
NO. _____

In The Court of Appeals of Maryland

LINDA SCHADE, ANDREW HARRIS, JUDITH BURNS, MARK ELRICH, KWAME
ABAYOMI, TERRENCE FITZGERALD, SHARON BEARD, and PAUL SUH,

Petitioners,

v.

MARYLAND STATE BOARD OF ELECTIONS, LINDA H. LAMONE (as Administrator of
Maryland's State Board of Elections),

Respondents.

PETITION FOR WRIT OF CERTIORARI

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REFERENCE TO THE ACTION IN THE LOWER COURT

The action is in the Circuit Court for Anne Arundel County, *Linda Schade, et al. v. Maryland State Board of Elections and Linda H. Lamone*, Case No. C0497297.

DECISION BY THE COURT OF SPECIAL APPEALS

The case has not yet been decided by the Court of Special Appeals. Petitioners seek declaratory and/or injunctive relief determining that the Maryland State Board of Elections is not authorized to use the Diebold AccuVote TS electronic voting system as currently deployed on Election Day 2004, and therefore petitioners seek to present the case to this Court in order to obtain timely review and decision.

BRIEFING IN THE COURT OF SPECIAL APPEALS

No briefs have yet been filed in the Court of Special Appeals, because, as noted above, Petitioners seek to present the case to this Court by certiorari in order to obtain relief before Election Day 2004.

JUDGMENT OF THE CIRCUIT COURT

The circuit court has not yet adjudicated all claims in this action in their entirety. This petition concerns the circuit court's refusal to timely grant Petitioners' request for a preliminary injunction, and adjudication of all claims is therefore not necessary for appeal. *See* MD Code, Courts and Judicial Proceedings § 12-303(3)(iii).

JUDGMENT SOUGHT TO BE REVIEWED

The judgment sought to be reviewed was entered by the circuit court on June 29, 2004. The Court of Special Appeals has not yet entered a mandate.

QUESTIONS PRESENTED FOR REVIEW

1. Did the Maryland State Board of Elections violate its statutory obligation to decertify an electronic voting system that is neither secure nor reliable, and therefore cannot protect the security or accuracy of the voting process on Election Day 2004?
2. Are Petitioners entitled to immediate declaratory and/or injunctive relief determining that the Maryland State Board of Elections is not authorized to use the Diebold AccuVote TS electronic voting system on Election Day 2004, in order to ensure that the Maryland vote is secure and accurately counted on Election Day 2004?

PERTINENT STATUTES AND REGULATIONS

This case involves Maryland Code, Election Law §§ 9-102 & 9-103; Maryland Code, Election Law §§ 12-202 & 12-203; Maryland Code, Courts and Judicial Proceedings § 12-303(3)(iii); and COMAR § 33.09.02.07.

DOCUMENTS REQUIRED UNDER RULE 8-303(b)(2)

The docket entry evidencing the judgment of the circuit court is currently unavailable. Petitioner's docket retrieval service advises that the docket is in chambers. Petitioner's will file the docket entry evidencing the judgment of the

circuit court as soon as it becomes available pursuant to Rule 8-303(b)(3). The circuit court's June 29 Order is attached as Appendix 29-30. There is no Rule 2-602(b) order; no briefs have been filed in the Court of Special Appeals; and the Court of Special Appeals has issued no opinion.

STATEMENT OF THE CASE AND STATEMENT OF THE FACTS

This case concerns the Maryland State Board of Election's ("SBE") unlawful plan to use an electronic voting system on Election Day 2004 that does not protect the integrity of the voting process, does not count and record all votes accurately, and cannot provide a reliable record of votes cast by the citizens of Maryland as required by law. Petitioners are concerned citizens, representatives and candidates for public office who believe that the Diebold AccuVote TS electronic voting system threatens to deprive petitioners and thousands of citizens of their fundamental right to vote *and to have that vote recorded accurately*. Petitioners' concerns, however, are not theirs alone. In approving the electronic voting system, the SBE ignored the admonitions *of its own Procurement Review Committee and a series of independent expert reports commissioned by the State of Maryland*. Indeed, these same concerns have led several other States to implement alternative voting systems, rather than the indisputably faulty equipment at issue here. Petitioners respectfully submit that this Court is their last

chance to prevent the State of Maryland from becoming the Florida of Election Day 2004.

Petitioners in this case (collectively, “the Voters”) filed a complaint on April 21, 2004, alleging that the SBE’s use of the Diebold voting machines—in the face of overwhelming expert evidence that the systems are not secure or reliable—violates both state and federal law, including Maryland Code, Election Law §§ 9-102 & 9-103. This petition involves those specific provisions of Maryland law, which were strengthened by the Maryland General Assembly in 2001 after the disputed Florida presidential election results. Those provisions command that the SBE “*may not certify* a voting system unless [it] determines that ... the voting system will,” *inter alia*, (1) “protect the security of the voting process,” (2) “count and record all votes accurately,” and (3) “be capable of creating a paper record of all votes cast in order that an audit trail is available in the event of a recount.” MD Code, Election Law § 9-102(c)(1) (emphasis added). They likewise command that the SBE “*shall decertify* a previously certified voting system if” that system “[does not] protect the security of the voting process,” and “[does not] count and record all votes accurately.” *Id.* § 9-103(a)(2) (emphasis added). The SBE refuses to acknowledge state-commissioned expert reports—reports that several other States have recognized and acted upon—which expose significant security risks and flaws in the Diebold voting machines. The

SBE's "hear no evil" response to the state-commissioned experts is unlawful, and as matters presently stand, the SBE is needlessly imperiling the voting rights of Maryland citizens.

Petitioners filed this suit with the expectation of relying upon Maryland Code, Election Law § 12-203(a)(1), which requires that proceedings relating to the integrity of the election process "shall be heard and decided ... *as expeditiously as the circumstances require.*" The circuit court did not implement this fast-track provision, however, despite Plaintiffs' repeated requests. As a result, in an effort to obtain relief within a timeframe that would permit meaningful relief before Election Day, the Voters were forced to move on June 25, 2004 for a preliminary injunction, requesting that the circuit court enjoin the SBE from using the Diebold electronic voting system on Election Day 2004. (*See* June 25, 2004 Plfs.' Mot. for Prelim. Inj. (App. 1-5.) The Voters urged the court to proceed with all due speed and hold a hearing in July; otherwise, the SBE would not have time to implement an alternative to the Diebold voting machines before the November election. (*See* May 25, 2004 Letter from R. Phair to J. Manck (App. 6-18); June 9, 2004 Letter from R. Phair to J. Manck (App. 19-21).) The SBE did not dispute this allegation. To the contrary, it claimed that even if the court heard the motion in July, there would be insufficient time for the SBE to implement an alternative voting system. (*See* May 26, 2004 Letter from M. Berman to J. Manck at 1 (App. 22); June 2,

2004 Letter from M. Berman to J. Manck at 3 (App. 26).) The circuit court refused to hear the preliminary injunction motion in July. Based in part upon the SBE's attorneys' vacation schedule and its own crowded docket, the circuit court instead ordered that the preliminary injunction motion be heard eight weeks later on August 25. (*See* June 29, 2004 Order (App. 29-30).)

As the Voters informed the circuit court, a late August hearing simply does not allow enough time for appellate review and implementation of an adequate remedy by Election Day, and the June 29 Order therefore effectively denied the Voters' request for a preliminary injunction. The Voters had requested that the circuit court order the SBE to revert back to the voting systems previously used successfully in Maryland (*i.e.*, an optical scan system), or implement recommended measures to improve the security and reliability of the Diebold electronic voting system. It will be impossible to hold an election in November that fully complies with federal and state election law, unless this Court reviews the circuit court's refusal to timely grant a preliminary injunction.

This case raises issues of the utmost importance to the voters of the State of Maryland, and indeed as the electoral troubles in Florida demonstrated in 2000, potentially to the entire country. The Voters respectfully submit that this Court should grant the petition.

ARGUMENT

I. The Circuit Court’s June 29 Order Effectively Denied The Voters’ Request For Injunctive Relief In Time For Election Day 2004.

This Court may review the circuit court’s June 29 Order, because it effectively constitutes a denial of the preliminary injunction. By delaying any hearing on the Voters’ motion for a preliminary injunction, the circuit court’s June 29 Order effectively denied the Voters’ motion, because, absent intervention from this Court, any remedy will come too late to provide complete and meaningful relief for *this Election Day*—less than three months from today, and barely over two months from the scheduled hearing. Because the June 29 Order is in effect an order refusing to grant injunctive relief, it is appealable under Maryland Code, Courts and Judicial Proceedings, § 12-303. *See, e.g., Commission on Medical Discipline v. Stillman*, 291 Md. 390, 398, 435 A.2d 747, 752 (1981); *Mount Graham Red Squirrel v. Madigan*, 954 F.2d 1441, 1449-50 (9th Cir. 1992).

Section 12-303(3)(iii) of the Maryland Code, Courts and Judicial Proceedings, provides that a party may appeal from an interlocutory order “[r]efusing to grant an injunction.” Courts, including this one, have made clear that whether an order “[r]efus[es] to grant an injunction,” and thus whether an appeal should be allowed, depends upon the practical “effect” of the trial court’s order. *See, e.g., Commission on Medical Discipline*, 291 Md. at 398, 435 A.2d at 752 (where a court’s order “in effect” restrains a party’s action, that order is in the

nature of an injunction appealable under § 12-303, even though it does not explicitly grant an injunction); *Mount Graham Red Squirrel*, 954 F.2d at 1449-50 (“By delaying a hearing on [plaintiff’s preliminary injunction] motion ..., the district court effectively denied the motion”); *Watson v. Commissioners Ct. of Harrison Cty.*, 616 F.2d 105, 107 n.5 (5th Cir. 1980) (trial court’s decision to delay reapportionment until after the next census “in effect denied” plaintiffs request that the court enjoin an election until after a reapportionment); 11A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *FEDERAL PRACTICE & PROCEDURE* § 2962 (2004) (“These precedents make it clear that the court will look at the actual effect of the order that is issued by the district court when determining whether an appeal should be allowed.”) (citing cases); *cf. Rolo v. General Dev. Corp.*, 949 F.2d 695, 702 (3d Cir. 1991) (“[Federal appellate] jurisdiction pursuant to [28 U.S.C.] § 1292(a)(1) extends to the review of orders that grant or deny injunctions *and orders that have the practical effect of granting or denying injunctions and have serious, perhaps irreparable, consequence.*”) (internal quotations omitted; emphasis in original).

This focus on effect rather than form makes sense, because otherwise appellate review would come too late to offer any meaningful relief. *See, e.g., Cedar Coal Co. v. United Mine Workers of Am.*, 560 F.2d 1153, 1162 (4th Cir. 1977) (“Were an appeal not allowed under the facts as they are presented to us in

this case, it would permit a plain denial of even the bare consideration of whether to consider injunctive relief to go unaccounted for by virtue of an indefinite continuance.”). The actual label on the order, or even whether the trial court has issued a specific order denying or granting an injunction, cannot alone preclude appellate review; otherwise trial courts could avoid immediate, and potentially *any*, review of decisions that prevent injunctive relief. *See Rolo*, 949 F.2d at 702 (“[T]he label put on an order by the district court does not prevent us from treating it as an injunction”); FEDERAL PRACTICE & PROCEDURE § 2962 (“[A] district court may not avoid immediate review of its determination simply by failing to characterize or label its decision as one denying or granting injunctive relief.”).

The effect of the circuit court’s June 29 Order is undoubtedly the denial of injunctive relief in time for Election Day 2004. *See, e.g., Commission on Medical Discipline*, 291 Md. at 398, 435 A.2d at 752; *Mount Graham Red Squirrel*, 954 F.2d at 1449-50; *Rolo*, 949 F.2d at 702. If the preliminary injunction hearing is held only on August 25, as the circuit court ordered, there will not be enough time for appellate review and implementation of an adequate remedy, regardless of whether the circuit court (or appellate courts) rule that the SBE violated Maryland law by certifying and refusing to decertify the Diebold electronic voting system. ***This point is undisputed in this case.***

The Voters moved for a preliminary injunction on June 25, 2004, more than four months before the election. At that time, the Voters represented to the circuit court that a preliminary injunction hearing must be held by the end of July in order to allow time for an appeal to wind its course and for the SBE to implement a secure and reliable voting system by Election Day 2004. (*See* May 25 Phair Letter (App. 6-18); June 9 Phair Letter (App. 19-21).) The SBE did not dispute that characterization. To the contrary, it represented that any time would be too late (even though other States are currently implementing precisely the same remedies, on precisely the same timeframe that the Voters request here). (*See* May 26 Berman Letter at 1 (App. 22); June 2 Berman Letter at 3 (App. 26).) Despite the Voters' vociferous objections that delay would make adequate relief almost impossible, the circuit court ordered that the preliminary injunction hearing be held only on August 25, 2004. (*See* June 29 Order (App. 29-30).)

Maryland election law clearly envisions that judicial proceedings relating to the integrity of the voting process will be resolved with all due speed. In fact, it does more than envision speedy resolution; it requires it: such proceedings “*shall be heard and decided ... as expeditiously as the circumstances require.*” MD Code, Election Law § 12-203(a)(1). Contrary to the SBE's suggestion, *see* June 2 Berman Letter at 3 (App. 26), section 12-203's fast-track provision is simply not an optional one. Nor, as the SBE contended, does it apply only where a plaintiff

demonstrates, with “sworn evidence,” the feasibility of altering the status quo. (*Id.* (emphasis omitted).) It is quite simply contrary to the express language of § 12-203 to put this case on a “routine scheduling track,” *id.*, simply because the SBE refuses to make any effort to replace the Diebold electronic voting system in time for Election Day, as other States and counties across the nation are doing right now. The SBE has presented absolutely no support for its self-serving proposition that a lawsuit initiated in *April*—over *six months* before the election—comes too late to make any changes before Maryland voters head to the polls in November to help elect the next President of the United States. Section 12-203 requires all due speed “as the circumstances require,” not just where the SBE believes it might be possible.

Simply put, the SBE has failed in every respect to facilitate an expeditious resolution of this case on the merits. The SBE refused to agree to the Voters’ proposed scheduling order (which the Voters submitted on May 25, after weeks of failed efforts to negotiate a joint scheduling order with the SBE). (*See* May 25 Phair Letter at 1 (App. 6); May 26 Berman Letter at 1 (App. 22).) The SBE then represented to the circuit court that a preliminary injunction hearing could not be

held in July because its attorneys were too busy or on vacation.¹ Indeed, the SBE has failed even to file an opposition to the Voters' preliminary injunction motion.

Despite the fact that this lawsuit was filed almost seven months before election day, the SBE has dragged its feet at every occasion, turning what could have been a short trial into a drawn out dispute over protective orders and missed deadlines. This despite the fact that the public's trust in the electoral process turns on the integrity and reliability of the voting machines that the SBE selected (over vigorous opposition from its own Procurement Review Committee). The election code's fast-track provisions were expressly designed to allow litigation over such a timeframe. And, of course, the only reason the Voters were forced to move for a preliminary injunction in the first place is because the SBE and the circuit court failed to heed that mandate for all due speed.

The Voters are well aware that government attorneys as well as the circuit courts of this State carry heavy workloads, and may well be understaffed. But this too cannot excuse the failure to expeditiously resolve this case, not only because the issues here are of fundamental importance to the political processes in this State, but also because Maryland law and the public's trust in the voting process

¹ The circuit court conducted a scheduling conference for an hour and a half *in camera*. There is therefore no transcript documenting the SBE's arguments for delaying the preliminary injunction hearing.

demand speedy resolution. *See* MD Code, Election Law § 12-202, *et seq.*; *cf.* *Mount Graham Red Squirrel*, 954 F.2d at 1450 (“[T]he district court’s refusal to schedule a [preliminary injunction] hearing [because of] the awkwardness of balancing a hearing in this case with the demands of other cases ... is [an] insufficient [rationale].”).

The circuit court’s June 29 Order acquiesced in the SBE’s delay, and the SBE will get what it wants—no action—unless this Court steps in. Given the SBE’s track record of delay, along with what is at best ignorance of the election code’s fast-track requirements, any complaints from the SBE that it is too late should fall on deaf ears. This litigation began almost four months ago. It is too late for the expedited trial contemplated by § 12-203, but it need not be too late to provide relief in time for Election Day 2004, if this Court grants certiorari to review the case, a case which presents issues of great importance to the State of Maryland.

II. This Case Raises Questions Of The Utmost Significance About The Integrity Of The Maryland Voting Process On Election Day 2004.

This case seeks to prevent the SBE from forcing Maryland voters to use a voting system on Election Day 2004 that is demonstrably insecure, unreliable and thereby unlawful under Maryland Code, Election Law §§ 9-102 & 9-103. Election Day presents an immovable deadline. The circuit court’s failure to take adequate steps towards reviewing the merits of the Voters’ claims, as well as the SBE’s

refusal to implement any of the recommended changes to the voting system, now pose a significant threat to the integrity of the Maryland vote. The Voters have raised significant questions about whether the Diebold electronic voting system complies with Maryland election law, and there is no doubt the circumstances are urgent. This Court should step in and consider on the merits whether preliminary injunctive relief is warranted in order to safeguard the public's right to vote, and to have votes recorded accurately, on Election Day 2004.

Following the disputed presidential election results in Florida in 2000, the Maryland General Assembly and the Governor took steps to ensure the security and the reliability of the Maryland voting process. Now codified as Maryland Code, Election Law §§ 9-102 & 9-103, these provisions authorize the SBE to certify and decertify voting systems statewide. The law sets explicit standards, however, for such certification and decertification. The SBE “may *not* certify a voting system unless [it] determines that the voting system will,” *inter alia*, (1) “protect the security of the voting process,” (2) “count and record all votes accurately,” and (3) “be capable of creating a paper record of all votes cast in order that an audit trail is available in the event of a recount.” MD Code, Election Law § 9-102(c) (emphasis added). The law also left no doubt what should happen if it turns out that a certified voting system is later determined not to satisfy that standard: *the SBE “shall decertify.” Id.* § 9-103(2) (emphasis added).

Shortly after this legislation was passed, the SBE proposed adopting an electronic voting system. The proposal tracked the standards of the new law, but the machines that were available fell sufficiently short of such standards that the SBE's Procurement Review Committee refused to endorse any of the machines. The SBE, however, forged ahead, selecting Global/Diebold Election Systems as the vendor for the new voting systems in Maryland. This was a mistake and a serious abuse of the agency's authority under Maryland law.

The SBE received numerous expert reports—including expert reports that were state-commissioned—on the many ways in which the Diebold machines do not comply with Maryland voting standards, as well as particularized findings of what would need to be done to remedy or mitigate the problems. In February 2003, for example, one expert reported that she was able to access a file transfer protocol for the Diebold machines over the Internet and that it contained a “virtual handbook for vote-tampering.”² On July 23, 2003, researchers at Johns Hopkins University issued a report utterly devastating to the certification of the Diebold

² Bev Harris, *Voting System Integrity Flaw Discovered at Diebold Election Systems*, Scoop, Feb. 5, 2003 and Feb. 10, 2003, at <http://www.scoop.co.nz/mason/stories/HL0302/s0052.htm>.

machines. It found “significant and wide-reaching security vulnerabilities.”³ Governor Ehrlich then ordered an outside audit and review of the Diebold voting system. That audit confirmed and expanded upon the security concerns identified by the Johns Hopkins researchers. Again, other experts concurred, some of whom advocated abandoning touch-screen voting rather than attempting to mitigate the security risks with a printable, voter-verification receipt. Yet another study was commenced, this time at the initiation of the Maryland Department of Legislative Services, which hired RABA Technologies, LLC. The RABA Report confirmed the same vulnerabilities as the previous reports and many more.

As the Voters argued in the circuit court, the SBE abused its authority under the Maryland election law by ignoring these reports, since these reports demonstrate that the Diebold electronic voting system is (1) not secure, (2) not reliable, and (3) is not capable of creating a voter-verified paper trail.

1. **Security.** The Diebold voting machines do not “protect the security of the voting process.” MD Code, Election Law § 9-102(c)(1)(ii). As the Voters established in the circuit court, four independent expert reports—including three commissioned by the State of Maryland and paid for by Maryland voters—concluded that the Diebold system does not adequately protect the security of the voting system and that the SBE should have heeded the clear warnings of its own Procurement Review Committee. These reports found that, *inter alia*, the Diebold

³ Tadayoshi Kohno, Adam Stubblefield, Aviel D. Rubin & Dan S. Wallach, *Analysis of an Electronic Voting System*, at 4 (Feb. 27, 2004) at <http://avirubin.com/vote.pdf> (“Hopkins Report”).

electronic voting machines had “*significant and wide-reaching security vulnerabilities*,”⁴ the Maryland elections were at “*high risk of compromise*,”⁵ and the Diebold system presented “*considerable security risks*” that could cause “*moderate to severe disruption in an election*.”⁶ The SBE has not challenged these conclusions (nor does it have the expertise to do so), yet has inexplicably offered no explanation for its continued use of the Diebold machines.

2. **Reliability.** It is equally clear that the Diebold electronic voting system does not “count and record all votes accurately,” as required by § 9-102(c)(1)(iii), because the system *did not* do so in either the 2002 elections or the March 2004 primaries in Maryland, or in myriad other elections throughout the country. The Voters established below that in prior elections several registered Maryland voters and local election officials reported widespread malfunctions and glitches with the Diebold machines, including screen blackouts, a faulty ballot review function, missing races on the ballot, and electronically mismarked votes. Again, the SBE has failed, without explanation, to implement the changes recommended to remedy these problems.
3. **Voter-Verified Paper Audit Trail.** Finally, the Voters established that the Diebold voting machines are not “capable of creating a paper record of all votes cast in order that an audit trail is available in the event of a recount,” MD Code, Election Law § 9-102(c)(1)(vi), or, as the SBE’s own regulation requires, “providing an audit trail of all ballots cast so that, in a recount, the election can be reconstructed, starting with the individual votes of all eligible voters,” COMAR § 33.09.02.07. Indeed, there is no dispute that the Diebold machines

⁴ Hopkins Report at 4.

⁵ Science Applications Int’l Corp., *Risk Assessment Report: Diebold AccuVote-TS Voting System and Processes*, at 10 (Sept. 2, 2003) at http://www.dbm.maryland.gov/dbm_publishing/pulic_content/dbm_search/technology/toc_votting_system_report/votingsystemreportfinal.pdf.

⁶ RABA Technologies LLC, *Trusted Agent Report: Diebold AccuVote-TS Voting System*, at 3 (Jan. 20, 2004) at http://www.raba.com/press/TA_Report_AccuVote.pdf.

are not equipped with a voter-verified paper audit trail. The SBE Administrator has publicly acknowledged that the Diebold machines can print only a full day tally—not an individual vote—despite the unambiguous requirement in COMAR § 33.09.02.07 that the machines be capable of reconstructing an election “starting with the individual votes of all eligible voters.”

The Maryland-commissioned expert reports triggered a rapid response in *other* states, most notably California. These other states took swift action in hopes of avoiding the chaos predicted by the experts. *See, e.g.*, California Secretary of State Press Release, *Secretary of State Kevin Shelley Bans Diebold TSx for Use in November 2004 General Election* (April 30, 2004) (available at http://www.ss.ca.gov/executive/press_releases/2004/04_030.pdf). The California Secretary of State has even recommended a criminal investigation of Diebold.

The SBE, by contrast, has done essentially nothing. Under Maryland law, however, nothing is not an option, because the certification and decertification standards are mandatory. *See Smith v. Hackett*, 129 Md. 73, 98 A. 140, 143 (1916) (emphasizing that the laws governing elections should be “strictly observed in every detail, in order that no possible question may arise as to the fairness of an election or as to the accuracy of its results as officially declared”). The Maryland General Assembly did not leave the integrity of the voting process to the whim of bureaucrats. Section 9-102 of the Maryland Code, Election Law states that the SBE “may *not* certify a voting system unless [it] determines” that “the voting system will,” *inter alia*, “*protect the security of the voting process,*” “*count and*

record all votes accurately,” and “*be capable of creating a paper record of all votes cast in order that an audit trail is available in the event of a recount.*” MD Code, Election Law § 9-102(c) (emphasis added). Likewise, Section 9-103 states that the SBE “*shall decertify* a previously certified voting system” if the voting system is unable either to “protect the security of the voting process” or “count and record all votes accurately.” MD Code, Election Law §§ 9-102(c)(ii)-(iii) & 9-103(a)(2) (emphasis added). Furthermore, the SBE’s own regulations require a voting system that “*shall be capable of providing* an audit trail of all ballots cast so that, in a recount, the election can be reconstructed, starting with the individual votes of all eligible voters.” COMAR 33.09.02.07 (emphasis added).

As Maryland courts have repeatedly held, the use of the word “shall” indicates a command rather than a choice. *See, e.g., Pollock v. Patuxent Institution Bd. of Review*, 146 Md. App. 54, 71, 806 A.2d 388, 398 (2002) (concluding that “the regulation was mandatory, given its mandatory ‘shall’ language”), *aff’d*, 374 Md. 463, 823 A.2d 626 (2003). If the SBE cannot disprove the conclusions of the Johns Hopkins researchers or the other reports, then the Diebold machines “may not” be certified, or the SBE “shall decertify” an insecure, unreliable voting system. Maryland law is that simple.

Perhaps worse than the SBE’s silence in the face of the expert reports is the its vacillation as to whether the legal obligation to decertify has even been

triggered. The Administrator of the SBE, a respondent here, has admitted that she has no basis for disagreeing with the reports' conclusions. (See May 13, 2004 First Am. & Verified Compl. ¶ 117 (App. 32) ("I don't disagree with [the conclusions of the experts who drafted the RABA Report] -- they're the experts.")) The SBE is not allowed to play coy about whether Maryland Code, Election Law § 9-103 has been tripped. Otherwise, the SBE will have effectively imported into the regulatory scheme discretion that does not exist in the plain text of either the statute or the regulations. The regulatory scheme applicable to the SBE is not discretionary, and it is too important to allow the SBE to make it so.

The Voters have raised significant questions whether the Diebold voting machines can be trusted to protect the security of the voting process. They have also raised significant questions whether the machines are able to produce an audit trail for each individual voter. The SBE's refusal to acknowledge these facts and comply with the commands of Maryland law demands review from *some* court before Election Day 2004. The integrity of the vote for the next President of the United States is at stake.

III. This Court Is The Voters' Last Resort.

This Court is the Voters' last resort. The circuit court and the SBE failed to expedite resolution of this case as Maryland Code, Election Law § 12-202, *et seq.*, requires, and, when the Voters pursued an alternative avenue for immediate relief,

moving for a preliminary injunction, the circuit court and the SBE delayed the hearing until the end of August, effectively denying the Voters adequate relief for this Election Day. The Voters respectfully submit that they have raised serious questions about whether the SBE violated Maryland Code, Election Law §§ 9-102 & 9-103 by certifying, and refusing to decertify, the Diebold electronic voting system. Absent intervention from this Court, Maryland voters will be forced to use a demonstrably insecure, unreliable, and thereby unlawful voting system. This Court should grant the Voters' petition in order to safeguard the rights of the Maryland voters and avert the possibility of another electoral train wreck on Election Day 2004.

CONCLUSION

For the reasons set forth above, the Voters respectfully request that their petition be granted and the case docketed for expedited consideration.

Dated: August 9, 2004

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by facsimile and Federal Express to all counsel on the attached service list on this 9th day of August, 2004.



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