

LINDA SCHADE, <i>et al.</i> ,	*	IN THE
Plaintiffs,	*	CIRCUIT COURT
v.	*	FOR
MARYLAND STATE BOARD OF ELECTIONS, <i>et al.</i> ,	*	ANNE ARUNDEL COUNTY
Defendants.	*	Case No. C0497297
	*	

\* \* \* \* \*

MOTION TO DISMISS  
FIRST AMENDED COMPLAINT

Defendants, Maryland State Board of Elections and Linda H. Lamone, by their undersigned counsel, J. Joseph Curran, Jr., Attorney General, Michael D. Berman, Deputy Chief of Civil Litigation, and Judith A. Arnold and Elizabeth M. Borinsky, Assistant Attorneys General, hereby move, pursuant to Maryland Rule 2-322, for dismissal of this entire action on grounds of lack of subject matter jurisdiction as specified in Item 1 below, for dismissal of all alleged causes of action for failure to state claims upon which relief can be granted as specified in Items 2-9 below, and for dismissal as to two of the plaintiffs for lack of standing as specified in Item 10 below, all of which are set forth in more detail in the accompanying memorandum.

1. The action should be dismissed in its entirety for lack of subject matter jurisdiction, because it raises non-justiciable political questions the resolution of which is vested by statute in the defendants and is not within the competency of the Judicial Branch of government.

2. The First Cause of Action (Election Law art. §12-202) should be dismissed in its entirety, for failure to state a claim upon which relief can be granted, for several reasons:

a. Election Law Article, §12-202, Annotated Code of Maryland, is not intended to provide a vehicle for the kind of debate – about the merits of different kinds of voting equipment – embodied in the First Amended and Verified Complaint (hereafter, “the Complaint”); rather, §12-202 is a vehicle designed for expedited relief where a plaintiff challenges a discrete act or omission that may change or has changed the outcome of a specific election.

b. Election Law Article, §12-202, Annotated Code of Maryland, demands that an action under that section be brought within 10 days after the act or omission being challenged or the date the act or omission became known to the petitioner; facts alleged in the Complaint itself demonstrate that all of the plaintiffs knew or should have known of the basis for the Complaint well before April 11, 2004, 10 days before this suit was filed.<sup>1</sup> For example, Exhibit 24 to the First Amended Complaint demonstrates that lead plaintiff Linda Schade and others considered filing suit in November 2003.

3. The Second Cause of Action should be dismissed in its entirety, for failure to state a claim upon which relief can be granted, because it raises no substantive claims not included in the other causes of action, and it is deficient for the same reasons stated with respect to those other causes of action.

4. The Third Cause of Action (mandamus) should be dismissed in its entirety, for failure to state a claim upon which relief can be granted, because the decisions of the defendants to acquire, certify, and not decertify the Diebold AccuVote-TS voting system

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<sup>1</sup>This suit appears to be directed primarily to the November 2004 and subsequent elections. To the extent that plaintiffs complain that actions of the defendants may have changed the results of the March 2, 2004 primary, Complaint, ¶140, their suit is brought more than 7 days after the results of the primary were certified on April 6, 2004, and is thus untimely under the alternative deadline in Election Law Article, §12-202(b)(2).

were complex determinations involving the consideration of many factors – some of which are not even mentioned in the Complaint (for example, the need under federal law to provide a voting system accessible to the blind and visually impaired) – and required the exercise of judgment and discretion. Maryland courts have repeatedly declined to grant the extraordinary relief of mandamus in such circumstances.

5. The Fourth Cause of Action (alleged improper rulemaking) should be dismissed in its entirety, for failure to state a claim upon which relief can be granted, because, as a matter of law, defendants' refusal to decertify the Diebold AccuVote-TS voting system does not constitute rule-making subject to the requirements of State Government Article, Title 10, Subtitle 1, Annotated Code of Maryland, and defendants have not changed the language of, or their interpretation of, COMAR 33.09.02.07 (the regulation erroneously cited in the Complaint) since its adoption in early 2000.

6. The Fifth Cause of Action (U.S. Const., 14th Amend.) should be dismissed in its entirety, for failure to state a claim upon which relief can be granted, because, as a matter of law, plaintiffs have no right under the Fourteenth Amendment of the United States Constitution to the implementation of a voting system that will provide a voter-verified paper audit trail, or to the implementation of any particular type of voting system.

7. The Sixth Cause of Action should be dismissed in its entirety, for failure to state a claim upon which relief can be granted, because, as a matter of law, Article I, §1 of the Maryland Constitution affords plaintiffs no right to the implementation of a voting system that will provide a voter-verified paper audit trail, or to the implementation of any particular type of voting system.

8. The Seventh Cause of Action should be dismissed in its entirety, for failure to state a claim upon which relief can be granted, because, as a matter of law, plaintiffs have no right under Article 24 of the Maryland Declaration of Rights to the implementation of a voting system that will provide a voter-verified paper audit trail, or to the implementation of any particular type of voting system.

9. The Eighth Cause of Action should be dismissed in its entirety, for failure to state a claim upon which relief can be granted, because, as a matter of law, plaintiffs have no right under Article 7 of the Maryland Declaration of Rights to the implementation of a voting system that will provide a voter-verified paper audit trail, or to the implementation of any particular type of voting system.

10. The action should be dismissed, insofar as it is brought on behalf of plaintiffs Kwame Abayomi and Terrence Fitzgerald and with respect to the November 2004 election, because those plaintiffs are alleged to be residents, registered voters, and candidates in Baltimore City, and Baltimore City is not scheduled to use the Diebold AccuVote-TS voting system, which is the subject of the Complaint, at the November 2004 election.

WHEREFORE, defendants Maryland State Board of Elections and Linda H. Lamone request that the Complaint, cause, and action be dismissed, with costs.<sup>2</sup>

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<sup>2</sup>If this case is not dismissed in its entirety, as defendants believe it should be, it will be necessary for this Court to address at the outset whether to expedite the case in light of the upcoming election. Defendants have filed this motion well in advance of their mandated response date, at the request of plaintiffs. This early filing does not operate to accelerate the response date for discovery. *See* Motion for Protective Order.

Although the plaintiffs have *alleged* that it is currently possible to provide relief in the form of “updated” machines that would include a voter-verified paper audit trail or to “revert to the pre-existing optical scanning system” before November 2004, and thus the plaintiffs  
(continued...)

Respectfully submitted,

J. JOSEPH CURRAN, JR.  
Attorney General

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Attorneys for Maryland State Board of  
Elections and Linda H. Lamone

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this \_\_\_\_\_ day of May, 2004, copies of the foregoing Motion to Dismiss, supporting Memorandum, proposed Order, and Request for Hearing were served, by first-class mail, postage prepaid, on: Ryan P. Phair, Esquire, Kathryn R. DeBord, Esquire, Daniel M. Nelson, Esquire, Avery W. Gardiner, Esquire, Kirkland & Ellis, LLP, 655 15th Street, N.W., Suite 1200, Washington, DC 20005, and John B. Isbister, Esquire, Daniel S. Katz, Esquire, Richard D. Rosenthal, Esquire, Tydings & Rosenberg, LLP, 100 E. Pratt Street, 26th Floor, Baltimore, MD 21202, attorneys for Plaintiffs; and, Daniel F. Goldstein,

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<sup>2</sup>(...continued)

have made the bare allegations necessary to support their requests for expedited relief, defendants dispute these allegations. Because of the importance of resolving this factual dispute at the earliest possible time, defendants have suggested expediting this issue and bifurcating the trial of this issue to achieve its early resolution. Plaintiffs have not replied. Of course, if it is not possible to grant plaintiffs the relief they are seeking for November 2004, there is no reason for this case to be expedited, and defendants would seek scheduling of discovery and trial on a normal civil litigation time line.

Esquire, Shelly M. Martin, Esquire Brown, Goldstein & Levy, LLP, 120 E. Baltimore Street,  
Suite 1700, Baltimore, MD 21202-6701, attorneys for Intervenors.

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Michael D. Berman