accurately has already been infringed and there is no reason to believe that it will not happen again. It is the nature of computer programs to require updates and patches and those updates and patches must be evaluated and certified by some person or entity that is bound by duty to protect the rights of the people. There is no material issue with regard to the fact that the Plaintiffs' right to have their vote protected has been infringed and the Plaintiffs are entitled to summary judgment and to have this Court declare that that right shall not be infringed thus no machine which has not been certified can be used in any election in this State.

**c). PROCEDURE MUST BE ADVERSE.**

Any act or omission by any person of authority which undermines a right of the People is adverse to the People. The failure of the appropriate appointed personnel to provide proper certification of any voting machine is contrary to the laws of this State and is adverse to the Rights of its citizenry. There is no reason, set of facts, or instances which the legislature has set aside as reason for failure to certify any machine to be used in an election. Such failure to certify the machines is adverse to the voters of this State. Additionally, the proceeding is adverse because the Plaintiffs adequately represent the interest of those affected by the improper certification. Further, the State has adequate representation and the antagonistic nature of the proceeding will also protect the interest of the parties and ensure that all the issues are fully and properly litigated.

**d). DECLARATION WILL RESOLVE CONFLICT.**

The declaration of the Court will resolve a conflict with regard to when certification is required with regard to DREs. The Court upon review of the legislation requiring the certification of voting machines can determine that there is no set of facts which the legislature set out to allow voting machines to be used without the machines having been properly certified. The Plaintiff's are entitled to have this Court declare that no machine shall be used for collecting votes in this State until such time as that machine has been properly certified in accordance with State law and that when such certifications have not been completed alternate means of voting shall be made available for the voters. This Court's Declaration will prevent future voting on uncertified voting machines.

The Plaintiffs and the citizenry of the State of Georgia are entitled to have this Court declare that officials appointed or elected to protect the rights of the People must act with all diligence and fortitude to protect those rights. In this case, the Court must declare that any update, change, revision, or patch added to any voting machine requires that the voting machine must be recertified prior to being used for voting in any election in this State and failure to recertify after such change, update, revision or patch would render the voting machine unusable as a method of voting in any election, primary, runoff or other situation where the collection of votes is required, and that said certification must be completed in accordance with the time set by statute prior to such election.

The Courts have ruled that declaratory judgment is proper when a). an actual case or controversy over a valuable right, b). the right is in imminent danger of infringement, c). the procedure must be adverse, and d). the declaration will resolve the case or controversy.

Brown v. Lawrence, 204 Ga. 788 (1949). Plaintiffs have shown above that each of these elements have been met: the Plaintiffs have a fundamental right to vote and to have that vote counted, the laws of Georgia require certification of voting machines, that certification was not carried out properly. (Statement of Facts 14); therefore; there can be no assurance that “every vote cast” has been counted “correctly and accurately” on the day of election. O.C.G.A. § 21-2-379.1 (8). Defendants’ failure to follow the laws and rules for certification of the voting machines has placed the rights of the Plaintiffs and of all Georgia voters in jeopardy. There exists no genuine issue of material fact with regard to the matter of certification of voting machines in that State law requires that the machines be certified properly; there has been at least one instance when the machines were not certified since the use of DREs was mandated as the primary method of voting in Georgia; the voters of Georgia are entitled to vote and to have their votes counted, the State must be held accountable ensuring that the Rights of its citizens are protected. Plaintiffs are entitled to have this Court declare that proper certification of all Georgia DREs must occur pursuant to law or the machines shall not be used to collect votes on election day.

## **2). INJUNCTIVE RELIEF.**

The Plaintiffs and all electors of the State shall suffer irreparable harm if the right to vote by secret ballot is not protected and the Plaintiff’s are entitled to have this Court enjoin the State from using any voting equipment which has not been certified as required by law in order to protect Plaintiffs from future harm resulting from the dilution of the fundamental right to have their votes recorded and counted correctly and accurately. Plaintiffs are entitled to prevail on their Motion for Summary Judgment with regard to Count Ten of the Complaint. Plaintiff shows that there is no general issue of material fact

regarding the statutory and constitutional requirement for secret ballot. The rule for summary judgment in Georgia is that there must be no genuine issue of material fact and the moving party must be entitled to judgment as a matter of law. O. C. G. A. 9-11-56. The general rule in Georgia for the granting of injunctive relief is that the Plaintiff must show the following: a). threat of irreparable harm, and b). there is no other adequate remedy at law. Smith v. DeKalb County, et al., 288 Ga. App. 574, (2007). The remainder of this section will apply the law to the facts of this case.

**a). THREAT OF IRREPARABLE HARM.**

The voters of Georgia are under threat of irreparable harm if their right to vote and to have that vote counted is not protected. The benefits to the Plaintiffs in having this Court ensure the protection of that fundamental right would not be outweighed by harm to the other Parties by enjoining Defendants from using DREs which have not been properly certified. Use of an alternate voting system when machines have not been properly certified would not cause the Defendants any harm and vindication of Plaintiffs' fundamental right to vote is in the public interest. On point with this matter is the case of Reineke v. Cobb County School Dist., 484 F. Supp. 1252 (1980), in which the court found that an injunction against censorship of a school newspaper was causing Plaintiff irreparable harm which outweighed the harm to other parties and that "vindication of the First Amendment rights was in the public interest." The case at bar is similar because it also deals with a fundamental right; the voters of Georgia are under threat of irreparable harm if their right to vote and to have that vote counted is not protected.

**b). NO OTHER ADEQUATE REMEDY AT LAW.**

The Plaintiffs have no other adequate remedy at law. Upon review of Hunter v. George, 265 Ga. 573 (1995) we find that “The remedy by injunction is to prevent, prohibit or protect from future wrongs and does not afford a remedy for what is past. [Cits.]” (quoting Moorhead v. Luther, 219 Ga. 242, 244 (2), (1963). Plaintiffs have shown by the testimony of Defendant’s own witness, Professor Britain Williams in his admitted that a patch was installed in the voting machines before the 2002 election (Statement of Undisputed Facts # 13); that the machines were not recertified after said patches were applied (Statement of Undisputed Facts # 14); that a patch can do most anything including effect the efficiency of voting machines (Statement of Undisputed Facts # 15); and that the addition of a patch to the voting machines requires it to be recertified (Statement of Undisputed Facts # 16).

There is no genuine issue of any material fact with regards to the required certification of voting equipment. Plaintiff’s are entitled to summary judgment and are entitled to have this Court enjoin the Plaintiffs from using any voting equipment which has not been properly certified in any election in this State and to require that the State supply its voters an alternative method of voting when such certification has not been conducted.

In conclusion, the Plaintiffs and all electors of the State shall suffer irreparable harm if the right to vote and to have that vote counted is not protected and the Plaintiff’s are entitled to have this Court enjoin the State from allowing the use of uncertified or improperly certified voting machines or DREs for the collection of votes in any election in the State.

#### **D. SUMMARY JUDGMENT AS TO COUNT TWELVE.**

The legislative and executive Acts of the State of Georgia deny the Plaintiffs the free exercise of their fundamental right to vote in violation of the 14<sup>th</sup> Amendment Equal Protection Clause of the U. S. Constitution. “No State shall...deny to any person within its jurisdiction the equal protection of the laws.” U. S. Const. amend. XIV, § 1. This section of the memorandum will examine Count Twelve by applying the law to the facts as follows: 1). State action, 2). Classifications created by the legislation 3). Voting is a fundamental right, 4). Declaratory relief, and 5). Injunctive relief.

### **1). STATE ACTION.**

The required State action is apparent in the case at bar. In order to assert a claim under the 14<sup>th</sup> Amendment Equal Protection Clause, the Plaintiffs must show there is State action infringing, interfering, or otherwise adversely affecting a fundamental right. The rule to determine whether State action has occurred is “State action, as that phrase is understood for purposes of the Fourteenth Amendment, refers to exertions of state power in all forms. And when the effect of that action is to deny rights subject to the protection of the Fourteenth Amendment, it is the obligation of this Court to enforce the constitutional commands.” Shelley v. Kraemer, 334 U. S. 1, 20 (1948). In that case, the court held that a court’s order enforcing a contract between private parties was State action.

In the present case the Georgia General Assembly and Governor of Georgia have enacted the following public laws that effect the Plaintiffs’ fundamental right to vote: 1). Act 166 enacted 2001, 2). Act 646 enacted 2006, and 3). Act 789 enacted 2002. The aforementioned acts specifically display State action because only the State government may legislate and enact statewide statutes. Additionally, the enactment of statutes is not within the realm of private citizens or actors; it is a pure exercise of the State’s police power, as private citizens do not have this authority and the statutes were enacted by public officials using the process the State Constitution requires. Furthermore, Defendant, Former Secretary of State, Cox admits that her office

chose the DRE used in the 2006 audit trail pilot program (Statement of Undisputed Facts #4). She also admitted that her office staff created the Request for Proposal that asked for bids from DRE vendors in 2002 (Statement of Undisputed Facts #7). Thus, the legislative and executive Acts that require the use of DREs in State and Federal elections were State action as contemplated by that term.

## **2). CLASSIFICATIONS CREATED BY LEGISLATION.**

The legislation that was enacted to implement DREs as the preferred method of voting in Georgia creates an impermissible classification. The legislation in question has created two distinct classes by requiring some to use DREs and others to use types of paper ballots. The Plaintiffs in the interest of judicial economy hereby incorporate herein by reference the discussion of classification created by legislation from Count Five § A, 2 of this memorandum.

## **3). VOTING IS A FUNDAMENTAL RIGHT.**

The Plaintiffs have a fundamental right to vote and have their votes counted. For a right to be fundamental it must be “objectively, “deeply rooted in this Nation's history and tradition,” (“so rooted in the traditions and conscience of our people as to be ranked as fundamental”), and “implicit in the concept of ordered liberty,” such that “neither liberty nor justice would exist if they were sacrificed,” Washington v. Glucksberg, 521 U. S. 702, 721, 722 (1997). The Plaintiffs in the interest of judicial economy hereby incorporate herein by reference the discussion of fundamental rights from Count Five § A, 1 of this memorandum.

## **4). DECLARATORY RELIEF.**

The Defendants actions have created impermissible classifications that adversely affect the Plaintiffs' fundamental right to vote and Plaintiffs are entitled to declaratory relief to safeguard their Equal Protection guarantee afforded under the 14<sup>th</sup> Amendment of the U. S. Constitution. The Plaintiffs' are entitled to have this Court declare that the use of DREs in their current configuration violates the guarantees of Equal Protection under the law because it creates an impermissible classification that places a disadvantage on voters using electronic voting machines and does not effectuate a compelling State interest. The general rule in Georgia for the granting of declaratory relief is that the Plaintiff must show the following: a). an actual case or controversy over a valuable right, b). the right is in imminent danger of infringement, c). the procedure must be adverse, and d). the declaration will resolve the case or controversy. Brown v. Lawrence, 204 Ga. 788 (1949).

Further, the State will have the burden upon a threshold showing by the Plaintiffs that a fundamental right is in peril. The Supreme Court in Harper stated that "We have long been mindful that where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined. " Harper v. Va. State Board of Elections et al., 383 U. S. 663 (1966). The State must show that the act is necessary or narrowly tailored to effectuate a compelling state interest. The remainder of this section will discuss application of the facts to law.

**a). ACTUAL CASE OR CONTROVERSY.**

There exists an actual case or controversy over the Plaintiffs' fundamental right to vote insofar as said right has been clouded with uncertainty and insecurity by the use of DREs. The rule is that the Plaintiffs must show a legally protectible interest. The Brown court further defined that interest as: "If the petitioner can show that his rights are in direct issue or jeopardy, ... and that his

interest is not merely academic, hypothetical, or colorable, but actual, a ‘legal interest’ ... may be shown.” Brown v. Lawrence, 204 Ga. 788 (1949). Additionally, the Brown Court stated “The term, ‘legal interest,’ is not synonymous with the term, ‘cause of action,’ since there may arise a situation or dilemma wherein the petitioner is entitled to relief from uncertainty and insecurity over and beyond traditional statutory relief, or incidental thereto; and in some instances, independent of any traditional relief.” Brown v. Lawrence, 204 Ga. 788, 791 (1949). The Plaintiffs fundamental right to vote and have that vote counted is in direct issue. The Defendants’ expert witness, Ray Cobb, admitted that the recanvassing (recounting) of the electronic votes begins with the PCMCIA card (Statement of Undisputed Facts at #1). Additionally, Mr. Cobb admitted that the paper ballots could be manually read if the optical scan machine was inoperable (Statement of Undisputed Facts #11). Defense expert witness Ray Cobb admitted that the DREs at issue do not produce an independent audit trail that is separate from the DRE (Statement of Facts #6). The voters using electronic voting machines are in jeopardy of losing their votes when a DRE malfunctions. This is a distinct disadvantage to the electronic voter and places his vote in peril because a complete crash of the system would prevent a count or recount on that DRE. He will not have the benefit of a paper ballot that can be counted or recounted manually.

Further, Mr. Cobb admitted that the recount process on a DRE starts with the PCMCIA card (Statement of Undisputed Facts #1). Defense expert witness Ray Cobb admitted that the DREs at issue do not produce an independent audit trail that is separate from the DRE (Statement of Facts #6). He also admitted that the paper ballot recount begins with the paper ballot (Statement of Undisputed Facts #2). This undermines the

electronic voters' intent. One cannot determine a voter's original intent from a database. As the Court may recall, in the recount of the 2000 Presidential election the ballots were hand counted and examined for voter intent e.g. hanging chads. It is impossible to determine voter intent because the DRE is essentially an adding machine and does not show the intent of each individual voter but only the purported collective votes of the voters voting for a particular candidate. This places the electronic voter again at a disadvantage with regard to the counting and recounting of votes because his intentions cannot be garnered from the card.

Moreover, Mr. Cobb admitted that a voter cannot see if his vote is properly recorded upon the database (Statement of Undisputed Facts #3). The paper ballot user can visually verify that the proper candidates were marked and ensure the ballot is placed in the ballot box. Defense expert witness Ray Cobb admitted that the DREs at issue do not produce an independent audit trail that is separate from the DRE (Statement of Facts #6). Unlike the paper ballot user, this different treatment prevents the electronic voter from verifying his intent and that his votes are properly placed in the public custody of the elections officials. This places the electronic voter in the capricious position of having to completely trust non-governmental employees with his vote and a 'take our word for it' approach of elections officials. Common sense tells us that the aforementioned individuals may often be 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 entrusted it to a computer.

In addition, Mr. Williams has admitted that the GEMS database may be altered by use of Access (Statement of Undisputed Facts #9). He further admits that this alteration would

not leave any record (Statement of Undisputed Facts #8). Williams also admits the GEMS servers cannot prevent or detect such an alteration (Statement of Undisputed Facts #10). Moreover, he admits that if a DRE recorded a portion of one candidate's vote for another candidate it would not be detected (Statement of Undisputed Facts #12). In today's computer age most citizens will not be able to detect any fraud upon a DRE. The process of providing the sealed CD ROM to the Grand Jury within twenty four months (24) of the election does little to safeguard the electronic voting machine user's vote. This places the DRE voter at a disadvantage because hackers are notorious for circumventing databases and wreaking havoc upon the system infiltrated. This disadvantage places the DRE user in uncertainty and insecurity because as the State has already admitted these fraudulent activities cannot be detected and the average Grand Jury member does not have the knowledge necessary to properly investigate if fraud has occurred. This peril strikes at the very heart of liberty and freedom by placing the political process itself at issue and jeopardizing the fundamental right to have a say in a government purportedly by the People.

**b). IMMEDIATE DANGER OF INFRINGEMENT.**

The Plaintiffs fundamental right to vote is in imminent danger of infringement. DREs have been in use in Georgia since 2002. The aforementioned classifications present a current disadvantage to the Plaintiffs and all electronic voters in Georgia. Said inadequacies have been present in every election in which DREs have been used since their inception. Additionally, the use of DREs is a clear and present danger to the fundamental right to vote and to have one's vote properly counted or recounted because of the reasons articulated in preceding section of this

count. This further undermines voter certainty and security in the process because voter intent cannot be discerned from the database. Moreover, there is a present threat of fraud that is undetectable and this has been admitted by the State. This very danger is imminent at each and every election that uses DREs for voting. Thus, it is capable of repetition and evading review unless it is addressed by this court and the current system continues to be a clear and present danger to the bedrock institution that preserves liberty and governance by the People.

**c). PROCEDURE MUST BE ADVERSE.**

Any act or omission by any person of authority which undermines a right of the People is adverse to the People. The body politic has a sufficient interest in rectifying any insecurity or uncertainty over their fundamental right to vote. Additionally, the proceeding is adverse because the Plaintiffs adequately represent the interest of those voters affected by the uncertainty and insecurity from use of DREs. Further, the State has adequate representation and the antagonistic nature of the proceeding will also protect the interest of the parties and ensure that all the issues are fully and properly litigated. Therefore, each side of the controversy is represented sufficiently to protect the interest asserted and prevent it from being a one sided litigation.

**d). DECLARATION WILL RESOLVE CONFLICT.**

The declaration of the Court will resolve the conflict with regard to the uncertainty and insecurity over the use of DREs in elections in this State. The Plaintiffs' are entitled to have this Court declare that the use of DREs in their current configuration violates the guarantee of Equal Protection under the law because it creates an impermissible classification that places a

disadvantage on voters using electronic voting machines and does not effectuate a compelling State interest. This Court's declaration will rectify the uncertainty and insecurity of the fundamental right to vote by ensuring that each citizen's vote is properly counted, recorded, and treated equally at the time of counting and recounting. Thus, the declaration will in effect preserve the political process and safeguard the right the Plaintiffs seek to protect.

#### **5). INJUNCTIVE RELIEF.**

The Plaintiffs are entitled to injunctive relief enjoining the use of DREs, as currently configured to safeguard their fundamental right to vote and have that vote counted. The general rule in Georgia for the granting of injunctive relief is that the Plaintiff must show the following: a). threat of irreparable harm, and b). there is no other adequate remedy at law. Smith v. DeKalb County, et al., 288 Ga. App. 574 (2007). The remainder of this section will apply the law to the facts of the case at bar.

#### **a). THREAT OF IRREPARABLE HARM.**

The Plaintiffs' fundamental right to vote and have that vote counted is under direct threat of irreparable harm because of the statewide use of DREs. The rule in Georgia is "...where there is a vital necessity to prevent a party from being damaged..." Smith v. DeKalb County, et al., 288 Ga. App. 574, 576 (2007). The Plaintiffs face numerous adverse affects from the use of DREs in Georgia elections.

The Plaintiffs fundamental right to vote and have that vote counted is threatened with irreparable harm. The Defendants' expert witness, Ray Cobb, admitted that the recanvassing (recounting) of the electronic votes beginnings with the PCMCIA card (Statement of Undisputed Facts at #1). Additionally, Mr. Cobb admitted that the

paper ballots could be manually read if the optical scan machine was inoperable (Statement of Undisputed Facts #11). Defense expert witness Ray Cobb admitted that the DREs at issue do not produce an independent audit trail that is separate from the DRE (Statement of Facts #6). The voters using electronic voting machines are in jeopardy of losing their votes when a DRE malfunctions. This is a distinct disadvantage to the electronic voter and places his vote in peril because a complete crash of the system would prevent a count or recount on that DRE. He will not have the benefit of a paper ballot that can be counted or recounted manually.

Further, Mr. Cobb admitted that the recount process on a DRE starts with the PCMCIA card (Statement of Undisputed Facts #1). He also admitted that the paper ballot recount begins with the paper ballot (Statement of Undisputed Facts #2). Defense expert witness Ray Cobb admitted that the DREs at issue do not produce an independent audit trail that is separate from the DRE (Statement of Undisputed Facts #6). This undermines the electronic voters' original intent. One cannot determine a voter's original intent from a database. As the Court may recall, in the recount of the 2000 Presidential election the ballots were hand counted and examined for voter intent e.g. hanging chads. It is impossible to determine original voter intent because the selections that a voter verified disappear from the touchscreen when the ballot was cast and the ballot that is recorded within the machine was never in the public custody of the voter. This places the electronic voter again at a disadvantage with regard to the counting and recounting of votes because his original intentions cannot be garnered from the card.

Moreover, Mr. Cobb admitted that a voter cannot see if his vote is properly recorded upon the database (Statement of Undisputed Facts #3). Defense expert witness Ray Cobb admitted that the DREs at issue do not produce an independent audit trail that is separate

from the DRE (Statement of Undisputed Facts #6). The paper ballot user can visually verify that the proper candidates were marked and ensure the ballot is placed in the ballot box. Unlike the paper ballot user, this different treatment prevents the electronic voter from verifying his intent and that his votes are properly placed in the public custody of the elections officials. This places the electronic voter in the capricious position of having to completely trust non-governmental employees with his vote and a 'take our word for it' approach of elections officials. Common sense tells us that the aforementioned individuals may often be 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 entrusted it to a computer.

In addition, Mr. Williams has admitted that the GEMS database may be altered by use of Access (Statement of Undisputed Facts #9). He further admits that this alteration would not leave any record (Statement of Undisputed Facts #8). Williams also admits the DRE cannot prevent or detect such an alteration (Statement of Undisputed Facts #10). Moreover, he admits that if a DRE recorded a portion of one candidate's vote for another candidate it would not be detected (Statement of Undisputed Facts #12). In today's computer age most citizens will not be able to detect any fraud upon a DRE or GEMS server database. The process of providing the sealed CD ROM to the Grand Jury within twenty four months (24) of the election does little to safeguard the electronic voting machine user's vote. This places the DRE user at a disadvantage because hackers are notorious for circumventing databases and wreaking havoc upon the system infiltrated. This disadvantage places all DRE voters in uncertainty and insecurity because as the State has already admitted these fraudulent activities cannot be detected and the

average Grand Jury member does not have the knowledge necessary to properly investigate if fraud has occurred. This peril strikes at the very heart of liberty and freedom by placing the political process itself at issue and jeopardizing the fundamental right to have a say in a government purportedly by the People.

**b). NO OTHER ADEQUATE REMEDY AT LAW.**

The Plaintiffs have no other adequate remedy at law. The rule is the granting of an injunction is proper when “a party...[is] left without an adequate remedy at law.” Smith v. DeKalb County, et al., 288 Ga. App. 574, 576 (2007). In the present case, the Plaintiffs lack an adequate remedy at law because the very process they would use to rectify the issue is the subject matter at issue e. g. the election process. This would require the Plaintiffs to use a tainted process to rectify itself. Moreover, a small number of voters cannot influence the vote in such a manner as to effectuate the change that is necessary. Further, the use of the political process may take years or decades to resolve the issue. Additionally, the Plaintiffs fundamental right to vote would be threatened and in jeopardy during the entire time period they would be waiting for the General Assembly to take action. The General Assembly’s initial \$54 million Dollar expenditure on the current machines and millions of dollars of subsequent expenses will mostly likely hamper their efforts to expedite relief for the Plaintiffs. Therefore, the fundamental nature of the right at stake and the lack of any remedy at law that could quickly remedy the infringement of their fundamental right to vote, justifies this Court to use its discretion to grant the injunctive relief requested.

In conclusion, the Plaintiffs are entitled to injunctive relief enjoining the use of DREs, as currently configured to safeguard their fundamental right to vote and have that vote counted. The

threat of irreparable harm is present at each and every election in which DREs are operated in their current configuration. The body politics' fundamental right to vote is affected and threatened because original voter intent cannot be established from the database; additionally, the fundamental right to vote is threatened because of the inability of the State to prevent and detect fraud with regards to the DREs. Further, the State cannot show that the use of DREs is necessary to effectuate a compelling state interest. Hence, the Plaintiffs are entitled to have an injunction issue from this Court to prevent and enjoin the use of DREs under the current configuration in any and all elections in this State.

#### **E. SUMMARY JUDGMENT AS TO COUNT THIRTEEN.**

Certain legislative and executive Acts of the State of Georgia deny the Plaintiffs the free exercise of their fundamental right to vote in violation of the 14<sup>th</sup> Amendment Due Process Clause of the U. S. Constitution. “No State shall ... nor shall any State deprive any person of life, liberty, or property, without due process;” U. S. Const. amend. XIV, § 1. This section of the memorandum will examine Count Thirteen by applying the law to the facts as follows: 1). State action, 2). Voting is a fundamental right 3). Declaratory relief, and 4). Injunctive relief.

##### **1). STATE ACTION.**

The required State action is apparent in the case at bar. In order to assert a claim under the 14<sup>th</sup> Amendment Due Process Clause, the Plaintiffs must show there is State action infringing, interfering, or otherwise adversely affecting a fundamental right. The rule to determine whether State action has occurred is “State action, as that phrase is understood for purposes of the Fourteenth Amendment, refers to exertions of state power in all forms. And when the effect of that action is to deny rights subject to the protection of the Fourteenth Amendment, it is the obligation of this Court to enforce the constitutional commands.” Shelley v. Kraemer, 334 U.S. 1, 20 (1948). In Shelley, the court

held that a court's order enforcing a contract between private parties was State action. The Plaintiffs in the interest of judicial economy hereby incorporate herein by reference the discussion of fundamental rights from Count Twelve § D, 1 of this memorandum.

## **2). VOTING IS A FUNDAMENTAL RIGHT.**

The Plaintiffs have a fundamental right to vote and have their votes counted. For a right to be fundamental it must be “objectively, “deeply rooted in this Nation's history and tradition,” (“so rooted in the traditions and conscience of our people as to be ranked as fundamental”), and “implicit in the concept of ordered liberty,” such that “neither liberty nor justice would exist if they were sacrificed,” Washington v. Glucksberg, 521 U. S. 702, 721, 722 (1997). The Plaintiffs in the interest of judicial economy hereby incorporate herein by reference the discussion of fundamental rights from Count Five § A, 1 of this memorandum.

## **3). DECLARATORY RELIEF.**

The Defendants use of DREs has adversely affected the Plaintiffs' fundamental right to vote and Plaintiffs are entitled to declaratory relief to safeguard their Substantive Due Process right guaranteed under the 14<sup>th</sup> Amendment of the U. S. Constitution. The Plaintiffs' are entitled to have this Court declare that the use of DREs violates the guarantee of Substantive Due Process under the law because it directly threatens the voters using electronic voting machines and does not effectuate a compelling state interest. The general rule in Georgia for the granting of declaratory relief is that the Plaintiff must show the following: a). an actual case or controversy over a valuable right, b). the right is in imminent danger of infringement, c). the procedure must be adverse, and d). the declaration will resolve the case or controversy. Brown v. Lawrence, 204 Ga. 788 (1949).

Further, the State will have the burden upon a threshold showing by the Plaintiffs that a fundamental right is in peril. The Supreme Court in Roe stated that “Where certain ‘fundamental rights’ are involved, the Court has held that regulation limiting these rights may be justified only by a ‘compelling state interest, and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake.” Roe v. Wade, 410 U.S. 113, 156 (1973). The remainder of this section will discuss application of the facts to law.

**a). ACTUAL CASE OR CONTROVERSY.**

There exists an actual case or controversy over the Plaintiffs’ fundamental right to vote insofar as said right has been clouded with uncertainty and insecurity by the use of DREs. The rule is that the Plaintiffs must show a legally protectible interest. The Brown court further defined that interest as: “If the petitioner can show that his rights are in direct issue or jeopardy, ... and that his interest is not merely academic, hypothetical, or colorable, but actual, a ‘legal interest’ ... may be shown.” Brown v. Lawrence, 204 Ga. 788 (1949). Additionally, the Brown Court stated “The term, ‘legal interest,’ is not synonymous with the term, ‘cause of action,’ since there may arise a situation or dilemma wherein the petitioner is entitled to relief from uncertainty and insecurity over and beyond traditional statutory relief, or incidental thereto; and in some instances, independent of any traditional relief.” Brown v. Lawrence, 204 Ga. 788, 791 (1949). The Plaintiffs fundamental right to vote and have that vote counted is in direct issue. The Defendants’ expert witness, Ray Cobb, admitted that the recanvassing (recounting) of the electronic votes beginnings with the PCMCIA card (Statement of Undisputed Facts at #1). Additionally, Mr. Cobb admitted that the paper ballots could be

manually read if the optical scan machine was inoperable (Statement of Undisputed Facts #11). Defense expert witness Ray Cobb admitted that the DREs at issue do not produce an independent audit trail that is separate from the DRE (Statement of Facts #6). The voters using electronic voting machines are in jeopardy of losing their votes when a DRE malfunctions. This is a direct threat to the electronic voter and places his vote in peril because a complete crash of the system would prevent a count or recount on that DRE. He will not have the benefit of a paper ballot that can be counted or recounted manually.

Further, Mr. Cobb admitted that the recount process on a DRE starts with the PCMCIA card (Statement of Undisputed Facts #1). Defense expert witness Ray Cobb admitted that the DREs at issue do not produce an independent audit trail that is separate from the DRE (Statement of Undisputed Facts #6). He also admitted that the paper ballot recount begins with the paper ballot (Statement of Undisputed Facts #2). The paper ballot may be physically examined to ascertain the voter's intent. The DRE recount process prohibits election officials from ascertaining the electronic voters' original intent. One cannot determine a voter's original intent from a database. As the Court may recall, in the recount of the 2000 Presidential election the ballots were hand counted and examined for voter intent e. g. hanging chads. With DREs, it is impossible to determine original voter intent because the selections that the voter verified disappeared from the touchscreen when the ballot was cast and the ballot that is recorded within the machine was never in the public custody of the voter. This places the electronic voter in direct harm with regard to the counting and recounting of votes because his original intentions cannot be garnered from the database. Thereby depriving or diluting his vote.

Moreover, Mr. Cobb admitted that a voter cannot see if his vote is properly recorded upon the database (Statement of Undisputed Facts #3). 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 elections officials. This places the electronic voter in the capricious position of having to completely trust non-governmental 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 may often be 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.

In addition, Mr. Williams has admitted that the GEMS database may be altered by use of Access (Statement of Undisputed Facts #9). He further admits that this alteration would not leave any record (Statement of Undisputed Facts #8). Williams also admits the GEMS server cannot prevent or detect such an alteration (Statement of Undisputed Facts #10). Moreover, he admits that if a DRE recorded a portion of one candidates vote for another candidate it would not be detected (Statement of Undisputed Facts #12). In today’s computer age most citizens will not be able to detect any fraud upon a DRE or GEMS server database. The process of providing the sealed CD ROM to the Grand Jury within twenty four months (24) of the election does little to safeguard the electronic voting machine users vote. This places the DRE user at the mercy of hackers

because they are notorious for circumventing databases and wreaking havoc upon the system infiltrated. This DRE system places the DRE user in uncertainty and insecurity because as the State has already admitted these fraudulent activities cannot be detected and the average Grand Jury member does not have the knowledge necessary to properly investigate if fraud has occurred. Additionally, even if a Grand Jury member had the knowledge to examine the CD, the database source code is proprietary. This makes the CD presentation to the Grand Jury only a meaningless safeguard because the Grand Jury member would not have the source code to review the CD. This peril strikes at the very heart of liberty and freedom by placing the political process itself at issue and jeopardizing the fundamental right to have a say in a government purportedly by the People.

**b). IMMINENT DANGER OF INFRINGEMENT.**

The Plaintiffs fundamental right to vote is in imminent danger of infringement. DREs have been in use in Georgia since 2002. The aforementioned classifications present a direct threat to the Plaintiffs and all electronic voters in Georgia. Said inadequacies have been present in every election in which DREs have been used since their inception. Additionally, the use of DREs is a clear and present danger to the fundamental right to vote and to have one's vote properly counted or recounted because of the reasons stated in the previous section. This further undermines voter certainty and security in the process because voter intent cannot be discerned from the database. Moreover, there is a present threat of fraud that is undetectable and this has been admitted by the State. This very danger is imminent at each and every election in which DREs are used for voting. Thus, it is capable of repetition and evading review unless it is addressed by

this court and continues to be a clear and present danger to the bedrock institution that preserves liberty and governance by the People.

**c). PROCEDURE MUST BE ADVERSE.**

Any act or omission by any person of authority which undermines a right of the People is adverse to the People. The body politic has a sufficient interest in rectifying any insecurity or uncertainty over their fundamental right to vote. Additionally, the proceeding is adverse because the Plaintiffs adequately represent the interest of those affected by the uncertainty and insecurity from use of DREs. Further, the State has adequate representation and the antagonistic nature of the proceeding will also protect the interest of the parties and ensure that all the issues are fully and properly litigated. Therefore, each side of the controversy is represented sufficiently to protect the interest asserted and prevent it from being a one sided litigation.

**d). DECLARATION WILL RESOLVE CONFLICT.**

The declaration of the Court will resolve the conflict with regard to the uncertainty and insecurity over the use of DREs in elections in this State. The Plaintiffs are entitled to have this Court declare that the use of DREs violates the guarantee of Substantive Due Process under the law because it directly threatens the voters using electronic voting machines and does not effectuate a compelling state interest. This Court's declaration will rectify the uncertainty and insecurity of the fundamental right to vote by ensuring that each citizen's vote is properly counted and recorded and will reduce the probability of voter fraud and manipulation. Thus, the declaration will in

effect preserve the political process and safeguard the fundamental right the Plaintiffs seek to protect.

#### **4). INJUNCTIVE RELIEF.**

The Plaintiffs are entitled to injunctive relief enjoining the use of DREs, as currently configured to safeguard their fundamental right to vote and have that vote counted. The general rule in Georgia for the granting of injunctive relief is that the Plaintiff must show the following: a). threat of irreparable harm, and b). there is no other adequate remedy at law. Smith v. DeKalb County, et al., 288 Ga. App. 574 (2007). The remainder of this section will apply the law to the facts of the case at bar.

##### **a). THREAT OF IRREPARABLE HARM.**

The Plaintiffs' fundamental right to vote and have that vote counted is threatened with irreparable harm because of the statewide use of DREs. The rule in Georgia is "...where there is a vital necessity to prevent a party from being damaged..." Smith v. DeKalb County, et al., 288 Ga. App. 574, 576 (2007). The Plaintiffs face numerous adverse affects from the use of DREs in Georgia elections.

The Plaintiffs fundamental right to vote and have that vote counted is in direct issue. The Defendants' expert witness, Ray Cobb, admitted that the recanvassing (recounting) of the electronic votes begins with the PCMCIA card (Statement of Undisputed Facts at #1). Defense expert witness Ray Cobb admitted that the DREs at issue do not produce an independent audit trail that is separate from the DRE (Statement of Undisputed Facts #6). Additionally, Mr. Cobb admitted that the paper ballots could be manually read if the optical scan machine was inoperable (Statement of Undisputed Facts #11). The voters using electronic voting

machines are in jeopardy of losing their votes when a DRE malfunctions. This is a direct threat to the electronic voter and places his vote in peril because a complete crash of the system would prevent a count or recount on that DRE. He will not have the benefit of a paper ballot that can be counted or recounted manually.

Further, Mr. Cobb admitted that the recount process on a DRE starts with the PCMCIA card (Statement of Undisputed Facts #1). Defense expert witness Ray Cobb admitted that the DREs at issue do not produce an independent audit trail that is separate from the DRE (Statement of Undisputed Facts #6). He also admitted that the paper ballot recount begins with the paper ballot (Statement of Undisputed Facts #2). The paper ballot may be physically examined to ascertain the voter's intent. The DRE recount process prohibits election officials from ascertaining the electronic voters' intent. One cannot determine the original voter's intent from a database. As the Court may recall, in the recount of the 2000 Presidential election the ballots were hand counted and examined for voter intent e. g. hanging chads. With the current DREs, it is impossible to determine original voter intent because the selections that the voter verified disappeared from the touchscreen when the ballot was cast and the ballot that is recorded within the machine was never in the public custody of the voter. This places the electronic voter in direct harm with regard to the counting and recounting of votes because his original intentions cannot be garnered from the database. Thereby depriving or diluting his vote.

Moreover, Mr. Cobb admitted that a voter cannot see if his vote is properly recorded upon the database (Statement of

Undisputed Facts #3). 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 elections officials. This places the electronic voter in the capricious position of having to completely trust non-governmental 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.

In addition, Mr. Williams has admitted that the GEMS database may be altered by use of Access (Statement of Undisputed Facts #9). He further admits that this alteration would not leave any record (Statement of Undisputed Facts #8). Williams also admits the DRE cannot prevent or detect such an alteration (Statement of Undisputed Facts #10). Moreover, he admits that if a DRE recorded a portion of one candidates vote for another candidate it would not be detected (Statement of Undisputed Facts #12). In today's computer age most citizens will not be able to detect any fraud upon a DRE. The process of providing the sealed CD ROM to the Grand Jury within twenty four months (24) of the election does little to safeguard the electronic voting machine users vote. This places the DRE user at the mercy of hackers because they are notorious for circumventing databases and wreaking havoc upon the system infiltrated.

This DRE system places the DRE user in uncertainty and insecurity because as the State has already admitted these fraudulent activities cannot be detected and the average Grand Jury member does not have the knowledge necessary to properly investigate if fraud has occurred. Additionally, even if a Grand Jury member had the knowledge to examine the CD, the database source code is proprietary. This makes the CD presentation to the Grand Jury only a meaningless safeguard because the Grand Jury member would not have the source code to review the CD. This peril strikes at the very heart of liberty and freedom by placing the political process itself at issue and jeopardizing the fundamental right to have a say in a government purportedly by the People.

**b). NO OTHER ADEQUATE REMEDY AT LAW.**

The Plaintiffs have no other adequate remedy at law. The rule is the granting of an injunction is proper when “a party...[is] left without an adequate remedy at law.” Smith v. DeKalb County, et al., 288 Ga. App. 574, 576 (2007). In the present case, the Plaintiffs lack an adequate remedy at law because the very process they would use to rectify the issue is the subject matter at issue e. g. the election process. This would require the Plaintiffs to use a tainted process to rectify itself. Moreover, a small number of voters cannot influence the vote in such a manner as to effectuate the change that is necessary. Further, the use of the political process may take years or decades to resolve the issue. Additionally, the Plaintiffs fundamental right to vote would be threatened and in jeopardy during the entire time period they would be waiting for the General Assembly to take action. The General Assembly’s initial \$54 million Dollar expenditure on the

current machines and millions of dollars of subsequent expenses will mostly likely hamper their efforts to expedite relief for the Plaintiffs. Therefore, the fundamental nature of the right at stake and the lack of any remedy at law that could quickly remedy the infringement of their fundamental right to vote, justifies this Court to use its discretion to grant the injunctive relief requested.

In summation, the Plaintiffs are entitled to injunctive relief enjoining the use of DREs, as currently configured to safeguard their fundamental right to vote and have that vote counted. The threat of irreparable harm is present at each and every election in which DREs are operated in their current configuration. The body politics' fundamental right to vote is affected and threatened because original voter intent cannot be established from the database; additionally, the fundamental right to vote is threatened because of the inability of the State to prevent and detect fraud with regards to the DREs. Further, the State cannot show that the use of DREs is necessary to effectuate a compelling state interest. Hence, the Plaintiffs are entitled to have an injunction issue from this Court to prevent and enjoin the use of DREs under the current configuration in any and all elections in this State.

## **VI. CONCLUSION.**

In summation, the Plaintiffs are entitled to summary judgment on all the aforementioned counts because there is no genuine issue of material fact and the law demands the relief prayer for to protect the body politics' fundamental right to vote. In particular, the Plaintiffs are entitled to a declaration from this Court that declares the use of DREs and GEMS servers, as currently configured, as a direct and flagrant violation of the body politics' right to Equal Protection under the Georgia and U. S. Constitutions. In addition, the Plaintiffs are entitled to a declaration from this Court that declares the use of DREs and GEMS servers that

use a sequential printing of VVPAT paper ballots, as a direct and flagrant violation of the body politics' right to have elections conducted by secret ballot under the Georgia Constitution. Furthermore, the Plaintiffs are entitled to a declaration from this Court that declares the use of DREs and GEMS servers, which have not been properly certified in accordance with the laws of this State, as a direct and flagrant violation of the body politics' right to a secure and certain voting system. The Plaintiffs are also entitled to a declaration from this Court that declares the use of DREs and GEMS servers, as currently configured, as a direct and flagrant violation of the body politics' right to substantive due process under the Due Process Clause of 14<sup>th</sup> Amendment to the U. S. Constitutions. Additionally, the Plaintiffs are entitled to injunctive relief to prevent the aforementioned violations of the body politics' constitutional rights. Finally, the Plaintiffs are entitled to an order from this Court requiring the Defendants to implement a system of voting that does not impede the body politics' constitutional rights.

**THEREFORE**, the Plaintiffs are entitled as a matter of law to have the Court adjudicate, decree, declare, and enjoin the following:

**COUNT FIVE.**

a). **DECLARE** that the use of DREs and GEMS servers, as currently configured, violates the body politics' fundamental right to vote by creating impermissible classifications, which subjects electronic voters to a disadvantage and unequal treatment;

b). **DECLARE** that the use of DREs and GEMS servers, as currently configured, creates insecurity and uncertainty with regard to the exercise of the fundamental right to vote with regard to electronic voters because of the inability to detect fraud, inability to ascertain original voter intent, inability to equally count votes, and inability to equally recount votes;

c). **DECLARE** that the use of DREs and GEMS servers, as currently configured, are unconstitutional because their use violates the Equal Protection Clause of the Georgia State Constitution;

d). **ENJOIN** the use of DREs and GEMS servers, as currently configured, in any and all local, state, and federal elections; and

e). **ORDER** that the Defendants implement a system of voting that protects the body politics' fundamental right to vote;

**COUNT SEVEN.**

f). **ENJOIN** the use of DREs, that use any form of sequential printing of VVPAT paper ballots, in any and all local, state, and federal elections; and

g). **ORDER** that the Defendants implement a system of voting that protects the body politics' constitutional right to vote by secret ballot;

**COUNT TEN.**

h). **DECLARE** that the use of DREs, GEMS servers, and optical scan equipment that have not been properly certified in accordance with the laws of this State, creates insecurity and uncertainty with regard to the exercise of the fundamental right to vote;

i). **DECLARE** that the past and present failure of the State to properly maintain the certification reports for the DREs, GEMS servers and optical equipment used in Georgia have resulted in insecurity and uncertainty with regard to the fundamental right to vote;

j). **DECLARE** that electronic voters have a statutory right to vote on DREs, GEMS servers and optical equipment that have been properly certified in accordance with the laws of this State;

k). **ORDER** that a special master(s) be appointed to aid the Court in ascertaining that proper certification has been effectuated on the DREs, GEMS servers, and optical scan equipment in accordance with the orders of this Court;

l). **ORDER** that the Defendants produce and identify to the special master(s) the date, purpose and description of all software or operating system patches that have been applied to the DREs, GEMS servers and optical scan equipment used in Georgia since the November 2000 elections to eliminate the uncertainty and insecurity with regard to the exercise of the fundamental right to vote;

m). **ORDER** that the Defendants produce to the special master(s) certification reports for all DREs, GEMS servers and optical scan equipment in use on Georgia in accordance with Georgia law (O.C.G.A. 21-2-379.2) so as to protect the body politics' fundamental right to vote; and

n). **ENJOIN** the use of DREs, GEMS servers, and optical scan equipment until it can be established by the special master(s) that the aforementioned equipment has been properly certified in accordance with the laws of this State, in any and all local, state, and federal elections;

#### **COUNT TWELVE.**

o). **DECLARE** that the use of DREs and GEMS servers, as currently configured, violates the body politics' fundamental right to vote by creating impermissible classifications, which subjects electronic voters to a disadvantage and unequal treatment;

p). **DECLARE** that the use of DREs and GEMS servers, as currently configured, creates insecurity and uncertainty with regard to the exercise of the fundamental right to vote with regard to electronic voters because of the inability to detect fraud, inability to ascertain voter intent, inability to equally count votes, and inability to equally recount votes;

q). **DECLARE** that the use of DREs and GEMS servers, as currently configured, are unconstitutional because their use violates the Equal Protection Clause of the 14<sup>th</sup> Amendment of the U. S. Constitution;

r). **ENJOIN** the use of DREs and GEMS servers, as currently configured, in any and all local, state, and federal elections; and

s). **ORDER** that the Defendants implement a system of voting that protects the body politics' fundamental right to vote;

#### **COUNT THIRTEEN.**

t). **DECLARE** that the use of DREs and GEMS servers, as currently configured, creates insecurity and uncertainty with regard to the exercise of the fundamental right to vote with regard to electronic voters because of the inability to detect fraud, inability to ascertain voter intent, inability to equally count votes, and inability to equally recount votes;

u). **DECLARE** that the use of DREs and GEMS servers, as currently configured, are unconstitutional because their use violates substantive due process as contemplated by the Due Process Clause of the 14<sup>th</sup> Amendment of the U. S. Constitution;

v). **ENJOIN** the use of DREs and GEMS servers, as currently configured, in any and all local, state, and federal elections; and

w). **ORDER** that the Defendants implement a system of voting that protects the body politics' fundamental right to vote.

Respectfully submitted the 18<sup>th</sup> day of March 2008.

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**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. \***

**KAREN HANDEL, SECRETARY OF STATE OF GEORGIA \*  
SONNY PERDUE, GOVERNOR OF GEORGIA \*  
GEORGIA STATE ELECTION BOARD, \*  
DEFENDANTS. \***

**CIVIL ACTION FILE NO.**

**2006CV119719**

**CERTIFICATE OF SERVICE**

I hereby certify that I have served a true and accurate copy of the above **Motion for Summary Judgment and Notice of Motion** by U.S. Mail with appropriate postage affixed so as to ensure delivery to:

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

Respectfully submitted the 18<sup>th</sup> day of March 2008.

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