

FILED

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

WAKE COUNTY 05 CVS 16878

STATE OF NORTH CAROLINA

WAKE COUNTY

JOYCE MCCLOY,

Plaintiff,

v.

THE NORTH CAROLINA STATE
BOARD OF ELECTIONS; LARRY
LEAKE, LORRAINE SHINN, CHARLES
WINFREE, GENEVIEVE SIMS, and
ROBERT CORDLE, Members of the North
Carolina Board of Elections in their official
capacities; THE NORTH CAROLINA
OFFICE OF INFORMATION
TECHNOLOGY SERVICES; and
GEORGE BAKOLIA, North Carolina Chief
Information Officer, in his official capacity,

Defendants.

BY _____

**AMENDED VERIFIED COMPLAINT
FOR WRIT OF MANDAMUS AND
PERMANENT INJUNCTIVE RELIEF
AND MOTION FOR TEMPORARY
RESTRAINING ORDER AND
PRELIMINARY INJUNCTION**

INTRODUCTION

1. Plaintiff, registered voter and taxpayer Joyce McCloy, a resident of Forsyth County, brings this action for a writ of mandamus and injunctive relief to (a) compel Defendants to void the certification of voting systems approved on December 1, 2005, and (b) for Defendant North Carolina Board of Elections to meet its mandatory, non-discretionary statutory obligations to test the source code of proposed voting systems prior to certification as per N.C.G.S. §§ 163-165.7(c), 163-165.7(a)(6), and 163-165.9A(a)(1). Defendants' December 1, 2005, voting equipment certification awards were void as *ultra vires* acts because the Board of Elections failed to perform non-discretionary source code integrity reviews prior to granting certification.

VENUE AND JURISDICTION

2. Venue is proper in Wake County as Defendants are based in Wake County. Jurisdiction in the Superior Court is proper as the action is one for mandamus and equitable relief.

PARTIES

3. Plaintiff Joyce McCloy is a resident of Forsyth County and longtime advocate of transparent, secure, and accurate elections. As a registered voter and taxpayer whose right to vote is directly and adversely affected by Defendant's failure to comply with mandatory, non-discretionary statutory requirements critical to ensuring voting system integrity, Plaintiff has standing.

4. Defendant State Board of Elections is an agency of the State of North Carolina and has overall responsibility for administration of the elections process in North Carolina, including the certification of voting equipment as per the election code for use in the State.

5. Defendant Larry Leake is the Chairman of the North Carolina Board of Elections. He is being sued in his official capacity.

6. Defendant Lorraine Shinn is a member of the North Carolina Board of Elections. She is being sued in her official capacity.

7. Defendant Charles Winfree is a member of the North Carolina Board of Elections. He is being sued in his official capacity.

8. Defendant Genevieve Sims is a member of the North Carolina Board of Elections. She is being sued in her official capacity.

9. Defendant Robert Cordle is a member of the North Carolina Board of Elections. He is being sued in his official capacity.

10. Defendant North Carolina Office of Information Technology Services is an agency of the State of North Carolina and has the responsibility for procurement of information technology products and services for the State of North Carolina.

11. Defendant George Bakolia is the Chief Information Officer for the State of North Carolina. He is being sued in his official capacity.

FACTS AND LAW UNDERLYING THE DISPUTE

12. On August 26, 2005, the North Carolina General Assembly enacted Session Law 2005-323, "An Act to Restore Public Confidence in the Election Process," which changed the legal landscape regarding voting equipment certification. First, the statute immediately decertified all voting equipment previously certified for use in the State before August 1, 2005. *See* N.C.G.S. § 163-165.7(a). Second, the statute imposes a mandatory, non-discretionary obligation on the Board of Elections to perform the following substantive tasks prior to certifying new voting equipment:

- a. Escrow (or obtain access to an approved escrow account that contains) "all software that is relevant to functionality, setup, configuration, and operation of the voting system" for each proposed voting system. *See* N.C.G.S. §§ 163-165.9A(a)(1), 163-165.7(a)(6).
- b. "[R]eview, or designate an independent expert to review, all source code made available by the vendor pursuant to this section and certify only those voting systems compliant with State and federal law. At a minimum, the State Board's review shall include a review of security, application vulnerability, application code, wireless security, security policy and processes, security/privacy program management, technology

infrastructure and security controls, security organization and governance, and operational effectiveness, as applicable to that voting system.” *See* N.C.G.S. § 163-165.7(c).

13. On October 11, 2005, the State Board of Elections issued a Request for Proposal (“RFP”) to certify voting equipment to be used within the state. Instead of establishing a procedure by which Defendants would review before certification the source code of candidate voting systems for the nine criteria identified in N.C.G.S. § 163-165.7(c), Requirement #6 of the RFP required that bidding vendors “must agree to do all of the following as outlined in G.S. 163-165.9A within fifteen (15) working days of the contract award.” Under these procedures identified in the RFP, Defendants would not (and did not) in fact review system code “prior to certification,” defeating the entire point of pre-certification review.

14. On November 4, 2005, voting system vendor Diebold Election Systems (“Diebold”) filed a Complaint for Declaratory Judgment and Motion for Temporary Restraining Order and Preliminary Injunction, asking the Superior Court to exempt it from the escrow requirements of N.C.G.S. § 163-165.9A(a). Diebold’s Complaint was dismissed on November 28, 2005, “pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(1) and 12(h)(3) for lack of subject matter jurisdiction; pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) for failure to state a claim upon which relief can be granted; and pursuant to N.C. Gen. Stat. § 1-253 et. seq. and cases decided under that statute for lack of an actual case or controversy.” *See* Order of Dismissal of November 28, 2005.

15. In both its Complaint and during oral argument before Superior Court Judge Narley Cashwell on November 28, 2005, Diebold represented to the Court that it would be “unable to escrow” a wide range of materials mandated by N.C.G.S. § 163-165.9A(a)(1);

namely,

- (i) information that was never in the custody and control of [Diebold];
 - (ii) information that is no longer in the custody and control of [Diebold]; and
 - (iii) information in which [Diebold] is not legally permitted to disclose and release because it belongs to a third party.
- See, e.g.,* Diebold Complaint at ¶22.

16. On December 1, 2005, in violation of the law, without having first reviewed (or having a designated independent expert review) all of the systems' relevant code as required by N.C.G.S. § 163-165.7(c), the Board of Elections certified the voting systems submitted by three applicants: Diebold, Sequoia Voting Systems ("Sequoia"), and Election Systems & Software ("ES&S").

17. A representative of the Board of Elections publicly stated after certification was granted that "none" of the winning applicants was capable of placing into escrow all of its relevant source code as mandated by North Carolina law. *See, e.g.,* Gary Robertson, "Diebold Among Winning Bidders for N.C. Voting Equipment Sales," Associated Press, Dec. 1, 2005, at <<http://www.charlotte.com/mld/observer/news/local/13304893.htm>>.

18. The Board of Elections has informed the three winning vendors that they can begin selling their now-certified voting systems if the vendors are able to escrow their relevant source code by December 22, 2005. *See, e.g.,* Anne Broache, "North Carolina Defends E-voting Certifications," CNET News.com, December 2, 2005, at <http://news.com.com/North+Carolina+defends+e-voting+certifications/2100-1028_3-5980671.html>.

19. In addition to the systems certified on December 1, 2005, the Board of Elections is considering certifying other voting systems pursuant to N.C.G.S. § 163-165.7 in January of 2006. *See, e.g.,* Andrew Mackie, "Catawba County's New Voting Machines Obsolete?" Hickory

Daily Record, Dec. 1, 2005, at

<http://www.hickoryrecord.com/servlet/Satellite?pagename=HDR/MGArticle/HDR_BasicArticle&c=MGArticle&cid=1128768481947&path=>.

20. While administrative procedures exist by which a vendor can protest a decision not to certify its own proposed system, no procedures exist by which a voter or a vendor can protest an improper or illegal certification award made by Defendants.

FIRST CAUSE OF ACTION: MANDAMUS

21. Plaintiff incorporates the allegations of paragraphs 1-20 as set forth above.

22. A writ of mandamus is an extraordinary remedy to provide a swift enforcement of a party's already-established legal rights. *See Holroyd v. Montgomery County*, 167 N.C.App. 539, 543 (2004); *Steele v. Locke Cotton Mills*, 231 N.C. 636, 639 (1950). "Mandamus is the proper remedy to compel public officials to perform a purely ministerial duty imposed by law." *Buckland v. Town of Haw River*, 141 N.C.App. 460, 462 (2000); *see also Moody v. Transylvania County*, 271 N.C. 384, 390 (1967); *Holroyd*, 157 N.C. App. at 543. Moreover, a writ of mandamus is proper where there is no other legal remedy. *See Young v. Roberts*, 252 N.C. 9, 17, (1960); *Northfield Development Co., Inc. v. City of Burlington*, 165 N.C.App. 885 (2004).

23. Mandamus uses the *in personam* contempt power of the Court to coerce public officers to perform a plain duty. *See Ragan v. County of Alamance*, 98 N.C.App. 636, 639 (1990) (overturned on other grounds); *Orange County v. N.C. Dept. of Transp.*, 46 N.C.App. 350, 384- 85 (1980). The power of the Courts to issue such orders is bestowed by Article IV, § 1 of the North Carolina Constitution. *See Ragan*, 98 N.C.App. at 639; *Orange County*, 46 N.C.App. at 385.

24. An agency of expressly limited power, the Board of Elections only had the statutory authority to certify voting systems if both the systems and the actions of the Board complied with state law:

Only voting systems that have been certified by the State Board of Elections in accordance with the procedures and subject to the standards set forth in this section and that have not been subsequently decertified shall be permitted for use in elections in this State.

N.C.G.S. § 163-165.7(a) (emphasis added).

25. The Board of Elections has the mandatory, non-discretionary duty to escrow (or obtain access to an approved escrow account) and review all of relevant source code relevant to functionality, setup, configuration, and operation of the proposed voting system prior to certification: “[R]eview, or designate an independent expert to review, all source code made available by the vendor pursuant to this section and certify only those voting systems compliant with State and federal law. At a minimum, the State Board's review shall include a review of security, application vulnerability, application code, wireless security, security policy and processes, security/privacy program management, technology infrastructure and security controls, security organization and governance, and operational effectiveness, as applicable to that voting system.” *See* N.C.G.S. §§ 163-165.7(c), 163-165.7(a)(6), and 163-165.9A(a)(1).

26. The Board of Elections has exceeded its statutory authority and breached its mandatory, non-discretionary statutory duties by failing to (a) require voting systems vendors to escrow “all software that is relevant to functionality, setup, configuration, and operation of the voting system” for each proposed voting system; and (b) prior to certification, review “all source code made available by the vendor pursuant to this section and certify only those voting systems compliant with State and federal law.” *See* N.C.G.S. §§ 163-165.7(c), 163-165.7(a)(6), and 163-165.9A(a)(1).

27. Plaintiff is entitled to a writ of mandamus from this Court, declaring void the *ultra vires* voting system certifications awarded by Defendants on December 1, 2005, and forcing Defendants to comply with their non-discretionary, ministerial statutory obligations found in N.C.G.S. §§ 163-165.7(c), 163-165.7(a)(6) and 163-165.9A(a)(1) before certifying any voting systems.

SECOND CAUSE OF ACTION: INJUNCTIVE RELIEF

28. Plaintiff incorporates the allegations of paragraphs 1-27 as set forth above.

29. Plaintiff is entitled to temporary, preliminary, and permanent injunctive relief from this Court, declaring void the *ultra vires* voting equipment certifications awarded by Defendants on December 1, 2005, and forcing Defendants to prospectively comply with their non-discretionary, ministerial statutory obligations found in N.C.G.S. §§ 163-165.7(c), 163-165.7(a)(6) and 163-165.9A(a)(1).

**MOTION FOR TEMPORARY RESTRAINING ORDER
AND PRELIMINARY INJUNCTION**

30. Plaintiff incorporates the allegations of paragraphs 1-29 as set forth above.

31. As set forth above, Defendants are obligated to comply with non-discretionary, ministerial statutory obligations to (a) require voting systems vendors to escrow “all software that is relevant to functionality, setup, configuration, and operation of the voting system” for each proposed voting system; and (b) prior to certification, review “all source code made available by the vendor pursuant to this section and certify only those voting systems compliant with State and federal law.” See N.C.G.S. §§ 163-165.7(c); 163-165.7(a)(6); 163-165.9A(a)(1).

32. As demonstrated above, Plaintiff has a substantial likelihood of success on the merits.

33. The threatened and actual injury to Plaintiff – the approval of unqualified voting

systems in direct violation of critical statutory provisions specifically designed to protect Plaintiff's right to vote – outweighs any potential injury to the Defendants. Moreover, the cost to Defendants will be much higher if Defendants are permitted to illegally certify voting equipment and then be required at some point in the future to decertify such systems and force North Carolina counties to return equipment purchased on the basis of that illegal certification.

RELIEF REQUESTED

WHEREFORE, Plaintiff prays for the following relief:

34. That the Court declare invalid the voting equipment certifications announced on December 1, 2005.

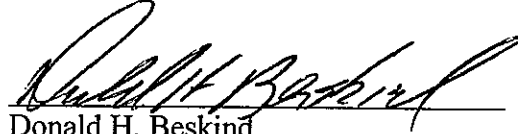
35. That the Court temporarily and immediately restrain and enjoin Defendants during the pendency of this action from certifying any voting system unless Defendants fully comply with the pre-certification source code escrow and review duties of N.C.G.S. §§ 163-165.7(c), 163-165.7(a)(6), and 163-165.9A(a)(1).

36. That the Court grant a writ of mandamus and permanent injunctive relief requiring Defendants to perform – before voting equipment certification is granted and a contract is awarded that permits a prospective vendor to sell voting systems for elections in the State – the pre-certification source code escrow and review duties of N.C.G.S. §§ 163-165.7(c), 163-165.7(a)(6), and 163-165.9A(a)(1) for any voting equipment bid that otherwise complies with their Voting System RFP and State and federal law.

37. That the Court grant any further relief that it deems appropriate.

Respectfully submitted this the 19th day of December, 2005.

TWIGGS, BESKIND, STRICKLAND
& RABENAU, P.A.



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(05 CVS 15474, Wake County)

Counsel for Plaintiff

STATE OF NORTH CAROLINA

Forsyth COUNTY

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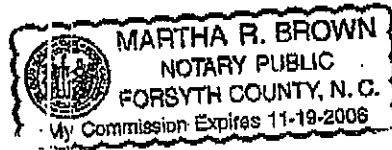
VERIFICATION

Joyce McCloy, being duly sworn, deposes and says that she is over eighteen years of age and that she is competent to make this Verification; she has personal knowledge of the matters set forth in the Verified Complaint; she has had read the Verified Complaint and finds that the comments are true to the best of her knowledge, information, and belief.

Joyce McCloy
Joyce McCloy

Sworn to and subscribed before me
this 19th day of December 2005

Martha R. Brown
Notary Public



My commission expires: 11-19-2006