

LINDA SCHADE, <i>et al.</i> ,	*	IN THE
Plaintiffs,	*	CIRCUIT COURT
v.	*	FOR
MARYLAND STATE BOARD OF ELECTIONS, <i>et al.</i> ,	*	ANNE ARUNDEL COUNTY
Defendants.	*	Case No. C0497297
	*	

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MEMORANDUM IN SUPPORT OF
DEFENDANTS’ MOTION TO DISMISS

Introduction

This case seeks to bring before this Court a debate that is raging, with varying degrees of fury, throughout the United States – including before Congress, the newly established federal Election Assistance Commission, and numerous state legislative and executive bodies. The only federal appellate court where the debate has been considered has flatly rejected claims substantially identical to those raised by the plaintiffs here, noting that “it is the job of democratically-elected representatives to weigh the pros and cons of various balloting systems,” and citing an earlier Second Circuit decision in a similar case: “Were we to embrace plaintiffs’ theory, this court would henceforth be thrust into the details of virtually every election, tinkering with the state’s election machinery, reviewing petitions, registration cards, vote tallies, and certificates of election for all manner of error and insufficiency under state and federal law.” *Weber v. Shelley*, 347 F.3d 1101, 1107 and n.2 (9th Cir. 2003), *citing Powell v. Power*, 436 F.2d 84, 86 (2d Cir. 1970).

Having failed in their quest to persuade the Maryland General Assembly to enter the fray,¹ plaintiffs now resort to the courts. This Court, too, should decline to second-guess the considered decisions of the defendants, who are charged by law with responsibility for conducting elections in this State.

The problems revealed by the 2000 presidential election are something that no one wants to see repeated in the 2004 presidential election. Election officials everywhere are only too aware that the November 2004 election will put their performance, and the performance of the voting equipment they have installed, under a microscope. At this point, Maryland has adopted a uniform voting system for all jurisdictions except Baltimore City,² and that system has been judged by experienced election officials to meet all of the elaborate standards applicable to a voting system used in this State. The system has been successfully used in numerous elections, and poll workers throughout the State are now familiar with it. The very worst scenario for causing an election failure in Maryland would be a Court order requiring the massive deployment of a new and untried voting system within the five-and-one-half months remaining before November 2, 2004. This Court should not be party to such a risky endeavor based on questionable assumptions and theories that are legally unsound.

In this case, plaintiffs seek to compel decertification of Diebold AccuVote-TS direct recording electronic voting machines, which were used in the March 2004 primary and many other previous elections, due to alleged security flaws in the machines. Plaintiffs ask that the

¹Senate Bill 393 and cross-filed House Bill 53 died in conference committee at the close of the 2004 Session of the Maryland General Assembly, a fact of which this Court can take judicial notice under Maryland Rule 5-201.

²Baltimore City's existing direct recording electronic (DRE) or touchscreen voting system is scheduled to be replaced with the uniform statewide system in 2006. Chapter 564, Laws of Maryland 2001, §5.

Court compel the State Board of Elections to either add a voter-verified paper audit trail to the machines or to revert to optical scan systems.

I. This Case Raises Non-Justiciable Political Questions.

Both the United States Supreme Court and the Court of Appeals of Maryland have recognized limits on the subject matter jurisdiction of the courts over certain “political questions.” These limits prevent the courts from entertaining claims of unlawful action brought against units of the Legislative and Executive Branches in disputes more properly left to those governmental branches directly accountable to the electorate. Late last month, four members of the Supreme Court (joined by another Justice to constitute the Court’s majority) invoked the political question doctrine in declining to entertain the political gerrymandering claims raised in *Vieth v. Jubelirer*, 124 S. Ct. 1769 (2004). While acknowledging the duty of the Judicial Branch to “say what the law is,” the Court’s opinion observed: “Sometimes, however, the law is that the judicial department has no business entertaining the claim of unlawfulness – because the question is entrusted to one of the political branches or involves no judicially enforceable rights.” *Id.* at 1776. The opinion set forth six independent tests, originally recognized in *Baker v. Carr*, 369 U.S. 186, 217 (1962), for the existence of a political question. The most important of those were (1) a textually demonstrable constitutional commitment of the issue to a coordinate political department, (2) a lack of judicially discoverable and manageable standards for resolving it, (3) the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion, and (4) the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of the government.

The Court of Appeals of Maryland engaged in a similar discussion in *Estate of Burris v. State*, 360 Md. 721 (2000). The Maryland court declared that whether a claim is justiciable involves two prongs: first, whether the claim presented and the relief sought are of the type which admit of judicial resolution, and second, whether the issue presents a political question – that is, one not justiciable because of the constitutional separation of powers. *Id.* at 745. As to the second prong, the Court of Appeals quoted the same multi-step test, derived from *Baker v. Carr*, acknowledged in *Vieth*. *Id.*

The case now before this Court is an exceptional case requiring the refusal of subject matter jurisdiction. At the heart of the case lies an important issue of election management – specifically, the selection of a voting system – an issue committed in Maryland, by constitutional provision and implementing statute, to the State Board of Elections, an Executive Branch agency. *See* Maryland Constitution, Article I, §§7, 8; Annotated Code of Maryland, Election Law Article, §9-101. The Complaint³ also raises questions for which there are no judicially discoverable and manageable standards. Judges have no experience in conducting elections and thus no way of properly appreciating and balancing the multiple complex factors involved in the selection and implementation of voting equipment.⁴ A voting system cannot be selected without making initial policy determinations of a kind clearly calling for executive or administrative discretion – for example, the weighing of

³In this memorandum, all references to “the Complaint” are to the plaintiffs’ “First Amended and Verified Complaint.”

⁴This is especially true in a case like this, where plaintiffs are seeking immediate relief and there is no time to develop and present the complex facts that a court would need to evaluate the Complaint and defendants’ administrative actions.

demands by individuals with disabilities for an accessible system⁵ against the narrower demands of computer experts for information system security. Moreover, a court cannot undertake to make such policy determinations without infringing on the proper separation of powers and without exhibiting lack of the respect due to coordinate branches of the government.

The principles recognized in *Vieth* and *Estate of Burris* are perfectly applicable here. The voting system selection issues raised by the plaintiffs are political questions wholly unsuited for judicial resolution. This Court should invoke the doctrine of political questions and dismiss the Complaint for lack of subject matter jurisdiction.

II. Plaintiffs Have Not Stated a Proper Cause of Action under Election Law Article, §12-202.

The plaintiffs' First Cause of Action purports to be brought under Election Law Article, Title 12, Subtitle 2, a subtitle providing a mechanism for *expedited* judicial review of certain discrete issues arising either in an election that has already been conducted or in one that is soon to be conducted. Subtitle 2 review must be sought by a registered voter; the petitioner must challenge an act or omission relating to the election on grounds that the act or omission is inconsistent with the Election Law Article or other law applicable to the elections process; the act or omission must have changed or be likely to change the outcome of the election; and the petition must be filed, if before election results are certified, within

⁵In their Complaint, the plaintiffs attempt to get around this troublesome complexity by repeatedly stating that their request for relief is limited only to non-disabled voters. Complaint, pp. 72-75. However, this simple recitation does not cure the problem; inherent in the statement itself is the assertion that individuals with disabilities should be treated differently than non-disabled voters and that somehow a voting system faulty for the non-disabled is acceptable for individuals with disabilities.

10 days after the challenged act or omission itself, or within 10 days after the act or omission became known to the petitioner.⁶

In this case, plaintiffs mount a broad challenge to defendants' selection and implementation of the Diebold AccuVote-TS voting system, not a focused challenge to a particular "act or omission" of the type contemplated by Title 12, Subtitle 2. That this is so is evidenced by the plaintiffs' own specification of the "acts and omissions" to which their First Cause of Action is directed. Complaint, ¶139. Those acts and omissions encompass the initial certification of the AccuVote-TS voting system, which occurred on March 13, 2002,⁷ as well as the failure to decertify the system or to "take steps to remedy security vulnerabilities that could be exploited by the system," alleged omissions to which no particular date is ascribed. The plain meaning of the words of Title 12, Subtitle 2 – including especially the short time within which a challenge may be brought (§12-202(b)), the command that the proceeding be heard and decided "as expeditiously as the circumstances require" (§12-203(a)(1)), the provisions for direct appeal to the Court of Appeals within 5 days after a circuit court decision (§12-203(a)(3)), and the mandate that the Court of Appeals give priority to hearing and deciding an appeal "as expeditiously as the circumstances require" (§12-203(b)) – is that this judicial review mechanism is aimed at challenges to specific and discrete acts of election officials that can be promptly heard and decided. Title

⁶Defendants interpret this knowledge requirement to mean that the petition must be filed within 10 days after the act or omission actually became known to the petitioner or could have been known to the petitioner if he or she had exercised reasonable diligence. The deadline has little or no meaning if all it requires a tardy petitioner to do is to find a willing co-petitioner who has no specific knowledge of the facts until a few days before suit is filed.

⁷Pursuant to Maryland Rule 5-201, this Court can judicially notice the fact that the Diebold AccuVote-TS voting system was certified on March 13, 2002. The decision to certify and procure the new system was widely publicized at the time.

12, Subtitle 2 is not designed to accommodate an expedited proceeding where an ordinary civil action could have been brought.

While there is very little case law under Title 12, Subtitle 2, defendants made this same argument in *Suessman, et al. v. Lamone, et al.*, (Court of Appeals, September Term 2003, No. 140),⁸ a recent challenge to Maryland's judicial election process. The *Suessman* case was brought under Election Law Article, §12-202, even though the challenged judicial election procedures had been in place for some 60 years. The case was argued on April 2, 2004 and is currently pending before the Court of Appeals. This case presents as sharp a contrast, as did *Suessman*, between the broad scope of the plaintiffs' untimely challenge and the targeted and extremely time-sensitive nature of the remedy fashioned by the General Assembly. This is simply not the kind of case contemplated by Title 12, Subtitle 2.

Moreover, even were the nature of the attack mounted here not incongruent with the legislative intent evidenced on the face of Title 12, Subtitle 2, it would still be necessary to dismiss plaintiffs' First Cause of Action under the time limits stated in §12-202(b). This suit was filed on April 21, 2004, more than 2 years after defendant State Board of Elections initially certified the Diebold AccuVote-TS voting system. As the voluminous exhibits to the Complaint reveal, the certification of the Diebold system, and the subsequent controversy over the security of the system, have been anything but hidden from public view. Any plaintiff who wished to challenge the certification decision knew or should have known about that decision long before suit was filed here.

Likewise, with respect to any alleged failure to decertify or to remedy security vulnerabilities, the Complaint reveals on its face that lead plaintiff Linda Schade on

⁸A portion of the Court's decision in *Suessman* was published at 380 Md. 436 (2004).

November 5, 2003 submitted to the State Board of Elections a document labeled “Citizens Complaint,” in which she requested decertification of the Diebold system and termination of the procurement of additional Diebold voting machines. Complaint, ¶86.⁹ It also alleges that the Campaign for Verifiable Voting in Maryland, an organization co-founded by plaintiff Schade and for which plaintiff Suh allegedly acts as a “security specialist,” published a “white paper” on February 4, 2004, objecting to the alleged failure of the defendants to address security issues. Complaint, ¶119. It further alleges that plaintiff Andrew Harris, minority whip of the Maryland Senate, co-sponsored legislation at the recent legislative session seeking the implementation of a voter-verified paper audit trail. Complaint, ¶12.

These admissions belie the statements in Paragraphs 11, 12, 18, and 141 of the Complaint that plaintiffs Schade, Harris, and Suh became aware of the acts or omissions challenged in this action on April 12, 2004. Neither those plaintiffs nor others who have joined with them in filing the instant suit acted timely; all plaintiffs knew or should have known of the basis for their complaint well before April 11, 2004. Thus, even were Election Law Article, §12-202 otherwise a vehicle for the type of broad challenge to the voting system embodied in this case, the plaintiffs’ First Cause of Action under §12-202 should be dismissed as untimely.

III. The Plaintiffs Have Not Stated a Proper Cause of Action for Declaratory and Injunctive Relief Based on Violations of Maryland Election Law.

Plaintiffs’ Second Cause of Action, added in the First Amended Complaint, is almost identical to the First Cause of Action, except that no specific statutory basis for the action is cited. The plaintiffs appear to invoke the general declaratory and equitable powers of the

⁹Indeed, Exhibit 24 to the Complaint indicates that plaintiff Schade and others were considering suit as early as November 6, 2003.

Court in aid of their challenge to defendants' certification and procurement decisions. However, statutes authorizing declaratory or injunctive relief do not create new substantive rights. *Fleischmann v. Mercantile Trust Co.*, 192 Md. 680, 685 (1949). For the reasons stated in Parts I, II, and IV of this memorandum, this Court should not – indeed, has no jurisdiction to – second-guess decisions made by Executive Branch officials in the proper exercise of their statutory responsibilities. These are matters committed to the judgment of election officials, and not matters in which this Court can properly intervene, whether by granting declaratory or injunctive relief or otherwise.

IV. Mandamus Is Not Available, Because Plaintiffs Have No Clear Right to the Relief They Seek, and Selection of a Voting System Is a Matter Plainly Vested by the General Assembly within the Discretion and Administrative Judgment of the Defendants.

The Court of Appeals of Maryland had occasion in two very recent cases to lay out the legal principles that govern plaintiffs' Third Cause of Action for mandamus. Those principles compel dismissal of that cause of action.

In *Wilson v. Simms*, 380 Md. 206, 217-24 (2004), Judge Battaglia, writing for the Court, discussed at length the writ of mandamus, tracing its origins in the Court of King's Bench and its adoption in Maryland after the Revolutionary War. The opinion stressed the fact that the writ of mandamus is an "extraordinary remedy," to be exercised by a court with caution, so as to avoid interfering with legislative prerogative and administrative discretion. *Id.* at 222-23. According to the Court of Appeals, "a writ of mandamus will not lie if the petitioner's right is unclear or issues only at the discretion of a decision maker" or if the right claimed by the petitioner is "of a nature to require the exercise of judgment." *Id.* at 223, *further quoting from Green v. Purnell*, 12 Md. 329, 336 (1858) (mandamus "cannot issue in a case where discretion and judgment are to be exercised by the officer; and it can be granted

only were the act required to be done is merely ministerial”). *Accord, Heft v. Maryland Racing Commission*, 323 Md. 257, 274-75 (1991) (when agency decision involves “the application of somewhat complex regulatory standards to the facts of a particular situation,” and when application of statutory criteria is committed to the exercise of administrative judgment, a writ of mandamus will not issue); *Board of Education v. Secretary of Personnel*, 317 Md. 34, 46 (1989) (“if the right be doubtful, or the duty discretionary, or of a nature to require the exercise of judgment, ... [mandamus] will not be granted”).

In another case decided the same day as *Wilson, Spencer v. Maryland State Board of Pharmacy*, ___ Md. ___, 846 A.2d 341 (2004), the Court of Appeals examined the proper standard to be applied in reviewing administrative agency action in a matter committed to the agency’s discretion. Reversing a decision in which the Court of Special Appeals had compelled the defendant Board of Pharmacy to refer a matter to the Office of Administrative Hearings, despite the fact that such a referral was by statute discretionary on the part of the Board, the Court of Appeals laid out the following general rule: “The standard of review for an agency decision ... will depend upon the level of discretion delegated to the administrative agency with respect to such decisions.” Slip opinion at 11. The Court went on to recognize the differing standards applicable under the Administrative Procedure Act when an agency acts in a quasi-judicial capacity and in a policy-making or quasi-legislative capacity, as well as the standards applicable in contested cases to agency factual determinations, conclusions of law, and other determinations. Slip opinion at 11-14. According to the Court of Appeals, when an agency acts neither as a finder of fact nor as an interpreter of law, but rather in a “discretionary capacity,” courts owe a higher level of deference than that embodied in either the *de novo* standard applicable to legal conclusions or the substantial evidence review

afforded an agency's factual findings; this highly deferential review is known as the arbitrary or capricious standard. Slip opinion at 14. Furthermore, "whether an action is in fact deemed arbitrary or capricious will vary depending upon the amount of discretion granted [the] agency." Slip opinion at 16.

Applying these holdings in this case, there can be little doubt that, notwithstanding the voluminous Complaint and exhibits, plaintiffs' disagreement here, and the challenge at the heart of this suit, concerns a decision made by the defendants in the sound exercise of discretion statutorily vested in them. Plaintiffs assert that defendants had a mandatory duty not to certify the Diebold AccuVote-TS voting system, a system that, *in plaintiffs' judgment*, does not meet the standards enumerated in Election Law Article, §9-102(c)(1). However, §9-102(c) does not leave the judgment about whether the enumerated standards have been met to voters like the plaintiffs, to courts, or to anyone other than the State Board of Elections. The statute states: "*The State Board* may not certify a voting system unless *the State Board* determines that" the standards are met (emphasis added). Section 9-102(d) then lists various considerations that *the State Board* must take into account in determining whether any voting system meets the §9-102(c) standards; in addition to specifically listed considerations, *the State Board* is also directed to take into account "any other factor that *the State Board* considers relevant." §9-102(d)(1)(e)(emphasis added). Moreover, *the State Board* is directed to adopt regulations for the review, certification, and decertification of voting systems, and regulations for each voting system that it certifies. §9-102(a), (e). The Election Law Article makes no provision for judicial review of the Board's certification actions. It would be hard to find a statutory regime that vests more complete discretion in an administrative agency than these sections vest in the State Board of Elections.

Likewise, the State Board of Elections is vested with broad discretion in decertifying a voting system previously certified. Under Election Law Article, §9-103(a), the State Board *may* decertify a voting system if *it determines* that the system no longer merits certification, and it is directed to decertify a system if the system no longer meets one or more of the standards in §9-102(c)(1)(i) through (iii) – standards that are met or not met based on *the State Board’s* determination. In addition, §9-103(b) provides that “*the State Board* shall determine the effective date and conditions of the decertification” (emphasis added). Implementing State Board regulations at COMAR 33.09.07.07 and .08 establish procedures ensuring that, before any decertification is final, the State Board will provide voting system vendors and local boards using the voting system with notice and an opportunity to respond (and an opportunity to implement steps to correct any deficiency or to explain why the system should not be decertified, depending on whether the decertification action is under Election Law Article, §9-103(a)(1) or (2)). Only if the deficiency remains uncorrected or the explanation is rejected, and only after a public hearing, will the State Board decertify a voting system.

In summary, the statutory scheme underlying this action confers broad discretion on the State Board of Elections to select and certify a voting system that *it* deems to be safe, secure, accurate, and reliable. This scheme requires that the courts exercise extreme deference to the agency’s determination in this regard and deny the extraordinary relief of mandamus.¹⁰

¹⁰It is instructive to note that in California, a state to which plaintiffs suggest this Court look as a model, it is *not* the courts, but an Executive Branch official, Secretary of State Kevin Shelley, who has exercised his discretion to step into the debate over touchscreen voting machines and to take perhaps the most extreme position of any election official in the (continued...)

By the same token, plaintiffs are not entitled to a writ of mandamus because the Election Code statutory scheme gives them absolutely no voice in the selection of a voting system or the determination whether a voting system is secure and reliable, and no clear and indisputable right to the voter-verified paper audit trail they desire. For these reasons, plaintiffs' Third Cause of Action must be dismissed as a matter of law.

V. Defendants' Actions in Certifying and Not Decertifying the Diebold AccuVote-TS System Do Not Constitute Rule-Making under the Maryland Administrative Procedure Act.

Plaintiffs' Fourth Cause of Action suggests that defendants engaged in improper rule-making and evasion of the rule-making procedures of the Maryland Administrative Procedure Act (APA), State Government Article, Title 10, Subtitle 1, when they declined to decertify the Diebold AccuVote-TS voting system in the face of COMAR 33.09.02.07. That State Board of Elections regulation, adopted in early 2000 (see Complaint, Exhibit 10¹¹), provides: "The voting system [that is, any voting system certified for use in Maryland] shall be capable of providing an audit trail of all ballots cast so that, in a recount, the election can be reconstructed, starting with the individual votes of all eligible voters." The Complaint implies that the State Board's failure to decertify is so irreconcilable with that regulation, as *the plaintiffs* interpret it, that it effectively amended the regulation.

¹⁰(...continued)

United States in favor of voter-verified paper audit trails. Secretary Shelley's position has engendered sharp opposition, and the Secretary is now being sued by California county election officials and organizations representing individuals with disabilities. *Benavidez, et al. v. Shelley*, U.S.D.C., Central District of California, Case No. CV-04-3318 FMC (PJW x).

¹¹Exhibit 10 contradicts the allegation in Complaint, ¶46 that COMAR 33.09.02.07 was adopted "[i]n conjunction with HB 1457," which became Chapter 564, Laws of Maryland 2001.

Despite the creativity displayed by plaintiffs' counsel in advancing this unsupported argument, the Fourth Cause of Action should be dismissed; it states no cause of action upon which relief can be granted.

First of all, the language of COMAR 33.09.02.07 cannot fairly be read to demand that a voting system in Maryland provide either a voter-verified or a paper audit trail. The regulation requires only that a voting system provide "an audit trail of all ballots cast" and that, in the event of a recount, this audit trail display "the individual votes of all eligible voters." This regulation was in effect when the Diebold AccuVote-TS voting system was certified by the State Board of Elections, and the State Board determined at that time that the individual ballot images which can be produced by the Diebold system (although not on the printers included in each voting unit¹²) satisfied the requirement. As may be judicially noticed under Maryland Rule 5-201, a printout of the images of individual voter ballots produced from the Diebold system, which was the voting system used in Allegany County for the 2002 gubernatorial election, was used in a recount of the Caspar Taylor/LeRoy Myers delegate race. The State Board of Elections has never altered its view that the Diebold system fully complies with COMAR 33.09.02.07, as *the Board* interprets and has consistently interpreted it, and plaintiffs' Complaint makes no allegation that defendants have done so. Without an allegation that *defendants* have changed *their* interpretation of COMAR

¹²Plaintiffs misinterpret statements by defendant Lamone that the *voting unit printers* can only produce full-day tallies. While that is true, the memory cards in the voting units can be and have been used to print out images of each individual ballot cast. These ballot images are printed out in randomized order to protect voter secrecy. Maryland Rule 5-201 permits the Court to take judicial notice of the 2002 election recount in which a printout of individual ballot images from Diebold machines was used. This Court itself entertained proceedings regarding the establishment of a bond for the 2002 recount. *Taylor v. Maryland State Board of Elections*, Circ. Ct. for Anne Arundel County, Case No. C-2002-84880.

33.09.02.07 since its adoption in 2000 in strict accordance with the APA, plaintiffs have not stated a cause of action.

Under Maryland law, whether an agency decision constitutes a “regulation” under the APA requires looking beyond the APA definition of the word “regulation.” *Maryland Association of Health Maintenance Organizations (HMOs) v. Health Services Cost Review Commission*, 356 Md. 581, 599 (“whether an agency policy technically fits the APA definition of ‘regulation’ is not the test for determining if the agency is required to proceed with formal rulemaking”). Maryland courts have focused on the nature and substance of the agency action and have uniformly refused to characterize an agency act as a “regulation” subject to APA notice and comment requirements when the act is a legitimate exercise of agency discretion and does not change existing law.

In *Department of Health & Mental Hygiene v. Chimes*, 343 Md. 336 (1996), a State agency announced that, in evaluating reimbursement rates, it would apply a “growth cap” for certain reimbursable expenses. One of the agency’s providers contested the “growth cap” on grounds that it constituted a “regulation” and was thus subject to APA notice and comment before it became effective. The trial court agreed with the provider and invalidated the cap, but the Court of Appeals reversed. The appellate court began its analysis by noting that the relevant statute and regulations expressly gave the agency authority to implement cost containment measures, and ruled that the agency’s “growth cap” was simply an exercise of that authority, rather than a change in existing law. *Id.* at 347. *See also Maryland Association of HMOs*, 356 Md. at 590-596 (where statute gave agency broad authority to set rates, decision to implement an inflation adjustment system was within the agency’s discretion, was not a “regulation” within the meaning of the APA, and therefore did not

trigger formal rule-making requirements); *Baltimore Gas & Electric Co. v. Public Service Commission*, 305 Md. 145 (1986) (agency decision did not modify existing standards and thus did not constitute rule-making, where statute granted agency discretion to determine if utility plants were operating at “reasonable levels” and agency applied that standard to petitioners’ plants, finding that the plants were not operating at a “reasonable level”).

In this case, as in *Chimes*, *Maryland Association of HMOs*, and *Public Service Commission*, in refusing to decertify the Diebold voting system, the State Board of Elections acted with respect to a matter that is plainly within its statutory discretion. Election Law Article, §§9-101 through 9-103.

Plaintiffs do not allege that the Board acted outside its statutory authority in concluding that the facts do not warrant decertification; rather, they simply disagree with the agency’s view that the existing system is secure and reliable. In *Chimes*, the plaintiffs disagreed with the agency decision to impose limits on reimbursable expenses; in *Maryland Association of HMOs*, the plaintiffs disagreed with the agency decision to use an inflation adjustment system to set rates; and in *Public Service Commission*, the petitioner disagreed with the agency’s application of the “reasonable level” standard to its facilities. In each of these cases, the Court looked to the agency’s statutory mandate, and because the agency decision was made under and consistent with that mandate, the agency action was found to constitute an application of agency authority to a specific matter, rather than the creation of a “new law” or “new standard.” In this case, Election Law Article, §§9-101 through 9-103 grant the State Board of Elections broad authority to certify and decertify voting systems. The Board’s decision not to decertify the Diebold system in response to requests that it do

so did not create new law or alter existing law; it simply constituted an exercise of the agency's statutory authority to decide whether the voting system was secure and reliable.

VI. Plaintiffs State No Claim under Any of the Constitutional Provisions Cited in Their Fifth through Eighth Causes of Action.

The Fifth through Eighth Causes of Action in plaintiffs' Complaint assert a variety of overlapping constitutional claims, none of which states a viable cause of action. The Fifth Cause of Action is the only one based on the federal Constitution. It purports to be brought under 42 U.S.C. §1983, alleges violation or threatened violation of Fourteenth Amendment rights, and invokes "due process rights, the right to vote and the ... right to have [one's] vot[e] uniformly, securely, reliably, and accurately recorded, counted, and able to be recounted." Complaint, pp. 66-67. There are several serious legal flaws that are fatal to this cause of action.

42 U.S.C. §1983 provides a federal cause of action for deprivation of "any rights, privileges, or immunities secured by the Constitution and Laws" of the United States. However, the Constitution and laws of the United States provide no right to have one's vote recorded, counted, or recounted in any particular manner. *Drueding v. Devlin*, 234 F. Supp. 721, 724 (D.Md. 1964), *aff'd*, 380 U.S. 721 (1965)(per curiam), *citing Pope v. Williams*, 193 U.S. 621, 632 (1904) ("the privilege to vote in a state is within the jurisdiction of the state itself, to be exercised as the state may direct, and upon such terms as to it may seem proper, provided, of course, no discrimination is made between individuals, in violation of the Federal Constitution").

As to any contention that defendants' actions violated equal protection or due process rights, similar claims were soundly rejected by the only federal appellate court to have considered the matter to date. In *Weber v. Shelley*, 347 F.3d 1101 (9th Cir. 2003), a case

substantially identical to this one, a voter brought a §1983 action against California election officials, claiming that lack of a voter-verified paper audit trail in a county’s touchscreen voting system violated her rights to equal protection and due process. The United States District Court for the Central District of California granted summary judgment in favor of the defendants, and the United States Court of Appeals for the Ninth Circuit affirmed.

While recognizing that the right to vote is fundamental, the *Shelley* court emphasized that states have “broad leeway in enacting reasonable, even-handed legislation to ensure that elections are carried out in a fair and orderly manner.” *Id.* at 1105. Rejecting the argument that use of a touchscreen voting system is subject to strict scrutiny,¹³ the federal appellate court framed the dispositive question as “whether using a system that brings about numerous positive changes (increasing voter turnout, having greater accuracy than traditional systems, being user-friendly, decreasing the number of mismarked ballots, saving money, etc.), but lacks a voter-verified paper ballot, constitutes a ‘severe’ restriction on the right to vote.” *Id.* at 1106. Answering that question in the negative, the Ninth Circuit concluded that the choice of California election officials to implement a touchscreen system without a voter-verified paper audit trail was constitutionally unobjectionable and should be free from judicial second-guessing. *Id.* at 1107. This Court should do the same.

¹³Plaintiffs appear to concede that defendants’ challenged actions are not subject to strict scrutiny and suggest that those actions cannot survive even deferential “rational basis” scrutiny. Complaint, ¶183. Again, plaintiffs ask this Court to interject itself into the midst of a raging national debate and to second-guess decisions that have been statutorily committed to the defendants and carefully considered by them. This Court should reject the invitation. The Court may judicially notice, for example, the State Board’s publicly available Voting System Security Action Plan, posted on the State Board’s web site at www.elections.state.md.us/pdf/voting_system_security_action_plan.pdf. Maryland Rule 5-201 (judicial notice); 5-803(b)(8)(public records).

With respect to plaintiffs' Seventh Cause of Action, Article 24 of the Maryland Declaration of Rights, although independent of the Fourteenth Amendment and capable of differing interpretation, has most often been interpreted by the Maryland Court of Appeals to apply "in like manner and to the same extent as the Fourteenth Amendment." *Attorney General v. Waldron*, 289 Md. 683, 704 (1981). Indeed, in *Bureau of Mines v. George's Creek Coal & Land Co.*, 272 Md. 143, 156 (1974), the Court of Appeals recognized as settled law that "the decisions of the Supreme Court on the Fourteenth Amendment are practically direct authorities." Plaintiffs' Complaint asserts no basis for interpreting Article 24 of the Declaration of Rights differently than the United States Court of Appeals for the Ninth Circuit interpreted the Fourteenth Amendment in *Weber v. Shelley*. Therefore, both plaintiffs' Fifth and Seventh Causes of Action should be dismissed on the authority and reasoning of *Weber*.

Plaintiffs' Sixth Cause of Action, added in the First Amended Complaint, invokes Article I, §1 of the Maryland Constitution, including specifically "the fundamental right to vote" and the requirement that "[a]ll elections shall be by ballot." This argument was laid to rest 67 years ago in *Norris v. Mayor & City Council of Baltimore*, 172 Md. 667 (1937). In *Norris*, plaintiffs who disapproved of the innovation of voting machines argued that using those machines would violate Article I, §1. However, the Court of Appeals rejected the argument, engaging in an extended discussion of the meaning of the constitutional requirement that elections be "by ballot," and concluding that the language permitted the use of voting machines or any other mechanism offering a secret method of voting, as contrasted with the open or *viva voce* system. This same conclusion has been reached almost

unanimously by courts considering similar language in the constitutions of other states. *See* 66 A.L.R. 855 (1930), and later case supplements.

Not only does a voting machine without a paper ballot or receipt comply with the constitutional requirement that all elections be by ballot, defendants are aware of no authority to support the contention that such a machine is somehow inconsistent with the “fundamental right to vote.” This unsupported claim should be rejected as a matter of law.

Likewise, plaintiffs’ Eighth Cause of Action, another claim added in the First Amended Complaint, is insubstantial as a matter of law. That claim rests on Article 7 of the Maryland Declaration of Rights, which gives every qualified citizen the right of suffrage. Plaintiffs appear to contend that the selection, certification, and implementation of a voting system without a voter-verified paper audit trail denies the right of suffrage “enshrined” in Article 7. However, defendants are aware of no authority whatsoever for that legally questionable claim.¹⁴ The Eighth Cause of Action, as the plaintiffs’ other constitutional causes of action, should be dismissed as a matter of law.

VII. Plaintiffs Abayomi and Fitzgerald, Baltimore City Voters and Candidates, Have No Standing to Challenge a Voting System Not Used in Baltimore City.

Of the eight plaintiffs in this suit, two of them – Kwame Abayomi and Terrence Fitzgerald – are stated in the Complaint to be residents, registered voters, and candidates in Baltimore City. Complaint, ¶¶ 15, 16. However, the Complaint as a whole is aimed at the defendants’ selection, certification, and deployment of the Diebold AccuVote-TS voting system. Baltimore City was “grandfathered” and excused from having to implement the

¹⁴As to both the Sixth and Eighth Causes of Action, the Court can take judicial notice (Maryland Rule 5-201) that mechanical lever voting machines, which included no paper ballot or receipt, were used in Maryland for many years, apparently without anyone arguing, at least successfully, that they infringed on the fundamental right to vote.

Diebold AccuVote-TS voting system until 2006. Chapter 564, Laws of Maryland 2001, §5. The City did not use the Diebold system in the March 2004 primary, and it is not scheduled to use the Diebold system in November 2004. Thus, insofar as this case seeks relief with respect to the November election, plaintiffs Abayomi and Fitzgerald have no standing to bring it.

Because they have no standing as to the November 2004 election, they have no standing as to subsequent elections. If the remaining plaintiffs are successful, the Baltimore City plaintiffs will have no claim for elections after November 2004 because relief will be ordered; and, if the remaining plaintiffs are unsuccessful, the Baltimore City plaintiffs will have no claim for elections after November 2004, because no relief would be justified. Therefore, the Complaint should be dismissed as to the Baltimore City plaintiffs.

Conclusion

For all of the reasons cited above, the Complaint should be dismissed in its entirety. None of the individual alleged causes of action can stand as a matter of law. Some of the named plaintiffs clearly lack standing to assert some or all claims. And most important, the decision being attacked by the plaintiffs is one unmistakably vested in the judgment and discretion of the State Board of Elections; therefore, this Court should not – indeed, it has no jurisdiction to – disturb or second-guess that judgment.

WHEREFORE, defendants Maryland State Board of Elections and Linda H. Lamone request that the Court grant their Motion to Dismiss First Amended Complaint.

Respectfully submitted,

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