STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
05 CVS 016878

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.

DEFENDANTS' MEMORANDUM OF LAW IN RESPONSE TO THE PLAINTIFF'S MOTION FOR MANDAMUS AND PRELIMINARY INJUNCTION

INTRODUCTION

Plaintiff has brought this action to compel the State Board of Elections ("State Board") to reverse the certification decision it made on December 1, 2005, for certain electronic voting systems. Plaintiff construes newly adopted legislation differently than does the agency charged with administering it and asks this Court to impose her view on the State. Our laws do not permit the extraordinary writ of mandamus to be used in this manner.

Additionally, the remedy Plaintiff seeks will not prevent the ultimate harm she fears. Plaintiff's tenacious insistence that the State Board must review all computer code required to be

escrowed by a voting system vendor allowed to sell under a State contract is an indication of her belief that reviewing source code of third-party software operating systems will somehow provide elections that are better, more reliable and less prone to fraud. Although her belief may be honestly held, it is not well-founded. Review of source code for third-party software simply will not guarantee elections that are better, more reliable and less prone to fraud. Third-party software code used in operating systems and other platforms upon which electronic voting systems run are commercially available and widely used. The way third-party off-the-shelf software packages operate is generally understood by software experts and the vulnerabilities of commercially or otherwise widely available operating systems are constantly studied in specialized journals or other press. The vulnerability of third-party software to hackers or other mischief makers is tied to the ability of mischief-makers to access the software either over the Internet or by physically getting into a voting machine and changing its software configuration. Voting machines certified by the State Board cannot be connected to the Internet and physical access to those machines must be strictly controlled by local boards of election. Reviewing source code, whether before or after certification, will not protect against vulnerabilities caused by improper access. Only vigilance in preventing unauthorized access will accomplish that goal. Plaintiff has only challenged code review. Because the relief Plaintiff seeks is not available under mandamus and because code review will not protect against the voting mischief that Plaintiff fears, the State opposes the Plaintiff's complaint for mandamus and other injunctive relief and files the following memorandum in support of its opposition.

STATEMENT OF THE CASE AND THE FACTS

On August 26, 2005, the Governor signed Senate Bill 223 into law. N.C. Sess. Law 2005-323 ("Chapter 323"), p. 12. Section 1(a) of this legislation decertified any voting equipment acquired or upgraded before August 1, 2005, and required the State Board to certify new equipment for the 2006 elections.[1]

Pursuant to the requirements of Chapter 323, the State Board and Defendant Office of Information Technology Services ("ITS") issued a Request for Proposals ("RFP") on October 11, 2005. The RFP mandated strict time lines in order to meet statutory deadlines for North Carolina county boards of elections to use federal and State money to replace aging and unreliable voting equipment. The RFP required sealed bids be received by November 4, 2005. Only five bidders submitted bids. Applying G. S. § 163-165.7(c), the State Board appointed a team to review the electronic voting systems submitted by vendors in response to the RFP. The State Board's Certification Team was charged with reviewing vendor voting systems according to the nine separate requirements listed in G.S. § 163-165.7(c).[2] The Certification Team was composed of five persons, and included citizens of North Carolina as well as two nationally recognized experts in electronic voting system hardware and software. Two State Board employees served as observers to the Certification Team. Additionally, the work of the Certification Team was observed by two invited observers from the staff of the General Assembly. The work of the Certification Team was

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[1] Thirteen counties have received $893,822 in federal funds in order to stop using punch card and lever voting equipment. If new equipment is not acquired by January 1, 2006, the State may have to refund that money to the federal government. 42 U.S.C. §15302(d).

[2] Those nine requirements at a minimum are a review of (1) security, (2) application vulnerability, (3) application code, (4) wireless security, (5) security policy and processes, (6) security/privacy program management, (7) technology infrastructure and security controls, (8) security organization and governance, and (9) operational effectiveness, all with the goal of determining whether the system complies with federal and state law.

performed in conjunction with an Evaluation Team, also made up of elections experts, advisors and staff. See Attachment 1 (Rauf Affidavit), Exhibit 2.

As part of its review, the Certification Team reviewed source code evaluation reports of each system conducted by an Independent Testing Authorities ("ITAs").[3] The federal Elections Assistance Commission ("EAC"), as a part of the federal testing process of voting systems using electronic means, has provided for interim accreditation of ITAs already accredited by the National Association of State Election Directors ("NASED"). Each ITA is accredited to perform, among other things, a code review comparing the source code of the application to the vendor's software design documentation to ascertain how completely the software conforms to the vendor's specifications. The ITA review also assesses the extent to which the voting system adheres to requirements including software design and coding standards, selection of programming languages, software integrity, software modularity and programming, audit record data, access control, polling place security, central count location security, software security, protection against malicious software, telecommunications and data transmission security, data interception prevention, protection against external threats, use of protective software, and security for transmission of official data.

Stephen Berger, one of the national experts on the State Board's appointed Certification Team, is an advisor to the EAC and is quite familiar with the code and other review processes of ITAs. He knows what an ITA review provides and what it does not. He was recruited to serve on the North Carolina team so that his expertise could identify and help fill the gaps of the ITA review and testing processes.

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[3] On December 1, 2005, the State Board ratified the use of ITA reports in the certification process. See Attachment 2.

In addition to reviewing the ITA reports, the Certification Team performed its own independent review using the checklist in G.S. § 163-165.7(c). After performing its own review and after reviewing the ITA certification reports for each electronic voting system under consideration, the Certification Team recommended two electronic voting systems to the State Board for certification and recommended conditional certification of a third system which had not yet received a number issued by the EAC indicating that the system was approved at the federal level.

The State Board met on December 1, 2005, and in a public meeting questioned its Executive Director and voting equipment project manager on the process giving rise to their recommendations. It accepted the recommendation of the Evaluation and Certification Teams and ratified the designation of ITAs as independent experts for code review. As is its custom, on December 14, 2005, the State Board issued a written order with respect to ratifying the designation of ITAs as an independent expert for code review. See Attachment 2.

The State Board also issued an Order appointing Escrow Agents for vendor code. (Attachment 3.) Vendor code will be escrowed with a corporation called Iron Mountain, Inc. Code not written by the vendor but used by the vendor ("third-party code") had to be escrowed with the third-party code manufacturer's escrow agent. The certified vendors must escrow all code used in their voting systems by December 22, 2005.

ARGUMENT

I. THE STATE BOARD IS NOT UNDER A PRESENT LEGAL OBLIGATION TO PERFORM THE ACT SOUGHT TO BE ENFORCED BECAUSE THE STATUTE DOES NOT COMPEL REVIEW OF THE ESCROWED CODE.

Mandamus will not issue to enforce an alleged right that is in question or in doubt. *Board of Managers v. Wilmington*, 235 N.C. 597, 70 S.E.2d 833 (1952); *Harris v. Board of Education*, 216

N.C. 147, 4 S.E.2d 328 (1939). *Moody v. Transylvania County*, 271 N.C. 384, 390, 156 S.E.2d 716, 721 (1967). Thus, in *Umstead v. Board of Elections*, 192 N.C. 139, 134 S.E. 409 (1926), where the plaintiff disputed the method the Durham County Board of Elections used to count votes in a three-person primary, the reviewing court held that the plaintiff's attempt to use a writ of mandamus to compel the Durham County Board of Elections to hold a second primary failed because there was no clear legal duty to hold a second primary.

In much the same manner, Plaintiff's case must fail. Like the plaintiff in *Umstead*, Plaintiff here disputes the way the State Board carried out its responsibility. Like the plaintiff in *Umstead*, she has requested a drastic remedy; not holding a second primary as in *Umstead*, but voiding certifications for electronic voting systems when the failure to have certified equipment presents severe repercussions for the State. Like the plaintiff in *Umstead*, her request for mandamus must fail because she seeks to compel not action, but a particular action.

Plaintiff contends that the statutory duty is clear and G.S. § 163-165.7(c) requires the State Board to review code that will be escrowed pursuant to G.S. § 163-165.9A before certifying an electronic voting system. To reach this conclusion she has had to construe the statute in a manner that does not follow accepted rules of statutory construction. The State Board has administered the certification process for voting systems consistently with the requirements of the statutes.

A. THE STATE BOARD FOLLOWED THE GUIDING PRINCIPLES OF STATUTORY CONSTRUCTION IN CONSTRUING PRINCIPLES OF STATUTORY CONSTRUCTION.

The cardinal rule of statutory construction is that legislation must be construed to accomplish the General Assembly's intent. The best indicia of the legislature's intent are the language of the statute, its spirit and its purpose. *In re Appeal of North Carolina Savings & Loan League*, 302 N.C.

458, 276 S.E.2d 404 (1981). A construction of a statute that operates to defeat or impair the object of the statute must be avoided if that can reasonably be done without violence to the legislative language. *In re Banks*, 295 N.C. 236, 244 S.E.2d 386 (1978).

It is presumed that the legislature comprehended the import of the words employed by it to express its intent. *State v. Baker*, 229 N.C. 73, 48 S.E.2d 61 (1948). Thus, technical terms must be given their technical connotation in the interpretation of a statute. *Henry v. A. C. Lawrence Leather Co.*, 234 N.C. 126, 66 S.E.2d 693 (1951). Dictionaries may be used to determine the ordinary meaning of words in a statute. *State v. Fly*, 127 N.C. App. 286, 488 S.E.2d 614 (1997), *rev'd on other grounds*, 348 N.C. 556, 501 S.E.2d 656 (1998).

To the extent a statute is ambiguous, the agency interpretation of the statute should be given deference. *MacPherson v. City of Asheville*, 283 N.C. 299, 196 S.E.2d 200 (1973). Neither the opinions of individual legislators as to legislative intent, *Styers v. Phillips*, 277 N.C. 460, 472, 178 S.E.2d 583, 590-91 (1971), nor the opinion of non-legislators, *Manning v. Atlantic & Yadkin R. Co.*, 188 N.C. 648, 125 S.E. 555 (1924), are relevant. While the history of actions by the General Assembly leading to the adoption of a statute, and the circumstances surrounding its adoption, are relevant to determining legislative intent, *Black v. Littlejohn*, 312 N.C. 626, 325 S.E.2d 469 (1985), this history does not include "the record of the internal deliberations of committees of the legislature." *Electric Supply Co. v. Swain Electrical Co.*, 328 N.C. 651, 657, 403 S.E.2d 291 (1991). Finally, statutes must be construed to avoid absurd results. *In re Hickerson*, 235 N.C. 716, 71 S.E.2d 129 (1952); *County of Lenoir v. Moore*, 114 N.C. App. 110, 441 S.E.2d 589 (1994).

B. THE LANGUAGE OF CHAPTER 323 DOES NOT SUPPORT PLAINTIFF'S ARGUMENT.

On August16, 2005, the General Assembly passed Chapter 323 which effectively decertified all voting equipment currently in use in North Carolina for the 2006 elections. G.S. § 163-165.7(a) (2005). Chapter 323 also contemplated that the State Board could avail itself of code review done by federally recognized Independent Testing Authorities ("ITAs"). Section 163-165.7(a)1 provides, "The State Board may use, for the purposes of voting system certification, laboratories accredited by the Election Assistance Commission under the provision of section 231(2) of the Help America Vote Act of 2002." Thus, despite the argument made by Plaintiff at the December 14 hearing on her motion for a temporary restraining order that ITA laboratory testing of computer software was somehow suspect, the session law clearly provided that the State Board could use such laboratories.

The new law also included a new G.S. § 163-165.7(c), which provides:

> 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. Any portion of the report containing specific information related to any trade secret as designated pursuant to G.S. 132-1.2 shall be confidential and shall be accessed only under the rules adopted pursuant to subdivision (9) of subsection (d) of this section. The State Board may hear and discuss the report of any such review under G.S. 143-318.11(a)(1). [Subdivision (9)(d) allows the State Board to prescribe rules for already certified voting systems.]

(Emphasis added.)

Dictionaries may be used to determine the ordinary meaning of words in a statute. *Fly*, 348 N.C. at 560, 501 S.E.2d at 658. The AMERICAN HERITAGE COLLEGE DICTIONARY 69 (4th ed. 2002) defines application as "of or being a computer program designed for a specific task or use:

applications software" (emphasis in original). It defines source code as "[c]ode that is written by a programmer in a high-level language that can be read by people but not computers," *id.* at 1324, and defines object code as "[t]he code produced by a compiler from the source code, usu. in the form of machine language that a computer can execute directly." *Id.* at 958. The affidavit of Robert Rauf filed contemporaneously with this memorandum provides the same definitions from the perspective of an expert in the field.

Despite the fact that the words used in G.S. § 163-165.7(c) refer only to application code, a term with an accepted technical meaning, Plaintiff argues that the source code which must be reviewed pursuant to this statute is all the source code which must be placed in escrow. This includes – presumably – operating system source code[4] and commercial off-the-shelf ("COTS") software (sometimes known as third-party software)[5] which provides the underpinnings to the electronic voting counting and tabulation application code. She points to G.S. § 163-165.7(a), which states that any RFP which the State Board issues for electronic voting machines must include a long list of elements, among which is:

> (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).

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[4] An operating system is "software designed to control the hardware of a specific data-processing system in order to allow users and application programs to make use of it." AMERICAN HERITAGE COLLEGE DICTIONARY at 975. *See also* Attachment 1 (Rauf affidavit) ¶ 7.

[5] Attachment 1 (Rauf Affidavit) ¶ 8.

Plaintiff contends that this quoted portion of section 163-165.7(a) means the State Board must review all software required to be placed in escrow in order to certify an electronic voting system.

This construction of the statute is erroneous for at least five reasons. First, subsection 163-165.7(a) provides a list of items that the State Board must include in any RFP issued for voting equipment. The numbered items specify that the RFP must (a)(1) provide notice to a bidder that, if successful, it must post a bond or letter of credit to cover damages from defects in the amount of at least the cost of conducting a new election; (a)(2) provide notice that any system bid must comply with all federal requirements; (a)(3) provide notice that any system supplied in response to the RFP must be able to report out-of-precinct votes; (a)(4) provide notice that if an electronic voting system is bid, it must have a paper record for backup; (a)(5) provide notice to the vendor that if it bids a direct record electronic voting system the voter has to be able to see the paper backup and correct any errors before she or he casts a vote; (a)(6) provide notice to the vendor that code required to be escrowed after the contract is entered into pursuant to G.S. § 163-165.9A must be accessible to the State Board, to ITS, to "the State chairs of each political party," to "the purchasing county" and to designees of these entities[6]; (a)(7) provide notice that the vendor must quote a uniform statewide price in response to the RFP; and (a)(8) provide notice to the vendor that in the event of bankruptcy or a problem, the escrowed code will be turned over to the county purchasing the system. Thus the section cited by Plaintiff as proof that the State Board must review all code which must be escrowed

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[6] G.S. § 163-165.7(a)(6) provides,"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."

prior to certifying any equipment does not support her argument. The cited section in pertinent part merely serves as notice to vendors that if they are awarded a contract, they must agree to allow escrowed code to be viewed by certain statutorily named individuals.

It is particularly telling that subsection (a)(6) lists individuals and entities such as a "purchasing county" and the State's political party chairs as well as the State Board. It is only the State Board that has the duty of making the certification decision. The list of the purchasing county and the party chairs only make sense if this part of the statute is construed to mean these parties can see the code *after contracts are reached.* Surely, there would be no basis for the party chairs to review computer code before a certification decision is made. Their interest arises only if an election is disputed because of an alleged defect in the voting equipment. This view is reinforced by G.S. § 163-165.7(d) which requires the State Board to prescribe rules for the "adoption, handling, operation and honest use of certified voting systems" and includes setting procedures for the review and examination of information placed in escrow by a vendor under contract.

Second, Plaintiff's construction of the statute is erroneous because section 163-165.7(c) clearly states that the State Board or its designated independent expert shall review all source code made available by the vendor for *the application code.* As the clear rule of statutory construction provides, dictionary definitions may be used to establish the meaning of a word used in a statute. "Application software" (application code) is defined in the AMERICAN HERITAGE COLLEGE DICTIONARY as "of or being a computer program designed for a specific task or use." Application code is the code associated with the actual electronic voting system itself, that is, the system that records and tabulates votes. Nowhere in §163-165.7(c) are the words "system code" or "operating system code" used. The statute clearly contemplates that the State Board will review source code

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of application code, not source code of third-party computer programs used in operating systems or other software platforms.

Third, the words of G.S. § 163-165.7(c) clearly state that the code to be reviewed is code *made available by the vendor*. Source code for third-party code used in third-party operating systems generally cannot be made available by the vendor because the vendor does not own the intellectual property rights to software manufactured by third parties. As the affidavit of Robert Rauf (Attachment 1) states at paragraph 10, commercial third-party software manufacturers usually do not allow their licensees to have access to their source code. Certainly, when anyone buys Windows 2000 or some other operating system, what is loaded onto their personal computer is not source code for Windows 2000, but the object code. Also, when application code programs like WordPerfect or Word are loaded onto their personal computer, it is object code that is loaded.

Fourth, if the statute is construed as Plaintiff proposes, the time needed to review the source code of an operating system would prohibit having electronic voting machines in place for the 2006 elections as the new law requires. Robert Rauf states in his affidavit that there are an estimated 30 million lines of source code in a third-party commercial software package such as Windows 2000. Even if the State Board could find money and persons to review 1000 lines of code a day, it would take too long to review this one operating system and it would make compliance with the statutory deadline impossible.

Fifth and finally, the requirement to escrow code is a post-contract requirement found in G.S. 163-165.9A.[7] The requirement to certify an electronic voting system under G.S. 163165.7(c)

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[7] Section 163-165.9A provides, "Every vendor *that has a contract* to provide a voting system in North Carolina" shall perform five separate acts, one of which is to place in escrow with an independent escrow agent approved by Defendant State Board of Elections, "all software that is

comes before a contract can be made. Escrowing code is separated in time and in status from reviewing code. Only vendors having contracts with the State are required to escrow code and to expose it to the view of the parties listed in G.S. 163-165.7(a)(6). Code review necessarily must come before code escrow.

Essentially, what Plaintiff is requesting this Court to do is to compel the State Board to review all third-party code used in machines to make the electronic voting system application run. She is asking this Court to construe the voting systems statutes in such a way as to compel an absurd and oppressive result. No electronic voting system could be certified under Plaintiff's view of the statute as all systems submitted to the State Board use third-party code, the intellectual property rights for which is held by third parties. Even if an electronic voting system vendor could provide a license to look at a third-party's source code, no review of that code could be accomplished before the 2006 elections.

Indeed if Plaintiff's view prevails of the review required before voting systems may be certified, the result will be to cause North Carolina's 2006 elections to be conducted on paper ballots and counted by hand. This surely was not the intent of the General Assembly in enacting S.L. 2005-323. The voting system accessibility requirements under 42 U.S.C. § 15481, effective January 1, 2006 for voters with disabilities and incorporated in North Carolina law by G.S. § 163-165.7, cannot be met solely by hand marked and counted paper ballots. Attachment 1, Rauf Affidavit ¶ 18. Moreover, the State Help America Vote Act ("HAVA") Plan for spending federal HAVA funds was submitted to the EAC before the adoption of S.L. 2005-323 and does not

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relevant to functionality, setup, configuration, and operation of the voting system." (Emphasis added.) The statute further provides that intentional failure of a vendor *under contract* to perform the five mandated acts exposes that contracted vendor to civil and criminal penalties.

contemplate the use of federal funds for paper ballots that would be marked and counted by hand. For these reasons, as well as all those set forth above, adoption of Plaintiff's construction of S.L. 2005-323 would be contrary to the legislature's intent.

Finally, it must be noted that the members of the State Board, its staff, and most of the persons association with the Evaluation and Certification teams are registered voters in North Carolina. Thus, on a personal level they share Plaintiff's desire that their votes not be adversely affected by voting equipment decisions. Unlike Plaintiff, however, they have the additional responsibility as members and representatives of the State Board to assure that elections in North Carolina are conducted in accordance with state and federal laws, including but not limited to S.L. 2005-323. In their certification recommendations and decisions, they have responsibly used their expertise and their understanding of the General Assembly's intent to certify new voting systems on an accelerated timetable. Their informed decisions should not be countermanded by this Court at the request of a single voter.

II. MANDAMUS IS AN EXTRAORDINARY WRIT WHICH IS NOT AVAILABLE TO THE PLAINTIFF IN THIS CASE.

Mandamus confers no new authority. *Laughinghouse v. New Bern*, 232 N.C. 596, 61 S.E.2d 802 (1950). It lies to compel an inferior board to perform an existing legal duty. *Sutton v. Figgatt*, 280 N.C. 89, 185 S.E.2d 97 (1971). It will only lie against a party under present legal obligation to perform the act sought to be enforced, *Moody v. Transylvania County*, 271 N.C. 384, 156 S.E.2d 716 (1967), and only at the instance of a party having a clear legal right to demand performance, *id.*, and then only when there is no other adequate remedy available, *Snow v. North Carolina Bd. of Architecture*, 273 N.C. 559, 160 S.E.2d 719 (1968). Here, Plaintiff's request for mandamus does

not lie against a party under a present legal obligation to perform the act she seeks to enforce, Plaintiff does not have a clear legal right to demand specific performance by the State Board or to demand that a decision the State Board has already made be vacated. Even if she had such a right, there are other remedies available to her short of mandamus. Her request for mandamus must therefore be denied.

A. THE STATE BOARD HAS ALREADY PERFORMED THE REQUESTED ACT.

As part of the relief that she requests in her complaint for mandamus and injunctive relief, Plaintiff asks this Court to void the State Board's certification of certain electronic voting systems as *ultra vires*. The State Board certified those electronic voting systems after performing the review compelled by G.S. 163-165.7(c). It performed that review by appointing an independent expert to review source code of the electronic voting system's application code and by using a Certification Team of its own choosing to investigate each of the nine items listed in that statute which the State Board must review . G.S. § 163-165.7(c) (2005). Plaintiff's complaint recognizes that the State Board has already acted to perform the review and has certified certain electronic voting systems because she asks this Court to void those certifications. Requesting a court to void an act of the State Board is not relief available under mandamus. Plaintiff can request this Court to compel the State Board to perform an action, but she cannot use mandamus to request voiding an action already taken.

The State Board has already reviewed and certified certain electronic voting systems in a manner it deemed consistent with the statutes it is charged with carrying out. Plaintiff disputes the manner in which the State Board exercised its authority in performing the review. Normally mandamus will not lie to control the manner of performance of a public official's duties, *Lloyd v.*

Babb, 296 N.C. 416, 452, 251 S.E.2d 843, 866 (1979), unless evidence shows that the official has consistently failed to comply with the law in the past and there is reasonable certainty they will continue to fail to comply with the law. *Id.* Plaintiff has not made this showing and, indeed, because the statute is so new, she cannot make this showing.

B. MANDAMUS IS NOT AVAILABLE TO COMPEL THE STATE BOARD TO PERFORM CERTIFICATION REVIEW IN A CERTAIN WAY.

In *Batdorff v. North Carolina State Bd. of Elections*, 150 N.C. App. 108, 563 S.E.2d 43 (2002),[8] plaintiffs sought a mandatory injunction to compel the State Board to conduct an evidentiary hearing on a complaint alleging campaign financing irregularities. There the State Board had investigated and determined that no further investigation was required. Despite the plaintiff's allegations to the contrary, the reviewing court held that mandamus was unavailable to the plaintiff to compel an evidentiary, investigatory hearing because the State Board had performed its statutory duty. In so holding the Court stated, "[I]t is not the role of the trial court or our Court [of Appeals] to direct the Board of Elections in what manner to exercise its discretion." *Id.* at 113, 563 S.E.2d at 46. "The statute does not . . . give the court the power to compel a different decision from the [Board of Elections] once it has exercised its duty, which is exactly what [plaintiff] seeks in this lawsuit." *Id.* (parentheticals in original). Here, the State Board has carried out its statutory duty, although not in a manner with which Plaintiff agrees. Like the plaintiff in *Batdorff*, Plaintiff disputes the result of the State Board's action. However, under the holding of *Batdorff*, Plaintiff cannot use mandamus to compel the result she wants.

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[8] The plaintiff's standing to bring the lawsuit in *Batdorff* was not in question as there is explicit statutory authority to sue for injunctive relief if campaign finances are at issue. G.S. § 163-278.28(a) (2005). The statute affording standing is explicitly limited to campaign finance cases.

C. Plaintiff does not have a Clear Legal Right to Demand Specific Performance by the State Board because She Lacks Standing.

Mandamus requires that a person bringing the action have a clear legal right to demand performance. *Moody*, 271 N.C. at 390, 156 S.E.2d at 729. Plaintiff alleges in paragraph 3 of her amended complaint that she has standing to bring this action "[a]s 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." She alleges no harm unique to her as either a taxpayer or a voter. She challenges a completed act – certification of voting systems – by the State Board, the governmental agency charged with determining whether a voting system should be certified. For these reasons she does not have the standing she claims.

1. Plaintiff Has No Standing by Virtue of Being a Voter.

Essential to a court's jurisdiction over any claim is "an actual or real existing controversy between parties having adverse interests in the matter in dispute." *State ex rel. Edmisten v. Tucker*, 312 N.C. 326, 338, 323 S.E.2d 294, 303 (1984). *See also Andrews v. Alamance County*, 132 N.C. App. 811, 813-14, 513 S.E.2d 349, 350 (1999). For such a controversy to exist, plaintiffs must show they have standing to challenge the State Board's actions in this case. *See Transcontinental Gas Pipe Line Corp. v. Calco Enters.*, 132 N.C. App. 237, 246, 511 S.E.2d 671, 678 (Wynn, J., concurring), *disc. rev. denied*, 351 N.C. 121, 540 S.E.2d 751 (1999).

In other words, if she is to proceed, Plaintiff "must allege she has sustained an 'injury in fact' as a direct result of" the challenged state actions or failure to act. *Dunn v. Pate*, 334 N.C. 115, 119, 431 S.E.2d 178, 181 (1993). *See also Grace Baptist Church v. City of Oxford*, 320 N.C. 439, 444,

358 S.E.2d 372, 375 (1987) (plaintiffs in declaratory judgment action must show they have "sustained an injury or [are] in immediate danger of sustaining an injury as a result of" the challenged governmental action); *accord, Andrews*, 132 N.C. App. at 814, 513 S.E.2d at 350. Because standing is a jurisdictional prerequisite, Plaintiff's inability to establish standing is fatal to her claim. *See Transcontinental Gas Pipe Line Corp.*, 132 N.C. App. at 241, 511 S.E.2d at 675; *Union Grove Milling & Mfg. Co. v. Faw*, 109 N.C. App. 248, 251, 426 S.E.2d 476, 477, *aff'd per curiam*, 335 N.C. 165, 436 S.E.2d 131 (1993). *See also Tucker*, 312 N.C. at 346, 323 S.E.2d at 307 ("actual and existing case or controversy" is a jurisdictional prerequisite to an action).

When the complaint in this case is read carefully, with a view to what is actually complained of, it is apparent that Plaintiff has not alleged any injury in fact suffered by her as a result of the defendants' actions. She alleges only that the State Board has not followed the statute in the manner in which she would follow it. Her most specific statement of harm is in Paragraph 33 of the amended complaint, in which she alleges that "the approval of unqualified voting systems in direct violation of critical statutory provisions specifically designed to protect Plaintiff's right to vote." But it is clear that her alleged harm is in no way different from any other voter in North Carolina. Moreover, she does not even allege that the failure to review third-party computer code before it is escrowed has actually affected her right to vote. Nor could she, unless and until an election in which she voted was tainted by equipment that functioned improperly because of a code defect that would have been detected had that piece of code been reviewed before certification. Her alleged injury also assumes that the vendor with this defective code will escrow it by December 22, 2005 and that counties will purchase that vendor's equipment despite the aggressive lobbying of plaintiff not to do so. Her alleged injury is simply too speculative to be cognizable.

In *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 94 S. Ct. 2925, 41 L. Ed. 2d 706 (1974), the United States Supreme Court investigated whether the plaintiffs in that case had standing to sue as citizens of the United States under a generalized grievance about the conduct of government, in that case the involvement of the military in the Vietnam War. The Supreme Court found that plaintiffs lacked standing as citizens because to seek review, the party "must himself suffered an injury," *Schlesinger*, 418 U.S. at 218-219, 94 S. Ct. at 2931, 41 L. Ed. 2d at 717 (citing *Sierra Club v. Morton*, 405 U.S. 727, 738, 92 S. Ct. 1361, 1368, 31 L. Ed. 2d 636, 645 (1972)). Abstract injury is not enough. *Id.* (citing *O'Shea v. Littleton*, 414 U.S. 488, 494, 94 S. Ct. 669, 675, 38 L. Ed. 2d 674, 682 (1974)). For a private individual to invoke the judicial power to determine the validity of executive or legislative action, he must show that "he has sustained or is immediately in danger of sustaining a direct injury as a result of that action and it is not sufficient that he has merely a general interest common to all members of the public." 418 U.S. at 219, 94 s. Ct. at 2931, 41 L. Ed. 2d at 718. Here, Plaintiff has failed to show that she has sustained or is in immediate danger of sustaining a direct injury as a result of that action.

Lloyd v. Babb, 296 N.C. 416, 428, 251 S.E.2d 843, 852 (1979), is the only case related to elections cited by Plaintiff in her December 14, 2005 memorandum. Yet on the very page Plaintiff cites, the court specifically notes that in that case the "[p]laintiffs' standing . . . has not been challenged." In other words, the court was not asked to address the issue of standing and whether an individual's status as a voter conferred standing in the absence of any showing of continuing harm.

Unlike the statutory provision of G.S. § 163-278.28(a) cited in *Batdorff*, which explicitly provides that a North Carolina registered voter may apply to superior court "to issue injunctions or

grant any other equitable relief appropriate to enforce" the provisions of the campaign contribution laws, there is no such explicit statutory authority for a registered voter to apply to superior court for equitable relief to enforce voting equipment certification. Because her interest is a general one, because she has alleged no direct injury, and because – unlike the situation with campaign finance laws – there is no explicit statutory grant of standing, she lacks standing as a registered voter to raise the issue.

2. Plaintiff Has No Standing by Virtue of Being a Taxpayer.

In her complaint, Plaintiff mentioned her status as a taxpayer in order to assert a basis for standing. (Amended Complaint, ¶3) However taxpayers cannot sue the government simply because they believe the government is acting wrongly with regard to the collection and spending of tax monies. Otherwise, any citizen and taxpayer who disagreed with any action of any government official or entity could judicially challenge the validity of that action so long as any tax funds were collected or spent in connection with the action. Such a rule of standing would allow virtually unlimited challenges to government action by any taxpayer who disagreed with anything the government did. Plaintiff cannot show the existence of any such standing rule and cannot fit within any existing rule under which taxpayers gain standing.

> Exercise of the judicial power is properly invoked only when it is necessary to determine the respective rights and liability or duties of litigants in an actual controversy properly brought before the court. It is not appropriate merely to determine questions of general public interest. Plaintiff here has shown only such interest as is shared generally by all residents, citizens, and taxpayers of the State. He has failed to show that individual interest which is requisite for standing in court.

Green v. Eure, 27 N.C. App. 605, 610, 220 S.E.2d 102, 106 (1975), *dis. rev. denied*, 289 N.C. 297, 222 S.E.2d 696 (1976). *See also Cannon v. City of Durham*, 120 N.C. App. 612, 615, 463 S.E.2d

272, 274 (1995) ("Our courts have consistently held that a taxpayer has no standing to challenge questions of general public interest that affect all taxpayers equally."), *disc. rev. denied*, 342 N.C. 653, 467 S.E.2d 708 (1996).

Moreover, government officials cannot be forced to litigate the validity of their actions against all citizens and taxpayers based on whatever personal beliefs or political motivations may lead citizens to initiate lawsuits. No principle of law authorizes a citizen or taxpayer to compel the courts "to determine the validity of any statute [or government action] which he may choose to question." *Green*, 27 N.C. App. at 609, 220 S.E.2d at 105. "Absent evidence to the contrary, it will always be presumed 'that public officials will discharge their duties in good faith and exercise their powers in accord with the spirit and purpose of the law.'" *Styers v. Phillips*, 277 N.C. 460, 473, 178 S.E.2d 583, 591 (1971) (citations omitted). The fact that a particular governmental action may never be judicially examined if challengers are determined to be without standing does not somehow create standing in litigants who otherwise lack a personal stake in the matter. *See Whitmire v. Cooper*, 153 N.C. App. 730, 735-36, 570 S.E.2d 908, 912 (2002) (agreeing that alleged actions may be "beyond the reach of the Courts" if plaintiffs are held to be without standing, but nevertheless concluding on grounds of lack of standing that the court was without jurisdiction to consider the matter), *disc. rev. denied & appeal dismissed*, 356 N.C. 696, 579 S.E.2d 104 (2003). Plaintiff lacks standing as a taxpayer to compel mandamus.

D. There are Other Adequate Remedies Available to the Plaintiff Besides Mandamus.

Plaintiff chose to file this action for mandamus prior to the time the electronic voting system procurement was finished. She did not seek to compel an investigation by the State Board into its

expert's actions under G.S. 163-20, nor has she waited to see if a vendor protest is filed, in which case she can intervene. If she had chosen either of the two options, there would have been a more developed record before this Court of what the State Board did and the reasons behind its actions. Plaintiff may also appeal the State Board's final decision in certifying any one or all electronic voting systems to Superior Court as a final agency action pursuant to G.S. 150B-43. Again, had she chosen that course, she would have created a more fully developed record and would have established processes for this court's review of an agency action.

III. THE STATE HAS NOT WAIVED SOVEREIGN IMMUNITY FOR THE PLAINTIFF TO BRING THIS MATTER AND THIS COURT LACKS PERSONAL JURISDICTION OVER THE DEFENDANTS.

The State cannot be sued except with its consent or upon its wavier of immunity. *Whitfield v Gilchrist*, 348 N.C. 39, 497 S.E.2d 412 (1998). The preeminent purpose of state sovereign immunity is to accord States the dignity that is consistent with their status as sovereign entities. *Federal Maritime Comm'n v South Carolina State Ports Authority*, 535 U.S. 743, 152 L.Ed.2d 962, 122 S.Ct. 1864 (2002). Provided that the State has not consented to suit, or has not waived its immunity through the purchase of liability insurance, the immunity provided by the doctrine of governmental or sovereign immunity is absolute and unqualified. *Price v Davis*, 132 N.C. App. 556, 512 S.E.2d 783 (1999).

A waiver of sovereign immunity must be established by the General Assembly. *Wood v. North Carolina State University*, 147 N.C. App. 336, 556 S.E.2d 38 (2001), *appeal dismissed, rev. denied*, 355 N.C. 292 (2002). As the Plaintiff concedes in paragraph 14 of her complaint, "no procedures exist by which a voter...can protest an improper or illegal certification award made by" the State Board. The State has not waived sovereign immunity as to a protest of a procurement

decision by a voter, either by statute, by regulation or by purchasing insurance against such an eventuality. Thus, this Court lacks personal jurisdiction over the State on this question, *Coastland Corp. v North Carolina Wildlife Resources Comm'n*, 134 N.C. App. 343, 517 S.E.2d 661, *cert. denied*, 351 N.C. 111 (1999), and the Plaintiff's claim for mandamus is defeated by this fact.

CONCLUSION

For the foregoing reasons, Defendants respectfully request this Court to deny Plaintiff's request for writ of mandamus or other injunctive relief. Defendants also renew their request for a bond in the amount of $893,822 for the reasons presented to the Court during hearing on December 14, 2005.

Respectfully submitted this 20th day of December 2005.

ROY COOPER
Attorney General

Karen E. Long
Special Deputy Attorney General
State Bar No. 8874
Telephone: (919) 716-6900
Facsimile: (919) 716-6763
E-mail: klong@ncdoj.com

Susan K. Nichols
Special Deputy Attorney General
State Bar No. 9904
Telephone: (919) 716-6800
Facsimile:
E-mail: snichols@ncdoj.com

North Carolina Department of Justice
Post Office Box 629
Raleigh, North Carolina 27602
ATTORNEYS FOR DEFENDANTS