

SECOND JUDICIAL DISTRICT COURT
COUNTY OF BERNALILLO
STATE OF NEW MEXICO

PATRICIA ROSAS LOPATEGUI,
CLIFTON R. BAIN, JAMES CASEY REED,
AURORA SANCHEZ, TERRY ASHCOM,
BOB WALSH, LAURA STOKES, and BRUCE BUSH,

Plaintiffs,

vs.

No. _____

REBECCA VIGIL-GIRON, in her
capacity as Secretary of State,
MARY HERRERA, in her capacity
as Bernalillo County Clerk,
DAVE KUNKO, in his
capacity as Chaves County Clerk,
BARBARA CASTILLO, in her
capacity as Colfax County Clerk,
RUBEN CEBALLOS, in his
capacity as Dona Ana County Clerk,
CAROL K. SLOAN, in her capacity
as McKinley County Clerk, J. FRED
VIGIL, in his capacity as Rio Arriba
County Clerk, FRAN HANHART,
in her capacity as San Juan County
Clerk, VALERIE ESPINOZA, in
her capacity as Santa Fe County
Clerk, AUDREY JARAMILLO,
in her capacity as Socorro County
Clerk, JEANETTE G. RAEL, in
her capacity as Taos County Clerk,
and LINDA KAISER, in her
capacity as Torrance County Clerk,

Defendants.

COMPLAINT FOR INJUNCTIVE RELIEF

NATURE OF PLAINTIFFS' CLAIMS

1. This is an action to protect the elective franchise of the plaintiffs and other citizens of New Mexico as guaranteed by the New Mexico Constitution in Article II, § 2 (providing for

popular sovereignty); §8 (protecting elections and the elective franchise), Article VI, §3 (non-abridgment of voting on account of religion, race, language or color), Article VII, §1 (requiring that the legislature provide for the purity of elections and guard against abuse of the elective franchise), and in Article II §18 (providing for equal protection and due process of law).

2. In this action, plaintiff New Mexico voters seek an order of the District Court enjoining the use in New Mexico of the types of voting devices used in the 2004 presidential election that malfunctioned and/or produced demonstrably incorrect tallies of the ballots cast. In addition, plaintiffs seek an order of this Court requiring that the defendant Secretary of State adopt regulations that are reasonably necessary to make the counting of provisional, emergency and absentee ballots uniform throughout the state.

3. In order to substantiate the basis for the relief they request and to preserve the status quo in order to make meaningful relief possible, the plaintiffs seek orders of this Court a) temporarily restraining and then preliminarily enjoining the defendants from “clearing” the election programs, data and other electronic information presently contained within a representative sample of the types of machines and the associated central processing computers into which voting data from the individual voting devices was fed during the course of the 2004 general election, and; b) ordering that computer and voting experts, under the supervision of the court or as agreed upon by the parties, examine the voting devices and central processing devices, their data and associated programs, in order to determine why the devices malfunctioned during the 2004 general election. In the event that the foregoing analysis confirms the level of malfunction and error that is already apparent from the election results in many New Mexico precincts, plaintiffs seek an order enjoining any further use of any types of machines that are

determined by the Court to have failed to produce reliable and verifiable election results and, accordingly, have failed to provide for the purity of New Mexico elections as required by the Constitution and laws of this state.

PARTIES

4. Plaintiff Patricia Rosas Lopategui is a duly qualified New Mexico voter who cast a ballot in the 2004 general election and who wishes to have her vote properly counted and weighted in any forthcoming elections. She is a resident of Bernalillo County and a member of the Democratic Party.

5. Plaintiff Clifton R. Bain is a duly qualified New Mexico voter who cast a ballot in the 2004 general election and who wishes to have his vote properly counted and weighted in forthcoming elections. He is a resident of Taos County. Mr. Bain is a member of the Green Party.

6. Plaintiff James Casey Reed is a duly qualified New Mexico voter who cast a ballot in the 2004 general election and who wishes to have his vote properly counted and weighted in any forthcoming elections. He is a resident of Bernalillo County. Mr. Reed is a member of Democratic Party.

7. Plaintiff Terry Ashcom is a duly qualified New Mexico voter who cast a ballot in the 2004 general election and who wishes to have her vote properly counted and weighted in any forthcoming elections. Ms. Ascom is a resident of Bernalillo County. She is a member of Democratic Party.

8. Plaintiff Aurora Sanchez is a duly qualified New Mexico voter who cast a ballot in the 2004 general election and who wishes to have her vote properly counted and weighted in any

forthcoming elections. Ms. Sanchez is a resident of Santa Fe County. She is a member of the Democratic Party.

9. Plaintiff Laura Stokes is a duly qualified New Mexico voter who cast a ballot in the 2004 general election and who wishes to have her vote properly counted and weighted in any forthcoming elections. Ms. Stokes is a resident of Sandoval County. She is a member of the Democratic Party.

10. Plaintiff Bob Walsh is a duly qualified New Mexico voter who cast a ballot in the 2004 general election and who wishes to have his vote properly counted and weighted in any forthcoming elections. Mr. Walsh is a resident of Santa Fe County. He is a member of the Democratic Party.

11. Plaintiff Bruce Bush is a duly qualified New Mexico voter who cast a ballot in the 2004 general election and who wishes to have his vote properly counted and weighted in any forthcoming elections. Mr. Bush is a resident of Bernalillo County. He is a member of the Libertarian Party.

12. Defendant Rebecca Vigil-Giron is the duly elected Secretary of State of New Mexico. Under N.M. Stat. Ann. § 1-2-1(A), she is the chief election officer of the state and is required to “obtain and maintain uniformity in the application and operation” of the Election Code of New Mexico, to “make rules and regulations...necessary to carry out the purposes of the Election Code” and is required to “bring such actions as deemed necessary and proper for the enforcement” of New Mexico’s election laws. Under N.M. Stats. Ann. § 1-2-2, the Secretary of State is required to supervise all elections, to administer the Election Code and to instruct county clerks regarding the conduct of elections. Accordingly, the relief that plaintiffs seek herein is

appropriately sought from, or imposed upon, the defendant Secretary of State.

13. Defendants Mary Herrera, Dave Kunko, Barbara Castillo, Ruben Ceballos, Carol K. Sloan, Mary D. Quintana, J. Fred Vigil, Fran Hanart, Valerie Espinoza, Audrey Jaramillo, Jeanette G. Rael and Linda Kaiser are the County Clerks for Bernalillo County, Chavez County, Colfax County, Dona Ana County, McKinley County, Otero County, Rio Arriba County, San Juan County, Santa Fe County, Socorro County, Taos County and Torrance County, respectively. Each is charged with the custody of his or her county's voting machines after an election and required to "furnish all necessary protection to see that the transported and stored voting machines are not tampered with or damaged." N.M. Stat. Ann. 1-13-22.

FACTS GIVING RISE TO PLAINTIFFS' COMPLAINT

I. MALFUNCTIONING, MISPROGRAMMED AND/OR DEFECTIVE VOTING DEVICES.

14. The certified results of the 2004 New Mexico general election demonstrate that election devices utilized in the election malfunctioned in ways that were serious and substantial enough to affect the outcome of races in that election, including the race for the President of the United States. Specifically, those results include the following:

- A. The statewide undervote rate in New Mexico was 2.72%. An "undervote" occurs when it appears that a voter has cast a ballot but has not voted for any candidate in a particular race. In contrast to the 2.72% statewide average, the average undervote rate in precincts using push-button Direct Record Electronic (DRE) machines was considerably higher at approximately 5%. In precincts not using these machines, the average percentage of undervotes was approximately 1%.

This disparity suggests that the push-button DRE machines may have failed to record a significant number of lawful votes.

- B. Even more troubling is that the rate of presidential undervotes in precincts using the push-button DRE machines was disproportionately high in Native American and Hispanic plurality counties. In Native American plurality precincts, the percentage of undervotes for ballots cast using the push-button DRE machines averaged approximately 8%, while the undervote rate for other machines was less than 1.5%. In Hispanic plurality precincts, the percentage of undervotes for ballots cast using the push-button DRE machines averaged 6.46%, while the undervote rate for other machines was less than 0.6%. In White plurality precincts, the percentage of undervotes for ballots cast using the DRE machines averaged 3.55%, while the undervote rate for other machines was less than 0.8%. Thus, although the undervote rate was fairly consistent across voter ethnicity when votes were cast using machines other than a push-button DRE, the undervote rate for minority precincts using the push-button DRE machines was approximately twice as high as the rate for white precincts.
- C. Equally troubling is analysis showing that thirty-two precincts across the state reported undervote rates over 10%, with some precincts reporting undervote rates as high as 36.69%. These precincts are located in ten of New Mexico's thirty-three counties, including Bernalillo, Cibola, Colfax, Dona Ana, McKinley, Mora, Sandoval, San Miguel, Santa Fe, and Taos. In one absentee precinct, 207 overseas absentee ballots recorded no presidential votes for an undervote rate of

100%. Furthermore, on Election Day, ninety-one precincts reported undervote rates over 10%, for an overall Election Day undervote rate of 12.65%. These results are strongly indicative of a problem with the push-button DRE machines used in past elections and slated for use in upcoming elections.

- D. Other machines counted more votes for president than the number of ballots cast by voters. In New Mexico, 2,087 presidential votes were reported that had not been cast by voters. This number was calculated by subtracting the number of voters from the number of votes recorded for President in each precinct. The vast majority of these “phantom votes” were reported from early and absentee ballots. One precinct in Dona Ana County reported only 107 absentee ballots, but counted 325 presidential votes. The majority of these “phantom votes” (1,649) were reported from Optical Scan machines, with a particularly high number reported from the Optech 4C. These phantom votes are problematic not only in that they dilute legitimate votes, but also because they mask the problem of undervotes.
- E. Plaintiff Terry Ashcom voted on a paperless DRE voting machine and observed the voting machine change her attempt to vote for a candidate for state office changed into a vote for a different candidate. On information and belief, a number of voters attempted to vote for a particular presidential candidate on Sequoia Edge paperless touch screen machines and, when they did so, the machines treated the vote as for another presidential candidate.

15. The foregoing results demonstrate significant malfunctions and inaccuracy in the recording and tabulation of votes by the following voting systems: the Dahaher Shouptronic

pushbutton DRE, Sequoia Advantage pushbutton DRE, Sequoia Edge touchscreen DRE, Sequoia Optech optical scan and ES&S Optech optical scan voting systems.

16. The foregoing results demonstrate that malfunctioning of voting devices and consequent failure to properly record and tabulate election results is peculiarly associated with areas of high-percentage minority population.

17. As a result of the foregoing malfunctions by the voting machines listed above, plaintiffs were harmed in the following respects:

A. First and foremost, those results demonstrate that plaintiffs' right to "purity of elections" was violated;

B. One or more of the Plaintiffs may have suffered the failure to count their votes for one or more races in which they attempted to vote;

C. Because there are a number of precincts in which "phantom" votes were counted, plaintiffs' votes were necessarily unlawfully diluted;

D. As citizens, plaintiffs are entitled to have confidence that their and their fellow citizens' votes will be properly counted after they are cast, but the results of this election demonstrate that it is likely that they were not;

E. Plaintiffs' right to equal protection of law is violated because there is a significant chance that their votes will be miscounted or not be counted at all;

F. Plaintiffs are damaged because the malfunctioning of the subject voting devices creates more than a remote possibility that persons whom the voters have not actually elected to office will nevertheless be declared winners and will take office, contrary to the will of the people, a situation that the New Mexico Constitution categorically forbids. N.M. Const. Art.

II, Sec. 2 (providing for popular sovereignty).

18. The continued use in New Mexico of the subject voting devices, as permitted and provided by the defendant Secretary of State and defendant county clerks, violates the following provisions of New Mexico's Constitution and laws: New Mexico Constitution Article II, Section 8, providing that "All elections shall be free and open, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage."; Article VII, Section 1, requiring that "The legislature ... enact such laws as will secure ... the purity of elections and guard against the abuse of elective franchise."; Article VI, Section 3, providing, in relevant part, that "The right of any citizen of the state to vote ... shall never be restricted, abridged, or impaired on account of religion, race, language or color ... except as may otherwise be provided in this constitution." In addition, the Due Process and Equal Protection clauses of the New Mexico Constitution guarantee that no "person shall be deprived of life, liberty or property without due process of law; nor shall any person be denied equal protection of the laws." N.M. Const. Art. II, § 18. Finally, N.M. Stat. Ann. § 1-9-4.1 establishes requirements for touch-screen direct recording electronic voting systems to be used in any election for public office in New Mexico; N.M. Stat. Ann. § 1-9-15 lists requirements for electronic voting systems; and the Legislature has also required that the Secretary of State promulgate specifications for computer voting devices that "have as their purpose securing the secrecy of the ballot, protecting against fraud in the voting process, preserving in all respects the purity of elections, [and] facilitating voting by the voters of this state." N.M. Stat. Ann. § 1-9-14(D).

19. Plaintiffs will suffer irreparable harm if the malfunctioning types of machines are utilized in future New Mexico elections, some of which will take place in February, 2005 (school

board elections).

II. NON-UNIFORM TREATMENT OF PROVISIONAL, EMERGENCY AND ABSTENTEE BALLOTS.

20. On many occasions during the November 2004 general election, many New Mexico voters were required - sometimes properly and sometimes improperly - to cast “provisional,” or “emergency” or “in lieu of” ballots. Neither New Mexico law nor the defendants’ regulations or instructions provided for uniform treatment of such ballots. As a result, the votes of electors in one precinct or county who cast a provisional, emergency or “in lieu” ballot would be counted, while the votes of similarly-situated electors in other precincts or counties would not be counted. This had the effect of disenfranchising thousands of New Mexico voters while, at the same time, enfranchising similarly-situated voters.

21. The foregoing injures the plaintiffs because the plaintiffs are entitled to “pure” elections, to “free and open” elections, and to have the outcomes of elections reflect the actual will of the people, as guaranteed by Art. II §2 and §8, and Art. VII § 1 of the New Mexico Constitution. The conduct of elections in New Mexico, insofar as they do not provide for uniform treatment of provisional ballots, deprives the plaintiffs of these rights.

22. Plaintiffs have no adequate remedy at law.

23. The balance of hardships from preserving intact in the voting machines the evidence from the November 2004 general election weighs strongly in plaintiffs’ favor and against the defendant, since the upcoming elections can be conducted easily on paper ballots, without utilizing the subject types of machines.

24. The public interest in preserving intact in the voting machines the evidence from the

November 2004 general election weighs heavily in Plaintiffs' favor.

WHEREFORE, Plaintiffs pray for preliminary injunctive relief, prohibiting the Secretary of State from authorizing the clearing of voting machines used in the 2004 Presidential Election and prohibiting Defendant county clerks and any other persons from unlocking and clearing these machines until such time as this Court has ruled on the substance of the Plaintiff's claims, and for permanent injunctive relief, enjoining the use in New Mexico of the types of voting devices used in the 2004 presidential election that malfunctioned and/or produced demonstrably incorrect tallies of the ballots cast. In addition, plaintiffs seek an order of this Court requiring that the defendant Secretary of State adopt regulations that are reasonably necessary to make the counting of provisional, emergency and absentee ballots uniform throughout the state.

Respectfully submitted,

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