NORTH CAROLINA

WAKE COUNTY

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IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
05 CVS 16878

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.

SUPPLEMENTAL MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S PETITION FOR WRIT OF MANDAMUS

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I. INTRODUCTION

Plaintiff Joyce McCloy – a voter and taxpayer from Forsyth County – seeks a writ of mandamus requiring the Defendants – the state Board of Elections, the Office of Information Technology Services, and respective officers[1] – to comply with state law obligating them to pre-screen the source code[2] of voting systems prior to certification.

The Court has requested this supplemental briefing so that the parties may more fully address issues raised in an initial hearing that took place on December 14, 2005. These issues include whether a bond is appropriate, the appropriateness of mandamus relief, the effect of sovereign immunity, and Plaintiff's standing. As will be seen below, Plaintiff has standing and no procedural question raised at the previous hearing bars her case: no bond is appropriate and sovereign immunity does not apply. In addition, mandamus is the appropriate relief to grant here where agencies failed to perform ministerial, non-discretionary tasks.

Plaintiff respectfully submits that only two substantive questions face this Court as it determines whether Plaintiff's writ of mandamus should be granted:

1. *Before certification*, did the vendors provide the Board of Elections (or a designated independent expert) access to *all* source code that is "relevant to functionality, setup, configuration, and operation of the voting system?"

2. Did the Board of Elections (or a designated independent expert) review that source code for the nine minimum categories required by the statute prior to certification?

As discussed below, if the answer to either of these questions is no, Defendants have failed to comply with North Carolina's election code and mandamus relief is appropriate.

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[1] Plaintiff amended her Complaint on December 19, 2005, to add Board of Election members Larry Leake, Lorraine Shinn, Charles Winfree, Genevieve Sims, and Robert Cordle and North Carolina Chief Information Officer George Bakolia in their official capacities.

[2] A glossary of technology terms is attached as Exhibit 1 to the Declaration of David Dill.

Plaintiff argues that this is indeed the case.

II. THE LAW

Listed below are the relevant portions of the statutory provisions at issue in this case.[3] Together, the statutes create a non-discretionary obligation on the part of the Board of Elections to review, *prior to certification*, all source code "relevant to functionality, setup, configuration, and operation of the voting system" for nine characteristics.

> **§ 163-165.9A(a).** Every vendor that has a contract to provide a voting system in North Carolina **shall** do all of the following: (1) The vendor shall place in escrow with an independent escrow agent approved by the State Board of Elections all software that is relevant to functionality, setup, configuration, and operation of the voting system, including, but not limited to, a complete copy of the source and executable code, build scripts, object libraries, application program interfaces, and complete documentation of all aspects of the system including, but not limited to, compiling instructions, design documentation, technical documentation, user documentation, hardware and software specifications, drawings, records, and data. [emphasis added]
>
> **§ 163-165.7 (a)(6).** With respect to all voting systems using electronic means, that the vendor provide access to all of any information required to be placed in escrow by a vendor pursuant to G.S. 163-165.9A for review and examination by the State Board of Elections; the Office of Information Technology Services; the State chairs of each political party recognized under G.S. 163-96; the purchasing county; and designees as provided in subdivision (9) of subsection (d) of this section.
>
> **§ 163-165.7 (c).** **Prior to certifying a voting system**, the State Board of Elections **shall** review, 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. [emphasis added]

[3] Session Law 2005-323 is included as Exhibit A.

III. THE FACTS

The following relevant facts are not in dispute:

1. On October 11, 2005, the State Board of Elections and the Office of Information Technology Services issued a Request for Proposal ("RFP") regarding the certification of voting equipment to be used within the state.[4]

2. The RFP demanded that vendors wanting to sell voting equipment in the state must provide *all* relevant source code to the Board of Elections.

3. The RFP failed to demand that this relevant source code be reviewed *prior to certification.*

4. The RFP instead informed bidding vendors that they must agree to place into escrow within 15 working days of the contract award, among other things, all source code "that is relevant to functionality, setup, configuration, and operation of the voting system." The RFP also informed vendors that they must agree to "provide access to all of any information required to be placed in escrow…"[5]

5. On December 1, 2005, the Board of Elections certified voting systems submitted by two vendors, Diebold Election Systems ("Diebold") and Election Systems & Software ("ES&S").[6]

6. Neither the Board of Elections nor any other designated independent expert reviewed (for the characteristics listed in N.C.G.S. § 163-165.7(c)) the source code of all of the

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[4] North Carolina Office of Information Technology Services Request for Production No. ITS-002724 ("RFP") is included as Exhibit B.

[5] RFP (Exhibit B) at Technical Requirements #6, 7.

[6] *See, e.g.*, Attachment D to Defendants' Memorandum of Law in Response to the Plaintiff's Motion (North Carolina State Board of Elections Transcript of Meeting of Thursday, December 1, 2005), submitted December 14, 2005, at pp. 38-62. A third vendor, Sequoia Voting Systems, was conditionally certified but has subsequently dropped its bid.

relevant software used in the now-certified systems prior to certification.

7. The Board of Elections has cited the work of a federally-accredited Independent Testing Authority ("ITA") "as an independent expert in fulfilling the mandate that all source code made available by a vendor seeking certification of a voting system be reviewed."[7]

8. The ITA voting equipment certification process does not include a review of the source code of unmodified "commercial-off-the-shelf" ("COTS") software like Windows CE and Adobe Acrobat, software used in the voting systems of Diebold and ES&S, respectively.[8]

9. To the extent that a source code review *is* performed as part of the standard ITA voting equipment certification process, this review does not include all of the tests mandated by N.C.G.S. § 163-165.7(c). Instead, the ITA source code review process is limited to (1) comparing the source code to the vendor's software design documentation, and (2) testing "selection of programming languages, software integrity, software modularity and programming, control constructs, naming conventions, coding conventions, and comment conventions."[9]

IV. ARGUMENT – PROCEDURAL

The Court has asked the parties to brief a number of procedural issues, including whether a bond is appropriate, the appropriateness of mandamus relief, the effect of sovereign immunity, and Plaintiff's standing. None of these issues bar Plaintiff's suit from proceeding.

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[7] *See, e.g.*, Attachment C to Defendants' Memorandum of Law in Response to the Plaintiff's Motion (Order Appointing Independent Expert for Code Review Pursuant to G.S. 163-§165.7(c)), submitted December 14, 2005, at p.2.
[8] *See, e.g.*, Declaration of Aviel Rubin In Support of Plaintiff's Petition for Writ of Mandamus at ¶ 8; Declaration of Doug Jones In Support of Plaintiff's Petition for Writ of Mandamus at ¶ 6; U.S. Election Assistance Commission, "Voting Systems Performance and Test Standards: An Overview," attached as Exhibit C. *See also* 2002 FEC Voting Systems Standards Vol. I § 4, attached as Exhibit D, at § 4.1.1: "Unmodified software is not subject to code examination…"
[9] *See* 2002 FEC Voting Systems Standards Vol. I § 4 (Exhibit D) at § 4.1; 2002 FEC Voting Systems Standards Vol. II § 5, attached as Exhibit E at § 5.4.

A. A Bond is Not Appropriate In This Case.

In their December 14, 2005 brief, Defendants claimed that North Carolina counties would have to repay money already distributed by the federal government if this Court granted a preliminary injunction and Defendants are subsequently successful in defending the lawsuit. Specifically, Defendants argued that thirteen counties (who were obligated to replace older outdated punch-card and lever voting machines) must arguably purchase new federally-compliant equipment before an imminent federal deadline of January 1, 2006. *See, e.g.*, 42 U.S.C. §§ 15302, 15481. Therefore, argues Defendants, a bond of $893,822 is required.

Defendants are incorrect. The deadline is not January 1, 2006, but with the waiver the State received in 2003, the deadline is the "first election for Federal office held after January 1, 2006. Therefore, no bond is appropriate since this Court will have ample time to rule on the merits without the need for preliminary relief.

1. Federal Law Will Not Require Defendants or North Carolina Counties to Forfeit Any Money.

Defendants have misconstrued the federal deadline. Pursuant to 42 U.S.C. § 15302, any county that received federal HAVA funds and to replace punch-card or lever voting machines (and that received an appropriate waiver in 2003) must do so *in time for the first election for Federal office held after January 1, 2006:*

> Waiver -- If a State certifies to the Administrator not later than January 1, 2004, that the State will not meet the deadline described in subparagraph (A) for good cause and includes in the certification the reasons for the failure to meet such deadline, the State shall ensure that all of the punch card voting systems or lever voting systems in the qualifying precincts within that State will be replaced in time for the first election for Federal office held after January 1, 2006. [emphasis added]

42 USC § 15302.

Defendants have cited no valid potential costs or damages that the State or counties may incur as a result of any form of preliminary relief. Consequently, an injunction is not appropriate.

2. No Material Facts are In Dispute.

In addition, as discussed above and below, no material facts are in dispute. As such, preliminary relief is unnecessary and the court can make a final decision on mandamus.

B. Mandamus is the Appropriate Action to Compel Government Officials to Perform Non-Discretionary Duties.

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, sounding in common law,[10] to compel public officials to perform a non-discretionary, ministerial duty imposed by law, where there is no other adequate remedy. *See Hamlet Hospital and Training School for Nurses, v. Joint Committee on Standardization*, 234 N.C. 673, 680 (1952); *North Carolina v. Bowes*, 159 N.C. App. 18, 28 (2003) (dissenting opinion); *see also Buckland v. Town of Haw River*, 141 N.C.App. 460, 462 (2000); *Moody v. Transylvania County*, 271 N.C. 384, 390 (1967); *Holroyd*, 157 N.C. App. at 543.

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[10] In North Carolina, the writ began as a common law action (*see Tucker v. Justices of Iredell*, 46 N.C. 451, 459 (1854)), codified in 1836 (*see State v. King*, 23 N.C. 22, 23 (1840) and later significantly amended in 1872 (*see* 1872 N.C. Sess. Laws ch. 1234, § 3). Statutory authority for the special remedy of mandamus was repealed in 1970, although the legislation specified that the repeal did not constitute a repeal of the common law right (*see* 1967 N.C. Sess. Laws ch. 954 § 7). The North Carolina Supreme Court quickly confirmed that there was no "practical difference in the results to be obtained by the common-law remedy of mandamus and the equitable remedy of mandatory injunction[,]" and that the writ of mandamus therefore remains available as an extraordinary remedy issued by a court of competent jurisdiction to command the performance of a specified official duty issued by law. *Sutton v. Figgatt*, 280 N.C. 89, 92 (1971); *see also Holroyd*, 167 N.C. App at 543. In short, "the remedy formerly provided by the writ of mandamus is still available … and the substantive grounds for granting the remedy as developed under our former practice still control." *Fleming v. Mann*, 23 N.C. App. 418, 420 (1974) (citation omitted); *see also Bowes*, 159 N.C. App. at 28.

Mandamus uses the *in personam* contempt power of the court to coerce an individual public officer to perform a plain duty. *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). "[R]egardless of which theory or legal fiction is used, the courts of this State have the power, pursuant to Article IV, Section 1 of the North Carolina Constitution, to issue *in personam* orders requiring public officials to act in compliance with their ministerial or non-discretionary public duties." *Orange County*, 46 N.C.App. at 385. *See also Ragan*, 98 N.C.App. at 639 (1990).

North Carolina courts have no discretion to refuse the writ when it is sought to enforce a clear legal right to which a Plaintiff is entitled. *Sutton v. Figgatt*, 280 N.C. 89, 93 (1971).

C. Sovereign Immunity Does Not Bar Mandamus Actions.

Sovereign immunity is no bar to a mandamus action aimed at requiring a public officer to perform a duty imposed by law. *See Ragan v. County of Alamance,* 330 N.C. 110, 112, 408 S.E.2d 838, 839 (1991) ("In light of the fact that we held that the County Commissioners under certain circumstances were subject to a writ of mandamus to construct or repair courthouse facilities, the doctrine of sovereign immunity does not bar this action").

The North Carolina Supreme Court so held in *In re Alamance County Court Facilities,* 329 N.C. 84, 405 S.E.2d 125 (1991). In that case, the Supreme Court specifically approved the use of a writ of mandamus to compel county commissioners to perform their statutory duty of providing suitable court facilities. *See id.,* 329 N.C. at 105-06. According to the Court, "[b]y virtue of their being a co-ordinate department of the government, courts of this state are empowered to issue *in personam* orders requiring public officials to act in compliance with their … public duties." *Id.*, 329 N.C. at 107 (internal quotations and citations omitted). Moreover,

both the Court of Appeals and Supreme Court reiterated this same point in subsequent proceedings in the case. *See Ragan v. County of Alamance,* 330 N.C. 110, 112 (1991); *Ragan v. County of Alamance,* 98 N.C.App. 636, 640 (1990).

The inapplicability of sovereign immunity to mandamus actions is rooted in the well-established principle that such actions are not against the State at all, but are rather an expression of the court's *in personam* contempt powers directed at a public official who is flouting the express instructions of the State. *See Houston v. Ormes,* 252 U.S. 469, 472-73 (1920) ("It is settled that in [a mandamus] case a suit brought by the person entitled to the performance of the duty against the official charged with its performance is not a suit against the government"); *accord Simmat v. U.S. Bureau of Prisons,* 413 F.3d 1225, 1234 (10th Cir. 2005). *See also Orange County*, 46 N.C.App. at 385; *Ragan*, 98 N.C.App. at 639.

D. Plaintiff Has Standing to Seek Mandamus Relief.

Standing consists of three main elements: (1) injury in fact – an invasion of a legally protected interest that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury must be fairly traceable to the challenged action of the defendant; and (3) it must likely that the injury will be redressed by a favorable decision. *Neuse River Found., Inc. v. Smithfield Foods, Inc.*, 155 N.C.App. 110, 114 (2002) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, (1992) (citations omitted)).

Plaintiff Joyce McCloy is a taxpayer and registered voter of Forsyth County and is entitled to bring the immediate action challenging the failure of the Defendants to perform their non-discretionary duties under North Carolina law, duties that directly impact Plaintiff's right to vote. The paramount importance of the right to vote in North Carolina is apparent given that three of the first eleven sections of the State's Constitution – Sections 9, 10, and 11 – all concern

this fundamental right. Moreover, the harm caused by Defendants' failure is not remote. Defendants' failure to subject all proposed voting systems to the legislatively-mandated level of scrutiny means that Plaintiff will be forced to cast her ballot on an illegal voting machine, one whose source code has not been screened for vulnerabilities. That failure imperils Plaintiff's ballot in contradiction to the wishes of the General Assembly in that a machine is more likely to – using examples of malfunctions that have been reported in electronic voting systems in recent years – eliminate her ballot entirely or reduce its importance by counting votes that were not actually cast.

Plaintiff has standing in two separate ways: Plaintiff's interests as both a voter and as a taxpayer are directly harmed by Defendants' actions.

1. Plaintiff's Interests Are Harmed By Defendants' Illegal Actions.

As a voter, Plaintiff has standing as a member of the intended beneficiary class.

The U.S. Supreme Court has held that standing is satisfied when the injury asserted by a plaintiff "[a]rguably [falls] within the zone of interests to be protected or regulated by the statute ... in question." *Federal Election Comm'n v. Akins*, 524 U.S. 11 (1998); *National Credit Union Admin. v. First Nat. Bank & Trust Co.*, 522 U.S. 479, 488 (1998). For example, in *Federal Election Comm'n v. Akins*, the Court upheld the standing of voters who sought review of the Federal Election Commission's refusal to compel the American Israel Public Affairs Committee to register as a "political committee." The Court identified plaintiffs' injury as the failure to obtain relevant information that would help them evaluate candidates for public office, especially candidates who received assistance from the Committee. As noted by Justice Breyer, "the informational injury at issue here, directly related to voting, the most basic of political rights, is sufficiently concrete and specific such that the fact that it is widely shared does not deprive

Congress of constitutional power to authorize its vindication in the federal courts." *Akins*, 524 U.S. at 24-25.

(a) The Right to Vote is a Fundamental Right.

Not only is Plaintiff's interest – the right to vote and the right to have that vote counted – an interest recognized by the courts, it is indeed a fundamental right. The United States Supreme Court holds that the right to vote is a "fundamental political right," the deprivation of which triggers strict scrutiny. *See*, e.g., *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972). Moreover, the Supreme Court has found that "where fundamental rights and liberties are asserted [...] classifications which might invade or restrain them must be closely scrutinized and carefully confined." *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 670 (1966).

(b) Increasing the Risk That Plaintiff May Be Miscounted In Violation of the Law Is a Cognizable Injury.

Notably, courts have held that the selection of voting equipment and procedures which increase the *risk* to the right to vote can establish a Constitutional violation. *See, e.g., Black v. McGuffage*, 209 F.Supp.2d 889, 902 (N.D. Ill. 2002) (use of punch card voting systems with higher error rates than other equipment in minority neighborhoods would establish an Equal Protection violation); *Common Cause v. Jones*, 213 F.Supp.2d 1106 (C.D.Cal.2001) (use of punch card voting systems with higher error rates than other equipment in some counties would establish an Equal Protection violation). As in these cases, Defendant's failure to fully review applicant systems for security flaws and vulnerabilities will necessarily lead to Plaintiff being forced to vote on equipment more likely to misread or lose her vote than permitted by the General Assembly's clear mandate.

(c) North Carolina Courts Recognize Mandamus Standing When Statutes Impact Individual Interests.

North Carolina courts have applied a similar test ruling on mandamus cases, including voting-related cases. In *Lloyd v. Babb*, registered voters sought a writ of mandamus against the Orange County Board of Elections, alleging that the Board had systematically violated and were continuing to violate state election laws by registering nonresidents. *Lloyd v. Babb*, 296 N.C. 416, 428 (1979). Defendants moved to dismiss for failure to state a claim. The Court in *Lloyd* noted that the defendants had not challenged the plaintiffs' standing and went on to hold that the plaintiffs had stated a cognizable claim. Like the *Lloyd* plaintiffs, Ms. McCloy is a registered voter who seeks nothing more than to "require election officials to perform their legal duties." *Id.* at 428.

In the non-voting context, North Carolina courts regularly find that the standing requirement is met in the event that the plaintiff is an intended beneficiary of – or directly affected – by the statute.[11] In *Stocks v. Thompson*, 1 N.C.App. 201, 207 (1968), as directly relevant to the immediate case as *Lloyd*, the Court of Appeals permitted the plaintiff to seek a writ of mandamus requiring a defendant agency to review specific categories of information as part of its decision-making process. *Stocks* involved a resident of Columbus County who challenged the decision of county officials who were required by statute to include tobacco allotments as an element of real estate valuation and for tax purposes. The Court denied a motion to dismiss, implicitly finding that plaintiff had standing, and holding that if the allegations were proven to be true then a writ of mandamus would be issued. Like the *Stocks*

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[11] *See, e.g., Multimedia Publishing of North Carolina, Inc. v. Henderson County*, 145 N.C.App. 365 (2001) (publisher had standing to seek writ of mandamus ordering county to produce minutes from board of commissioners meeting); *In re Annexation Ordinance No. 300-X*, 304 N.C. 549 (1981); *Safrit v. Costlow*, 270 N.C. 680 (1967) (land owners in territory annexed by municipality had standing to seek writ of mandamus forcing municipality to follow through with its service plans); *Midgette v. Pate*, 94 N.C.App. 498 (1989) (property owner had standing to seek writ of mandamus for enforcement of neighbor's alleged zoning and protective covenant violations).

plaintiff, Ms. McCloy is asking that a governmental agency be forced to perform its non-discretionary duty to review certain information as part of its decision-making process.

2. Plaintiff Has Standing as a Taxpayer Directly Harmed By Defendants' Actions and As a Member of a Class Prejudiced by Defendants' Failure to Follow the Statute.

The general rule that a taxpayer has no standing to challenge questions of general public interest that affect all taxpayers does not apply where a taxpayer shows that the challenged action will cause her to personally sustain direct and irreparable injury or where she is a member of a class prejudiced by operation of the statute. *See Texfi Industries v. Fayetteville*, 44 N.C.App. 269, 270 (1979); *Nicholson v. State Education Assistance Authority*, 275 N.C. 439, 448 (1969); *Appeal of Martin*, 286 N.C. 66 (1974). Plaintiff meets this standing requirement.

In *Orange County v. N.C. Dept. of Transportation*, plaintiffs – including citizens, taxpayers, and residents of Orange and Durham Counties who lived near a proposed highway – were found to have standing to bring a mandamus action to challenge an agency's failure to prepare an environmental impact statement prior to approving the project. The court found that the "procedural injury" – the failure to prepare an environmental impact statement as required by the statute – "is itself a sufficient 'injury in fact' to support standing as 'aggrieved parties' under the statute" as long as plaintiffs had a sufficient nexus (in this case a geographical one) with the challenged project. *Orange County v. N.C. Dept. of Transp.*, 46 N.C.App. 350, 361 (1980).

As in *Orange County*, Plaintiff in the immediate case has suffered a similar "procedural injury" inflicted by an agency failure to comply with mandatory procedures designed to protect a class to which she belongs. And also as in *Orange County*, Plaintiff has a sufficient "nexus": without mandamus relief, Plaintiff will be forced to use a voting system in her individual polling place that has not been mandatorily screened as per the statute.

E. Preliminary Relief is Appropriate In This Case.

A preliminary injunction will be issued (1) if a plaintiff is able to show likelihood of success on the merits of his case, and (2) if a plaintiff is likely to sustain irreparable loss unless the injunction is issued, or if, in the opinion of the Court, issuance is necessary for the protection of a plaintiff's rights during the course of litigation. *See Redlee/SCS, Inc. v. Pieper*, 153 N.C.App. 421, 423 (2002) (quoting *A.E.P. Industries v. McClure*, 308 N.C. 393, 401 (1983)).

Defendants are obligated to comply with non-discretionary, ministerial statutory obligations to (a) obtain access to the source code of "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).

As shown below, Plaintiff has a substantial likelihood of success on the merits. Moreover, 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.

V. ARGUMENT – SUBSTANTIVE

A. The Board of Elections Failed to Perform Its Non-Discretionary Pre-Certification Duties.

1. The Board of Elections Did Not Review All Relevant Source Code Prior to Certification.

The election code imposes a duty on the Board of Elections to, prior to certification, review the source code for "all software that is relevant to functionality, setup, configuration, and operation of the voting system." N.C.G.S. §§ 163-165.9A(a)(1), 163-165.7(a)(6), and 163-

165.7(c). The Board of Elections has not met that obligation.

Neither certified vendor provided access to all of its source code for review prior to certification, contrary to the demands of the statute. *See* N.C.G.S. §§ 163-165.7(a)(6), and 163-165.7(c). Three days before certification was granted, vendor Diebold represented to the Superior Court in a related case that it had not and could not provide access to all of the source code used in its system.[12] Similarly, vendor ES&S apparently did not submit all of the source code for third party software of its own.

The Board of Elections did not review all of the source code prior to certification, in violation of the statute. *See* N.C.G.S. § 163-165.7(c). Neither the Board's own certification panel nor the federally-accredited ITAs reviewed all of the system's source code as required by law. The ITAs as a matter of policy do not review commercial-off-the-shelf software that both systems contain;[13] similarly, the Board's certification panel was not provided with the source code for all commercial-off-the-shelf software prior to certification. Moreover, even if the source code for commercial-off-the-shelf software was made available to the Board of Elections

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[12] *See, e.g.,* Transcript from Diebold v. Board of Elections Superior Court Hearing, November 28, 2005, attached as Exhibit F, at pg.11: "Diebold doesn't have the source code to escrow from some of that software, or some of those third party vendors like Microsoft Windows. Even if we had the source code and the executables, there would be licenses that were executed between Diebold and a third party that may prevent the disclosure or the escrow of this information"; *see also* Diebold Complaint, attached as Exhibit G, at ¶22: Diebold asserted that it would be "unable" to escrow the following materials: "(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."

[13] *See, e.g.,* Declaration of Aviel Rubin In Support of Plaintiff's Petition for Writ of Mandamus at ¶ 8; Declaration of Doug Jones In Support of Plaintiff's Petition for Writ of Mandamus at ¶ 6; U.S. Election Assistance Commission, "Voting Systems Performance and Test Standards: An Overview" (Exhibit C). *See also* 2002 FEC Voting Systems Standards Vol. I § 4 (Exhibit D) at § 4.1.1: "Unmodified software is not subject to code examination..."

for review prior to certification, Defendants apparently did not review it.[14]

2. The Board of Elections Did Not Perform All Relevant Source Code Tests.

In addition to failing to review all of the relevant source code, the Board of Elections and its designated independent experts have (based on all of the information about the confidential certification process that the Board has released) has apparently not performed all of the tests required by the statute. N.C.G.S. § 163-165.7(c) requires that:

> 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.

The ITA process, on the other hand, simply does not include all or even most of these tests. Instead, the ITA certification process includes a handful of design principles aimed more at standardizing the process of programming than at performing a substantive quality review of a voting system.[15] In any event, the statutory minimum source code tests required of all software – commercial-off-the-shelf or otherwise – are not part of the ITA process.[16]

B. Mandamus is Appropriate Relief to Compel the Board of Elections to Review All Relevant Source Code As Per the Statute.

Mandamus is the proper remedy to compel public officials to perform a non-discretionary, ministerial duty imposed by law, where there is no other adequate remedy. Having failed to perform its non-discretionary, ministerial statutory duties to review all relevant

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[14] *See* Transcript for *McCloy v. Board of Elections* Superior Court Hearing of December 14, 2005, attached as Exhibit H, at p.51: "But because [third party software] often [is] tangential to the application code that actually operates the machinery, in order to get certification, the State Board does not have to analyze the source code of [...] these third-party, off-the-shelf vendors."
[15] *See* 2002 FEC Voting Systems Standards Vol. I § 4 (Exhibit D) at § 4.1.
[16] *See* Memorandum of Points and Authorities In Support of Plaintiff's Petition for Writ of Mandamus, filed on December 14, 2005, for a more in-depth discussion of the ITA process and the 2002 Voting Systems Standards.

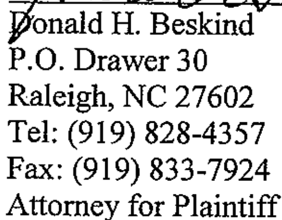
source code for security and system vulnerabilities, the members of the Board of Elections are subject to an order from this Court ordering them to do so.

VI. CONCLUSION

Defendants and their agents have failed to review all relevant voting system source code prior to certification as per the statute. For all of the reasons cited above, Plaintiff respectfully petitions the Court for a writ of mandamus forcing them to meet their statutory obligations and for all other appropriate relief.

Respectfully submitted this the 20th day of December, 2005.

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



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STATE OF NORTH CAROLINA	IN THE GENERAL COURT OF JUSTICE
WAKE COUNTY	SUPERIOR COURT DIVISION 05 CVS 16878

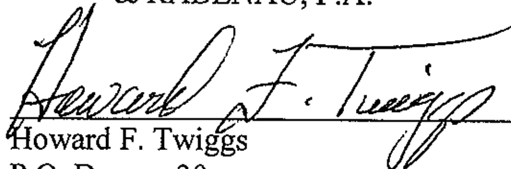
JOYCE MCCLOY, Plaintiff, v. THE NORTH CAROLINA STATE BOARD OF ELECTIONS; LARRY LEAKE, LORRAINE SHINN, CHARLES WINFREE, GENEVIEVE SIMS, and ROBERT CORDLE, Members of the North Carolina Board of Elections in their official capacities; THE NORTH CAROLINA OFFICE OF INFORMATION TECHNOLOGY SERVICES; and GEORGE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

The undersigned hereby certifies that the foregoing Supplemental Memorandum of Points and Authorities in Support of Plaintiff's Petition for Writ of Mandamus was served on all parties to the above cause by hand-delivery, addressed to the following:

Susan K. Nichols, Special Deputy Attorney General
Karen E. Long, Special Deputy Attorney General
North Carolina Department of Justice
114 W. Edenton Street
Raleigh, NC 27699-0601

This the 20th day of December, 2005.

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



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