

SECOND JUDICIAL DISTRICT COURT
COUNTY OF BERNALILLO
STATE OF NEW MEXICO

PATRICIA ROSAS LOPATEGUI,
CLIFTON R. BAIN, JAMES CASEY REED,
AURORA SANCHEZ, TERRY ASCHOM,
LAURA STOKES, and BRUCE BUSH,

Plaintiffs,

vs.

No. CV 2005-00433

REBECCA VIGIL-GIRON, in her
capacity as Secretary of State,
MARY HERRERA, in her capacity
as Bernalillo County Clerk,
DAVE KUNKO, in his
capacity as Chavez County Clerk,
BARBARA CASTILLO, in her
capacity as Colfax County Clerk,
RUBEN CEBALLOS, in his
capacity as Dona Ana County Clerk,
CAROL K. SLOAN, in her capacity
as McKinley County Clerk, J. FRED
VIGIL, in his capacity as Rio Arriba
County Clerk, FRAN HANHART,
in her capacity as San Juan County
Clerk, VALERIE ESPINOZA, in
her capacity as Santa Fe County
Clerk, AUDREY JARAMILLO,
in her capacity as Socorro County
Clerk, JEANETTE G. RAEL, in
her capacity as Taos County Clerk,
and LINDA KAISER, in her
capacity as Torrance County Clerk,

Defendants.

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

COME NOW, Plaintiffs, by and through their counsel of record, Freedman Boyd Daniels Hollander & Goldberg P.A. (John W. Boyd), Garcia & Vargas (David P. Garcia), and the Law Offices of Lowell Finley (Lowell Finley), and pursuant to the provisions of Rule 1-066 NMRA 2003, respectfully move this Court to temporarily restrain Secretary of State Rebecca Vigil-Giron from contracting to purchase, purchasing or leasing Sequoia AVC Edge DRE touch-screen voting machines. As grounds for this Motion, Plaintiffs state as follows:

1. Plaintiffs are informed and believe that in the Fall of 2005, Defendant Rebecca Vigil-Giron, in her capacity as New Mexico Secretary of State, certified the Sequoia AVC Edge DRE touch-screen voting machine for use by New Mexico counties to satisfy the requirement in section 301(a)(3) of the federal Help America Vote Act of 2002 (“HAVA”) that each polling place have, by January 1, 2006, at least one voting device accessible to persons with disabilities. Plaintiffs are informed and believe that on or about November 21, 2005, Defendant Vigil-Giron also certified for the same purpose another electronic voting system, the Automark vote-marking device paired with the M100 precinct-based optical scanner, both marketed by Election Systems & Software, Inc.

2. Plaintiffs are informed and believe that on or about Tuesday, December 6, 2005, Defendant county clerks Mary Herrera (Bernalillo County), Valerie Espinoza (Santa Fe County), Dave Kunko (Chaves County), Barbara Castillo (Colfax County), Ruben Caballos (Dona Ana County), J. Fred Vigil (Rio Arriba County), Audrey Jaramillo (Socorro County), and Linda Kaiser (Torrance County) informed Secretary of State Vigil-Giron that they wished to purchase Sequoia AVC Edge touch-screen voting machines using HAVA funds allocated to New Mexico for acquisition of one disability accessible voting station per polling place. Also on or about

December 6, 2005, Plaintiffs are informed and believe that the county clerks of Cibola, Lincoln, McKinley, Otero, Sandoval, and Valencia counties informed the Secretary of State that they had made the same choice. Plaintiffs are informed and believe that New Mexico's remaining nineteen county clerks selected the Automark voting system. Plaintiffs are informed and believe that the Secretary of State has stated publicly that in her view the HAVA January 1, 2006 deadline for disability accessible voting machines will be met if purchase contracts have been entered into by that date. Plaintiffs are also informed and believe that the Secretary of State has stated publicly that she intends to enter into such purchase contracts in December, 2005.

3. The New Mexico Election Code, NMSA 1978, § 1-9-7.1, requires that all touchscreen voting machines purchased after July 15, 2005 be equipped with printers capable of producing a voter verifiable and auditable paper trail ("VVAPT"), and that all touch-screen voting machines in the state be equipped with such printers no later than January 1, 2007. HAVA, however, does not provide funds to acquire such printers. Plaintiffs are informed and believe that the Sequoia AVC Edge DRE touch-screen voting machines that Defendant Vigil-Giron intends to purchase for the counties using HAVA funds are not equipped with printers capable of producing a VVAPT.

4. As set out more fully in the accompanying memorandum of law, and in the affidavits that are attached hereto and incorporated by reference, the purchase of Sequoia AVC Edge DRE voting machines is unlawful and should be immediately enjoined for the following reasons:

A. Under NMSA 1978, § 1-9-7.1, any voting machines acquired after July 1, 2005, must be equipped with printers that can generate voter verifiable paper trails that

allow the voter to confirm that the machine has accurately received his or her selections before finally casting the votes electronically. The Sequoia AVC Edge DRE machines that the Secretary of State plans to purchase do not have printers and do not have the capability of generating such “paper trails.”

B. Under NMSA 1978, § 1-9-2(A) and (B), all voting systems purchased by the State must meet current federal election standards. Under a provision of the “Help America Vote Act” (“HAVA”), 42 U.S.C. § 15481, states are required to purchase machines that will accommodate persons with disabilities and allow them to cast their votes independently and in private. The Sequoia AVC Edge DRE voting machines that the Secretary of State intends to purchase are incapable of accommodating persons with disabilities and their purchase is therefore unlawful under NMSA 1978, § 1-9-2(A) and (B).

C. The Sequoia AVC Edge DRE voting machines have been used in various counties in New Mexico in prior elections and have been the source of problems so pervasive, and so catastrophic to the accurate counting of individual citizen’s votes, that any further use of these machines—much less the purchase of more of them—would violate Plaintiffs’ rights to equal protection, due process and pure elections as established by the New Mexico Constitution. Specifically, the Sequoia AVC Edge voting system:

- i. Resulted in the loss of 12,000 votes in the November 2002 election in Bernalillo County.
- ii. Resulted in “vote switching” of numerous votes in the November 2004 election in several counties, where a voter selected one candidate on the touch

screen but the Sequoia AVC Edge DRE machine identified the opposing candidate as the one selected;

iii. Contains unreliable computer technology that makes it virtually impossible to secure the integrity of vote recording and tabulation; and

iv. Is not capable of verifying that any vote was recorded and tabulated accurately.

5. If the Secretary of State purchases hundreds of Sequoia AVC Edge voting machines, Plaintiffs will be irreparably harmed in two distinct respects. First, as voters, they and many other New Mexicans will be required to cast their votes on machines that do not reliably register or tally votes and that do not have any mechanism by which the voter can verify that his or her vote has been properly or improperly counted. Second, the expenditure of much of New Mexico's "Help America Vote Act" federal funds will be exhausted on machines that are likely to be unusable because they are inaccurate and do not meet state or federal requirements, thereby jeopardizing New Mexico's ability to purchase reliable voting machines that comport with those requirements. The result, in sum, will be that New Mexico voters will lose further confidence in the reliability, honesty and accuracy of the voting process, thereby compromising elections in New Mexico and jeopardizing the health of our democracy.

6. Plaintiffs have no adequate remedy at law.

7. The balance of equities weighs in favor of a Temporary Restraining Order.

8. The public interest weighs heavily in favor of a Temporary Restraining Order.

9. Plaintiffs have a probability of success on the merits.

10. Plaintiffs incorporate by reference their memorandum in support submitted herewith and incorporate by reference the affidavits of Stephen Fettig, James A. Noel, Terry Ashcom, Kim Griffith, Adela Willson, Richard Ortega, Hanson Stuart, Joyce Bartley, Michael Shook, Ron McCurley, Stanley Lane, Stephen Dubois, Stephen Smith, William Randolph Thompson, Noel Runyan and David Dill, which are attached to the memorandum in support.

11. Plaintiffs will suffer immediate, irreparable harm if a Temporary Restraining Order and preliminary injunction do not issue because New Mexico's federal HAVA funding will be exhausted to buy thousands of inaccurate and unreliable Sequoia AVC Edge touch-screen voting machines that produce no VVAPT. The HAVA funds will no longer be available to purchase for fourteen of New Mexico's counties the superior Automark and precinct optical scanner solution selected by the other nineteen counties. The Automark voting system produces a permanent paper ballot, does not require a VVAPT printer, and provides access for blind and low vision voters, as well as voters with dexterity disabilities, that the Sequoia AVC Edge fails utterly to provide. Unless purchase of the Sequoia AVC Edge is enjoined, however, these defective touch-screen voting machines will be used in the upcoming June 2006 primary election and November 2006 general election in which New Mexico voters will choose a governor, United States senator, two members of Congress, and many other officeholders.

12. There exists a substantial likelihood that Plaintiffs will prevail on the merits of this action because of the evidence presented in (a) the affidavits of voters who saw the Sequoia ACC Edge voting machines switch their votes before their eyes, and (b) the affidavits of Plaintiffs' experts concerning serious and widespread malfunctioning of the Sequoia Edge and its hardware and software components. The harm caused by the failure of that voting system to

accurately record and tabulate votes will increase dramatically if the imminent purchase by the Secretary of State of hundreds of additional Sequoia AVC Edge touch-screen voting machines is not enjoined, violating Plaintiffs' fundamental voting rights under the New Mexico Constitution.

13. No harm can inure to Defendants by the issuance of an injunction because they can fully satisfy the disability access requirements of HAVA section 301(a)(3), as well as the requirement in New Mexico law for a VVAPT, by using their HAVA funds to purchase and use the state-approved Automark vote-marking device combined with a precinct-based optical scanner for their polling places. This alternative is less costly, less vulnerable to programming error or fraud, and, unlike the Sequoia Edge touch-screen, meets the accessibility needs not only of blind and vision-impaired voters but also of voters with severe dexterity disabilities.

14. In accordance with Rule 1-066(B)(2), undersigned counsel certifies that Plaintiffs took reasonable efforts to give notice to the parties by calling opposing counsel and sending to all counsel by email and first-class mail a copy of this motion, the memorandum of support, and the accompanying exhibits to all parties on December 20, 2005, thus informing them that Plaintiffs would seek issuance of a Temporary Restraining Order in this Court at the earliest possible date, and the nature of and grounds for the relief requested.

15. In accordance with Rule 1-007.1(C), undersigned counsel contacted David Thomson (attorney for Defendant Secretary of State Rebecca Vigil-Giron), Jeffrey Landers (attorney for Defendant Mary Herrera (Bernalillo County)), Diane Garrity (attorney for Defendants Valerie Espinoza (Santa Fe County), Dave Kunko (Chaves County), Barbara Castillo (Colfax County), Ruben Caballos (Dona Ana County), Audrey Jaramillo (Socorro County), and

Linda Kaiser (Torrance County)), and Defendant J. Fred Vigil (Rio Arriba County), who has no counsel of record. All Defendants contacted oppose this motion.

WHEREFORE, Plaintiffs move this Court for the issuance of a Temporary Restraining Order prohibiting the Secretary of State from purchasing, leasing, or entering into agreements to purchase or lease Sequoia AVC Edge DRE voting machines. Plaintiffs also move this Court for a hearing on their Application for Preliminary Injunction to convert the Temporary Restraining Order into a Preliminary Injunction within ten (10) days of the issuance of the Temporary Restraining Order, and for such other and further relief as the Court deems just.

Respectfully submitted,

FREEDMAN BOYD DANIELS HOLLANDER & GOLDBERG P.A.

By: 

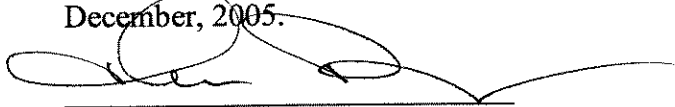
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I certify that a copy of the foregoing
Verified Motion was sent by U.S. Mail
to all counsel of record this 20th day of
December, 2005.

A handwritten signature in black ink, appearing to read 'Theresa M. Duncan', is written over a horizontal line. The signature is fluid and cursive, with a large loop at the beginning and a long, sweeping tail that extends to the right.

Theresa M. Duncan