

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.

**PLAINTIFFS' VERIFIED EX PARTE MOTION FOR TEMPORARY
RESTRAINING ORDER AND APPLICATION FOR PRELIMINARY INJUNCTION**

COME NOW, Plaintiffs, by and through their counsel of record, Freedman Boyd Daniels
Hollander & Goldberg P.A. (John W. Boyd), Montoya, Murphy & Garcia (David P. Garcia), and

the Law Offices of Lowell Finley (Lowell Finley), and pursuant to the provisions of Rule 1-066 NMRA 2003, respectfully move this Court for a Temporary Restraining Order and contemporaneously apply for a Preliminary Injunction enjoining Defendants from unlocking, or “clearing” vote results or other data from, voting machines used in the November 2, 2004 statewide general election. As grounds for this Motion, Plaintiffs state as follows:

1. Defendant county clerks have a statutory duty under N.M. Stat. Ann. § 1-13-21(B) to “keep locked those voting machines whereof a recount, judicial inquiry or inspection is sought, subject to order of the district court or other authority having jurisdiction of the contest or inspection.” On November 29, 2004, Presidential candidates David Cobb and Michael Badnarik sought a recount of the 2004 presidential election. Their December 29, 2004, Joint Notice of Appeal of district court orders in litigation connected with that request, Cobb v. State Canvassing Board, et al., First Judicial District Case No. D-0101-CV-2004-02396, is pending in the New Mexico Court of Appeals. Accordingly, only the First Judicial District Court or the Court of Appeals have jurisdiction to authorize the unlocking or clearing of the voting machines, not the Secretary of State, the State Canvassing Board, the county clerks, or other judicial district courts.

2. 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 the voting 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.

4. Plaintiffs will suffer immediate, irreparable harm if a Temporary Restraining Order and Preliminary Injunction do not issue because they will be forever be denied access to evidence of errors and irregularities in the recording and tallying of votes by voting systems used in the November 2, 2004 general election, and the causes of those errors and irregularities, evidence that is essential to the proof of their claims.

5. There exists a substantial likelihood that Plaintiffs will prevail on the merits of this action because of the evidence presented in their experts’ declarations concerning serious and widespread malfunctioning of voting systems and failure to accurately record and tabulate

votes that have violated and will continue to violate Plaintiffs' fundamental voting rights under the New Mexico Constitution unless enjoined by this Court.

6. No harm can inure to Defendants by the issuance of an injunction because this the upcoming school district elections can easily be conducted using paper ballots.

7. In accordance with Rule 1-066(B)(2), undersigned counsel certifies that on January 13, 2005, plaintiffs' counsel John W. Boyd gave telephone notice to Assistant Attorney General David Thomson and plaintiffs' counsel Lowell Finley and David P. Garcia gave telephone notice to defendant Fran Hanhart and her counsel of plaintiffs' intent to seek a temporary restraining order in the Second Judicial District Court on January 14, 2005. There was insufficient time to provide notice to other County Clerk defendants, many of whom were only identified on January 14, 2005, as planning imminent clearance of their voting machines.

WHEREFORE, Plaintiffs move this Court for the issuance of a Temporary Restraining Order prohibiting the Secretary of State and the State Canvassing Board 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, for a hearing on their Application for Preliminary Injunction to convert the Temporary Restraining Order into a Preliminary Injunction within ten (10) days of the issuance of the Temporary Restraining Order, and for such other and further relief as the Court deems just.

Respectfully submitted,

Freedman Boyd Daniels Hollander & Goldberg P.A.

By: _____

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