NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

ASSEMBLEYMAN REED GUSCIORA, STEPHANIE HARRIS, COALITION FOR PEACE ACTION, and NEW JERSEY PEACE ACTION, Plaintiffs, v. JAMES E. McGREEVEY, Governor of the State of New Jersey, and PETER C. HARVEY, Attorney General of New Jersey, Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION-MERCER COUNTY DOCKET No.: MER-L-2691-04 CIVIL ACTION OPINION

DECIDED: October 26, 2004

Frank Askin and Penny M. Venetis for the plaintiffs (Rutgers Constitutional Litigation Clinic, attorneys; Mr. Askin and Ms. Venetis, on the brief).

Peter C. Harvey, Attorney General of the State of New Jersey, for the defendants (Stefanie A. Brand, Assistant Attorney General, of counsel and on the brief; Donna Kelly, Senior Deputy Attorney General, Jeffrey C. Burstein, Assistant Attorney General, Karen Ballard, Deputy Attorney General and Loretta E. Lonergan, Deputy Attorney General, on the brief).

FEINBERG, A.J.S.C.

BACKGROUND

On Tuesday, October 19, 2004, in the late afternoon, plaintiffs, Assemblyman Reed Gusciora, Stephanie Harris, Coalition for Peace Action and New Jersey Peace Action, filed a complaint in lieu of prerogative writs and an order to show cause seeking to restrain the use of electronic voting machines in this State. The complaint named as defendants, Governor of the State of New Jersey, James E. McGreevey, and the Attorney General of the State of New Jersey, Peter C. Harvey.

The next day, Wednesday, October 20, 2004, the court held a preliminary conference, on the record, to establish an expedited briefing schedule. The State filed a cross-motion to dismiss with an accompanying brief and certifications on Monday, October 25, 2004 at 2:00 p.m. The plaintiffs filed a reply and supplemental certifications, via E-mail, at 9:00 p.m. on Monday, October 25, 2004.

The complaint asserts that the use of electronic voting machines, otherwise known as Direct Recording Electronic voting machines ("Electronic Voting Machines") violate: (1) the Constitutional requirement that every vote be counted, in N.J. Const. art. III, ¶ 3(a); (2) the Guarantee of Equal Protection, N.J. Const. art. 1, ¶ 1; (3) the statutory guidelines concerning

vote recounts, N.J.S.A. 19:28-1 et seq.; (4) the statutory requirement that each voter's intent be tabulated in accordance with N.J.S.A. 19:48-1(d), (f) and 19:53A-3(b); (5) the statutory requirement that voting equipment be secure as mandated by N.J.S.A. 19:53A-3(g); and (6) the statutory requirement that votes be counted accurately, N.J.S.A. 19:48-1(h) and 19:53A-3(h).

The record reflects that approximately 7,000 electronic voting machines will be used in fifteen of the twenty-one counties in the upcoming November 2004 election. To support the claim that the electronic voting machines are flawed, plaintiffs have attached the certifications of two experts in the field of computer science.[1] Dr. Appel, a Professor of Computer Science at Princeton University, received a bachelor's degree in physics from Princeton University in 1981 and a Ph.D. in computer science from Carnegie Mellon University in 1985. His areas of expertise within the field of Computer Science include computer security, software engineering and design, programming languages, computer architecture and operating systems

Dr. Mercuri received a Ph.D. from the University of Pennsylvania School of Engineering and Applied Sciences, a

[1] In addition, plaintiffs attach certifications from: (1) Stephanie G. Harris, a resident of Mercer County; (2) Beth Feehan, a concerned citizen; (3) Glenn H. Cantor, a registered voter in Mercer County; and (4) Douglas A. Kellner, a Commissioner of Elections for the City of New York.

Master of Science in Engineering from the University of Pennsylvania, a Master of Science in Computer Science from Drexel University and a Bachelor of Science in Computer Science from the Pennsylvania State University. Her primary fields of expertise are computer security and real-time interactive computer systems.

Relying on these certifications, plaintiffs contend that electronic voting machines are inherently unreliable and create the potential for: (1) manipulation of software, hardware and data; (2) the failure of the system to identify and detect software and hardware manipulation; (3) the development and utilization of fraudulent software; and (4) the easy removal and replacement of the ROM chip and cartridges utilized in the machines, thereby compromising the reliability and integrity of the system. To remedy these irregularities, the experts submit that: (1) the court should restrain the use of these machines for the November 2, 2004 election; (2) the court should require adequate testing and procedures; (3) the court should require that each machine produce an independent verifiable paper ballot; (4) the election statutes should be modified to provide for a certification process that requires each machine, rather than an entire model or class of machines, to be tested; and (5) the court should mandate that the certification process require

the participation of electrical engineers and computer scientists.

To support these allegations, plaintiffs cite: (1) research studies that conclude electronic voting machines, including the models to be used in New Jersey, have numerous security vulnerabilities; (2) specific examples where these machines have allegedly malfunctioned during elections; (3) reports from eight states that require all electronic machines to produce a voter verified paper ballot for voter verification or that all votes be cast on paper; and (4) data to establish the need to prevent the use of machines that lack strict security features.[2] Plaintiffs submit that, despite concerns expressed by both New Jersey citizens and legislators, the defendants have failed to respond to these concerns.

On October 25, 2004, the State filed a brief and certifications in support of a cross-motion for the dismissal of the complaint. The Attorney General submits that there are over five million registered voters in this State and that there are, among the 21 counties, a total of 10,234 voting machines currently in use. According to the Attorney General, the counties utilize several different types of machines, including

[2] Additionally, plaintiffs cite to other countries, such as, the Government of Ireland who dismantled its DREs six weeks before the June 2004 election, or the Supreme Court of Venezuela enjoining the use of all DREs scheduled to be used in the 2000 general election.

mechanical machines, which are presently used in Camden, Cape May, Cumberland, Essex and Monmouth Counties. The State represents that these five counties will utilize a total of 2,448 machines, while the remaining 16 counties will use electronic machines.

Among the types of electronic machines currently marketed; 11 counties use the AVC Advantage, manufactured by Sequoia Pacific. The Shouptronic 1242, manufactured by Shoup; the V-2000, iVotronic, and Optech 111-P Eagle, all manufactured by ES&S, are each found in individual counties, as is the AVC Edge, manufactured by Sequoia Pacific.

The brief submitted by the State is 105 pages. In a separate document the State has provided certifications, consisting of approximately 300 pages from: (1) Donna Barber, the Senior Management Assistant for the New Jersey Division of Elections, Department of Law and Public Safety; (2) Kenneth D. Carbullido, Senior Vice President of Product and Software Development of Election Systems and Software, Inc. (ES&S); (3) Richard Woodbridge, an attorney in private practice, specializing in patent law, who has served as a member of the State's Voting Machine examination Committee since approximately 1982; (4) Patricia DiCostanzo, employed as the Superintendent of Elections in Bergen County since 1996; (5) Joanne Nyikita, employed as the Superintendent of Elections in Burlington County

since 2001; (6) Mark Harris, employed by the Gloucester County Board of Elections since 1992, as the Director of Election Operations; (7) Lisa Gentile, employed by the Hudson County Superintendent of Elections since 1988 as Supervisor of Voting Machines; (8) Richard Lynch, employed by the Hunterdon County Board of Elections since 1991 as the Administrator to the Hunterdon County Board of Elections; (9) Robert J. Lester, employed nine years by the Mercer County Superintendent of Election as the Voting Machine Warehouse Supervisor; (10) Richard Plantec, employed 12 years by the Middlesex County Board of Election as the Voting Machine Warehouse Supervisor; (11) Robert Giles, employed since 1995 by the Ocean County Board of Elections as the Executive Supervisor of the Ocean County Board of Elections; (12) Alfonso Santoro, employed since 1977 by the Ocean County Board of Election as the Executive Supervisor of the Ocean County Board of Elections; (13) Edward Mach, employed since 1988; (14) Dennis Kobitz, employed since 1985 as Deputy Administrator of the Union County Board of Election; (15) Michael Frontera, Vice President of Operations for Sequoia Voting Systems, Inc., who represents that Sequoia has provided election services and support to state and local government for more than 100 years; (16) John D. Burke, employed since 1998 as the Commissioner of the Salem County Board of Election; (17) Rudolph G. Filko, employed four and one-half years as the

Superintendent of Elections for Passaic County; (18) Joanne Armbruster, employed as the Superintendent of Elections for Atlantic County; (19) Michael J. Garvin, employed eight years as the Clerk of Atlantic, responsible for the printing of all papers ballots to be used in any election; (20) Phillip Haines, employed almost five years as the Clerk of the County of Burlington; (21) James Hogan, employed seven years as the County Clerk of Gloucester County; (22) Javier E. Inclan, employed one year as the County Clerk of Hudson County; (23) Mary Beth Hurford, employed for 23 years, as the Deputy County Clerk of Hunterdon County; (24) Catherine DiCostanzo, employed nine years, as the County Clerk of Mercer County; (25) P. Janet Paulso, employed ten years as the Deputy County Clerk of Middlesex County; (26) Joan Bramhall, employed five and one-half years as the County Clerk of the County of Morris; (27) Carl W. Block, employed ten months as the County Clerk of the County of Ocean; (28) Ronni Nochimson, employed ten years as the County Clerk of the County of Passaic; (29) Gilda Gill, employed almost five years as the County Clerk of Salem County; (30) Brett Radi, employed two years as the County Clerk of the County of Somerset; (31) Joanne Rajoppi, employed nine years as the County Clerk of Union County; (32) Patricia Milligan, employed one and one-half years as the Chief Clerk of the Atlantic County Board of Elections; (33) Mary Ann Raymundo, employed 12 years as the

Chief Clerk of the Bergen County Board of Elections; (34) Alice Furia, employed 30 years as the Chief Clerk of the Burlington County Board of Elections; (35) Maria Klein, employed four years as Clerk of the Hudson County Board of Elections; (36) Christine Yates, employed eight years as a member of the Hunterdon County Board of Elections; (37) Karen D. Howard, employed 26 years as the Administrative Clerk of the Mercer County Board of Elections; (38) Betty Donegan, employed 11 and ½ years as the Office Manager of the Morris County Board of Elections; (39) James Vokrall, employed eight months as the Administrator of the Middlesex County Board of Elections; (40) Ken Hirmann, employed two years as Chief Clerk of the Passaic County Board of Elections; (41) Margaret Butler, employed 15 years as the Registrar of the Salem County Board of Elections; (42) Janice Hoffner, employed over 20 years as the Administrator of the Somerset County Board of Elections; and (43) Joanne Williams, employed four years as the Administrator of the Sussex County Board of Elections.

The certifications presented on behalf of the Superintendents of Election, officers and staff affiliated with the Superintendents of Election and officers and staff of the various County Boards of Election, regarding the AVC Advantage represent: (1) the machines have been properly tested; (2) the protocol provides for regular and routine testing; (3) the

voting machine is not a terminal connected to an external computer; (4) the machine cannot be connected to any other computer, network or phone line; (5) the machine does not use a smart card; (5) each cartridge is uniquely identified by serial number and associated with a particular machine; (6) sufficient procedures are in place to ensure the security of all equipment; (7) the machine and cartridges are impounded for a period of 15 days after the election to allow time to conduct a recount pursuant to a court order; (8) in the event a voting machine fails on election day, the officials are prepared to address and correct the problem without interruption of the orderly conduct of the election; (9) each voting machine is subject to a series of five tests plus a Pre-logic and Accuracy election cycle test before it is certified for use in an election; and (10) there is a tamper-proof seal to cut to release the cartridge which is then secured in a container and delivered by the officials to the office of the county clerk. In essence, the certifications of election officials and staff assert that the machines are accurate and reliable.

The certifications regarding the Sequoia Edge used in Salem County represent that: (1) the machine is not a terminal connected to an external computer; (2) the machine is a stand alone device containing its own memory that stores and displays a ballot specific to each election district; (3) the machine

provides an internal audit trail which randomly stores a ballot image of every vote cast on the machine; (4) while the machine is activated by a smart card, the Board issues smart cards for each machine in the election and these are returned to the Board after the election; (5) each voting machine is subjected to a series of tests before it is certified for use in an election; (6) the performance or accuracy of the Edge has not been challenged in any election contest in Salem County.

The certifications in reference to the V-2000, ES&S, used in Passaic County set forth the testing protocol and the security measures in place to ensure the accuracy and safety of the voting. The certifications regarding the Shouptronic, similarly, outline in detail the testing protocol and security measures in place to ensure the accuracy and reliability of the machines. The Shouptronic does not require a smart card and will record election results on a memory cartridge and then begin printing the results.

The certification of Kenneth D. Carbuillido, Senior Vice President of Product and Software Development of ES&S, asserts that the complaint demonstrates a fundamental misunderstanding concerning the nature and operation of Direct Recording Electronic voting machines, particularly the one manufactured by ES&S. He represents that the iVotronic proprietary hardware and software installed in the State of New Jersey complies with all

applicable Federal Election Commission standards. Furthermore, he certifies that the iVotronic DRE voting system has been tested by an Independent Testing Authority and found to be fully compliant with the 1990 Federal Voting Systems Standards.

The certification of Michael Frontera, Vice President of Operations for Sequoia Voting Systems, Inc., represents that the Advantage and Edge have been used in New Jersey for over 10 years and in connection with two presidential elections. During this time, he represents that Sequoia has never received a report of a miscount or other tabulation problem in New Jersey. The machines have been certified for use in at least 15 states, the machines are not connected to the internet or other network, each machine operates as a stand-alone device that cannot be manipulated or reprogrammed remotely and the design of each machine is tested at an independent testing laboratory that certifies the machine complies with federal standards. Furthermore, immediately prior to each election, the county subjects each machine to a battery of diagnostic tests to ensure that the machine is correctly and accurately registering each vote.

The certification of Richard Woodbridge, who serves on the three-member committee in accordance with N.J.S.A. 19:48-2, represents that all of the electronic voting machines in the State are certified voting machines and meet all of the

requirements in Title 19. Attached to his certification are a number of supporting documents.

The County Clerks all oppose a last minute switch to paper ballots. Some of the comments, include the following: (1) emergency and provisional ballots have already been printed for the November 2, 2004 election; (2) there would be additional costs and time required to print a sufficient number of paper ballots for use at the polling place on election day; (3) there are insufficient resources available to provide all paper ballots; (4) there would be voter confusion on election day in the polling places if paper ballots were used; (5) it is nearly impossible, if not impossible, at this late date to alter the voting process in the polling places; (6) it is impossible, in the time remaining until the election, to print a sufficient number of paper ballots before November 2, 2004; (7) the confusion which would certainly result from a switch to an all paper ballot system at the last minute would so overwhelm the voters and the board workers and would reduce the number of people able to vote; (8) a switch to paper ballots at this late date would also rush the administration of the elections so much that the risk of error in administering the voting process and then counting the paper ballots – a process never used in a county-wide scale in my experience – would increase. This risk of error could lead to erroneous tabulation of votes.

The supplemental certification of Dr. Appel, asserts "that none of the tests described in the certification of election administrators are tests that will reveal whether or not the right software is installed in electronic voting machines, nor can the tests determine whether malicious software has been installed in DREs." Futhermore, Dr. Appel states "the internal audit capacity of the DRE voting systems scheduled to be deployed in the upcoming election is not an independent audit."

I.

ARGUMENTS

A. PLAINTIFFS

Plaintiffs argue: (1) the electronic voting machines pose a risk to New Jersey voters' constitutionally protected right to vote under N.J. Const., art. II, § 1, ¶ 3(a); (2) the certification process for voting machines, set forth in N.J.S.A. 19:48-2 and 19:53A-4 requires all voting machines to be certified before being used in an election; (3) the testing under N.J.S.A. 19:48-2 does not guarantee proper certification of electronic voting machines inasmuch as the experts required to submit a report about the machines are not electrical engineers and computer scientists; therefore, there is no proper review to certify these machines; (4) determining whether these machines on Election Day will malfunction is impossible; (5) the electronic voting machines cannot recount actual votes, thus,

violating voters' statutory and constitutional rights as required by Title 19; (6) no instructions are given on how to perform recounts of votes using these machines, and in the event of a recount, voters have no assurance that their votes will be treated the same as votes cast on paper ballots, ballot cards or lever machines thereby resulting in the unequal consideration of votes as guaranteed by N.J. Const. art. 1, ¶ 1; and (8) electronic voting machines are too insecure to protect the statutory rights of voters in violation of the statutory requirements of N.J.S.A. 19:48-1 et seq. and 19:53A-1 et seq.

Therefore, plaintiffs argue that they are entitled to temporary injunctive relief.

B. DEFENDANTS

The defendants raise six separate and independent arguments: (1) the court lacks jurisdiction over the matter because the plaintiffs are challenging the final determinations of a state officer and such review lies only in the Appellate Division; (2) the action is time barred under R. 4:69-6(a); (3) the matter should be dismissed for the failure to include indispensable parties; to wit, the County Clerks, County Boards of Elections and County Superintendents of Elections; (4) the organizational plaintiffs lack standing to bring this action and the individual plaintiffs only have standing to challenge the utilization of electronic voting machines in Mercer County; (5A)

the request for emergent relief should be denied based on the doctrine of laches; (5B) the request for emergent relief should be denied based on the strong judicial policy disfavoring belatedly filed requests for injunctive relief which could disrupt a forthcoming election; (6) the law in New Jersey provides that the certification of voting machines is presumed valid and places the burden of persuasion on the party challenging such decision; and (7) assuming the court determines that it has jurisdiction to entertain this matter, plaintiffs have failed to establish any entitlement to injunctive relief.

II.

ANALYSIS

PRELIMINARY ISSUES

The filing of this action, thirteen days prior to the election, necessitated an expedited briefing schedule and hearing date. Due to this truncated time frame, the court will briefly address the procedural objections raised by the defendants. First, the court rejects the position by the defendants that: (1) this court lacks jurisdiction; (2) the matter is time barred; (3) the complaint fails to name and join indispensable parties; (4) plaintiffs lack standing; and (5) the complaint is barred by the doctrine of laches. The remaining issues will be addressed separately in this opinion.

A. JURISDICTION

The court rejects the argument advanced by the defendants that this court lacks jurisdiction. Title 19 provides:

> The certificate of approval, or a certified copy thereof, shall be conclusive evidence that the kind of machine so examined complies with the provision of this subtitle, except that the action of the Secretary of State in approving such machine may be reviewed by the Superior Court in a proceeding in lieu of prerogative writ.
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> [N.J.S.A. 19:48-2 (emphasis added).]

The statute is clear and unambiguous. Rule 4:69-1 provides for the "review, hearing and relief heretofore available by prerogative writs and not available under R. 2:2-3 or R. 8.2 shall be afforded by an action in the Law Division, Civil Part." Both the statute and Court Rule provide the same mechanism for the resolution of these kinds of disputes.

Furthermore, motions in lieu of prerogative writs may be filed in the Law Division in instances such as this, where there is no opportunity in any previous proceeding to create a record which the Appellate Division can review, and when the complaint seeks relief from state inaction, rather than governmental action. See Colon v. Tedesco, 125 N.J. Super. 446 (Law Div. 1973) (where the complaint sought relief not from governmental action but from inaction, where the relief sought was essentially by way of mandamus to compel the performance of

ministerial duties (i.e., to conduct an investigation), and where there was no mechanism for an adversarial, quasi-judicial proceeding in the agency, thus precluding the making of an agency record and requiring the taking of proofs before the court in a plenary manner).

B. TIMLEINESS

Rule 4:69-6(a) provides that "[n]o action in lieu of prerogative writs shall be commenced later than 45 days after the accrual of the right to the review, hearing or relief claimed, except as provided by paragraph (b) of this rule." Ibid. Despite the limited exceptions set forth in the rule, paragraph (c) permits the court to enlarge the period of time provided in the rule "where it is manifest that the interest of justice so requires." R. 4:69-6(c). Courts recognize three exceptions to the time period set forth in the rule. These include (1) substantial and novel constitutional questions; (2) informal or ex parte determinations made by administrative officials which do not involve a "sufficient crystallization of a dispute along firm lines to call forth the policy of repose and where the right to relief depends upon determination of a legal question; and (3) an important public rather than a private interest which requires adjudication or clarification." See Borough of Princeton v. Mercer County, 169 N.J. 135, 152-53 (2001), Reilly v. Brice, 109 N.J. 555 (1988); Schack v. Trimble,

28 N.J. 40, 48 (1958). This court finds that the complaint raises an important public interest that requires adjudication or clarification.

Furthermore, while the electronic voting machines set forth in the complaint were certified, in accordance with N.J.S.A. 19:48-1, more than 45 days ago, the thrust of the complaint is that the action by the Attorney General constitutes an on-going and continuous violation. Over the years, courts in this State have recognized that the "interest of justice" may require enlarging the time to file under R. 4:69-6(c), for violations that are considered to be of a continuous or on-going nature. Jones v. McDonald, 33 N.J. 132, 138 (1960) (finding that even though action was filed more than 45 days after defendant wrongfully took office, each official act defendant took was a violation of plaintiff's rights).

Irrespective of the outcome of this case ultimately on the merits, the thrust of the complaint is that the continued use of electronic voting machines in New Jersey constitutes a continuous wrong.

C. INDISPENSABLE PARTIES

The defendants assert that the matter should be dismissed for the plaintiffs' failure to include indispensable parties. Mandatory joinder is governed by R. 4:28-1(a). The rule provides:

> Persons to be joined if feasible: A person who is subject to service of process shall be joined as a party to the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest in the subject of the action and is so situated that the disposition of the action in the person's absence may either (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or other inconsistent obligations by reason of the claimed interest. If the person has not been so joined, the court shall order that the person be made a party . . . .
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> [R. 4:28-1(a).]

Whether a party is indispensable is a fact-sensitive issue. Toll Brothers, Inc. v. Township of W. Windsor, 334 N.J. Super. 77, 90 (App. Div. 2000), certif. denied, 168 N.J. 295 (2001). N.J.S.A. 19:31-6(a) names the Attorney General as the Chief Election Official of the State of New Jersey responsible for the "coordination of this State's responsibilities pursuant to the provisions of the National Voter Registration Act of 1993." Ibid. While the various Superintendents of Elections, County Boards of Elections and County Clerks are responsible for implementing the provisions of Title 19, the legislature vests in the Attorney General the authority to establish policy and to oversee elections in this State.

Furthermore, while ultimately different governmental

officials may be involved in executing local responsibilities under Title 19, complete relief can be accorded in their absence. R. 4:28-1. Furthermore, the State has submitted the certifications of County Clerks, Superintendents of Elections and several local officials in support of their application to deny injunctive relief. While they have not been named as parties, the participation of the Attorney General, the Chief Election Official in the State, more than adequately represents their interests.

D. STANDING

The standing requirements in New Jersey are very liberal. When a case before a New Jersey court presents an issue of "great public interest," even "only a slight private interest" will provide the plaintiff with standing. Elizabeth Fed. Sav. & Loan Ass'n v. Howell, 24 N.J. 488, 499 (1957). Courts have held that an individual's particular interest in the litigation, in certain circumstances, need not be the sole determinant. That interest may be accorded proportionately less significance where it coincides with a strong public interest. N.J. Chamber of Commerce v. N.J. Election Law Enforcement Comm'n, 82 N.J. 57, 68-9 (1980).

Furthermore, standing can be established although "there is nothing in the allegations or record to establish 'injury in

fact'." Home Builders League of S. Jersey, Inc. v. Township of Berlin, 81 N.J. 127, 134 (1979). Courts have traditionally liberally construed standing when addressing election issues. See, e.g., Reynolds v. Sims, 377 U.S. 533, 555 (1963)("The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government."); Gangemi v. Rosengard, 44 N.J. 166, 170 (1965) (quoting Wesberry v. Sanders, 376 U.S. 1, 17 (1964)). "The right to vote includes the right to have the ballot counted." Reynolds, supra, 377 U.S. at 555, n.29 (quoting South v. Peters, 339 U.S. 276, 279 (1950) (Douglas, J., dissenting)). Thus, the standing requirements are relaxed.

In determining whether a plaintiff has standing, a court is required to weigh issues of individual justice and the public interest heavily, with the ultimate goal of "expeditious determinations on the ultimate merits," while rejecting procedural frustrations. Crescent Park Tenants Ass'n v. Realty Equity, 58 N.J. 98, 107-08 (1971). To have standing, a plaintiff must show a sufficient stake in the outcome of the proceedings and show that her position is adverse to that of the defendant. See Home Builders League of S. Jersey, Inc., supra, 81 N.J. at 132; Crescent Park Tenants Ass'n, supra, 58 N.J. at 107. Both these factors are present here.

To determine organizational standing, a court must take into account an organization's goals and how its goals relate to the offending action in making a determination of standing. See Home Builders League of S. Jersey, Inc., supra, 81 N.J. at 132. While the organizational standing of plaintiffs Coalition for Peace Action and New Jersey Peace Action is less certain, at this juncture the court will not preclude their participation.

E. THE DOCTRINE OF LACHES

The doctrine of laches, an affirmative defense, applies when a party has waited an unreasonable period of time before seeking relief. The key factors to be considered are the length of delay, reasons for delay, and changing conditions of either or both parties during the delay. Lavin v. Hackensack Bd. of Ed., 90 N.J. 145, 152 (1982). It is because the central issue is whether it is inequitable to permit the claim to be enforced, that generally the change in conditions or relations of the parties coupled with the passage of time becomes the primary determinant.

Despite the late filing of this action, thirteen days before the election, the court is not inclined to dismiss the matter based on laches. The delay in filing, however, will be considered by the court in determining the propriety of injunctive relief.

III.

REMAINING ISSUES

A. STRONG POLICY NOT TO DISRUPT UPCOMING ELECTIONS

Despite the procedural determinations by the court, as cited above, plaintiffs' application for injunctive relief must be denied. There is a long-standing strong judicial policy disfavoring imposing injunctive relief that could disrupt a forthcoming election. Indeed, this principle has been applied to settings where, unlike here, plaintiffs have demonstrated a likelihood of ultimate success on the merits or even have already succeeded on the merits. In Reynolds v. Sims, 377 U.S. 533 (1964), the Supreme Court approved the initial refraining by the federal district court from enjoining an impending election despite proven Equal Protection Clause violations in the state voting systems at issue. Id. at 586. The Court explained:

> Where an impending election is imminent and a State's election machinery is already in progress, equitable considerations might justify a court in withholding the granting of immediately effective relief in a legislative apportionment case, even though the existing apportionment scheme was found invalid. In awarding or withholding immediate relief, a court is entitled to and should consider the proximity of a forthcoming election and the mechanics and complexities of state election laws....
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> [Id. at 585 (emphasis added).]

This principle of judicial restraint against issuing an injunction at a time close to an election has been applied in

various cases to the precise setting of the instant matter, i.e., challenges to the use of electronic voting machines. One recent such case is Schade v. Maryland State Board of Elections No. C-04-9729 (Md. Cir. Ct. of Anne Arundle County Sept. 1, 2004)(the decision of the Maryland court is not reported, but is attached to the State's brief). The Maryland Supreme Court has granted the petition for a writ of certiorari, 855 A.2d 1245 (Md. 2004). In Schade, plaintiffs sought, inter alia, a preliminary injunction to prevent the use of the Diebold electronic voting machine in Maryland in the forthcoming November 2004 election, seeking (as do plaintiffs here) the alternative use of paper ballots. Notably, plaintiffs in Schade brought their lawsuit with far more alacrity than plaintiffs in the instant matter; the Schade complaint was filed in April 2004, and soon thereafter the preliminary injunction application was made.

The court rejected the defense of laches. Nevertheless, the court found that "the plaintiffs had ample notice, as early as 2002, of the use of the Diebold machines and clearly could have taken steps earlier than late April of 2004 concerning the November 2004 presidential election." Id. 5. Thus, the court denied the preliminary injunction application "[i]n light of the fact that plaintiffs waited, perhaps years to bring this suit after notice of the use of the system...." Ibid. The

court also based its decision on "the exorbitant cost of their so-called fix," namely the use of paper ballots (the precise relief plaintiffs seek here), and the "confusion" that would be caused by plaintiffs' proposed paper ballot "remedy." Ibid.

Similarly, Wexler v. Lepore, 878 So.2d 1276 (Fla. Dist. Ct. of App. 2004), involved a challenge to the use of electronic voting equipment in Palm Beach County Florida. The court rejected plaintiff's request for injunctive relief, emphasizing the significantly heightened standard that exists for imposing injunctive relief that could alter the mode of conduct of a forthcoming election. "Only where, prior to an election, a palpable violation of the registration or election laws is about to take place is an injunction an appropriate remedy." Id. at 1282, (citing Johnson v. Parks, 143 So. 145 (Fla. 1932) (emphasis added)). See also Weber v. Shelley, supra, 347 F.3d at 1105-07 (denying injunction against use of paperless touchscreen voting system, i.e., the AVC Edge System); Davis v. Parkins, 456 N.W.2d 681 (Iowa 1990)(rejecting attempt to enjoin use of electronic voting equipment in forthcoming local election).

While there are no New Jersey cases (apart from the instant matter) involving challenges to electronic voting machines, the principle that courts should be extremely reluctant to issue injunctions affecting imminently forthcoming elections is emphasized in Mauk v. Hoffman, 87 N.J. Super. 276 (Ch. Div.

1965). In Mauk, despite the court's finding of an Equal Protection Clause violation in the structure of the county board of freeholders, the court relied on Reynolds in refraining from enjoining the forthcoming election to avoid the disruption that would ensue and to "allow resort to available political remedies." Id. at 283.

Further, Jackman v. Bodine, 49 N.J. 406 (1967), involved a finding by the New Jersey Supreme Court of unconstitutionality of provisions that fixed the composition of the State Legislature. A reapportionment plan devised after the Court's initial finding of Equal Protection violations contained provisions deemed by the court to still be unconstitutional. Despite the finding of unconstitutionality, the Court refused to issue an injunction that would impact an "imminent election", given the "imperative" need to avoid the governmental disruption such an injunction would entail. Id. at 419.

B. PLAINTIFFS HAVE FAILED TO ESTABLISH THE RIGHT TO INJUNCTIVE RELIEF

A temporary restraining order is an extraordinary measure that should be utilized sparingly and only when the proven

equities establish a clear need for the injunction. Preliminary injunctive relief is an equitable remedy that can, in appropriate circumstances, be imposed at the discretion of the court. The determination to grant temporary restraints of an injunction is made on an individualized basis after careful consideration of questions of justice, equity and morality presented by the circumstances of each particular case. Zoning Bd. of Adjustments v. Serv. Elec. Cable T.V., 198 N.J. Super. 370, 379 (App. Div. 1985); New Chancellor Cinema, Inc. v. Town of Irvington, 169 N.J. Super. 564, 572 (Law Div. 1979).

The test for granting injunctive relief is well established in New Jersey. The Supreme Court set forth the standards for injunctive relief in Crowe v. DeGioia, 90 N.J. 126 (1982). In order to justify the granting of injunctive relief, the claimant must:

> Demonstrate that, in the absence of such a stay, the claimant will suffer irreparable injury; and
>
> Demonstrate that the legal right underlying the plaintiff's claim is settled; and
>
> Demonstrate a reasonable probability of ultimate success on the merits; and
>
> Demonstrate that the probability of harm to other persons will not be greater than the harm the claimant will suffer in the absence of such relief.
>
> [Id. at 132-35]

Plaintiffs filed suit to prohibit 15 counties of the State from using the State-certified electronic voting machines for the November 2, 2004 Presidential election. Plaintiffs' application is to be heard within one week of this unprecedented election. The machines they seek to enjoin from use have been utilized by hundreds of thousands of voters over a significant period of time for numerous elections and for which there have been no widespread failures or overturning of elections because of machine malfunctions. For the reasons set forth herein, the court finds that the applicants have failed to meet the standards for injunctive relief as set forth in Crowe.

1. IMMEDIATE AND IRREPARABLE HARM

An applicant seeking injunctive relief must demonstrate that absent that relief it will suffer "irreparable harm" that cannot be redressed adequately by money damages. Crowe v. DeGioia, supra, 90 N.J. at 133. In construing the term "irreparable harm" courts have noted that a purported injury must be "great and irreparable," Van Walkenburgh v. Rahway Bank, 8 N.J. Eq. 725, 726 (E. & A. 1850), and it must be a "substantial injury." Humble Oil & Ref. Co. v. Wojtycha, 48 N.J. 562 (1967). In the case at bar, plaintiffs' request for injunctive relief does not meet the standards imposed by Crowe.

As described above, plaintiffs allege that the use of the voting machines at issue pose a risk that votes may not be properly recorded. Certainly the importance of accurately counting every vote is beyond question. In point of fact, the procedures set forth in Title 19 (and implemented by defendants) are designed to insure that this takes place. Based on the information available to the court, at this juncture, plaintiffs have failed to establish that the voters face irreparable harm.

To secure injunctive relief, the evidence present must identify an actual, as opposed to theoretical, harm sufficient to justify the relief requested. "The mere risk of harm does not constitute irreparable injury and may not provide the basis for injunctive relief." Apollo Techs v. Centrosphere Indus. Corp., 805 F. Supp. 1157, 1209 (D.N.J. 1992). "The mere risk of irreparable harm or the possibility of a remote future injury is not enough." Marsellis-Warner Corp. v. Rabens, 51 F. Supp. 2d 508, 528 (D.N.J. 1999). A plaintiff must demonstrate a "presently existing actual threat; [an injunction] may not be used to eliminate the possibility of a remote future injury." Cont'l Group, Inc. v. Amoco Chem. Corp., 614 F.2d 351, 359 (1980). Stated differently, to warrant the granting of an injunction on the ground of irreparable injury, "the injury contemplated must be real, not fancied; actual, not prospective; and threatened, not imagined." Ass'n of Prof'l Eng'g Pers. v.

Radio Corp., 183 F. Supp. 834, 839 (D.N.J. 1960); rev'd on other grounds, 291 F. 2d 105 (3d Cir. 1961), cert. denied, 82 S. Ct. 174 (1961).

Plaintiffs' application fails to meet this stringent standard. While plaintiffs' complaint is based upon allegations of harm that are speculative at this time, it is also true that these type of voting machines have been used in this State and, in other States, for many years without problems. Indeed, the successful history of the actual use of the machines in question in New Jersey provides the strongest rebuttal to the assertion that use of those machines poses a risk of irreparable harm.

In addition, the delay in filing the current action also militates against the claim of irreparable harm. "As a general proposition, delay in seeking preliminary relief cuts against finding irreparable injury." N.J. Ass'n of Health Care Facilities, Inc. v. Gibbs, 838 F. Supp. 881, 928 (D.N.J. 1993); "a plaintiff's undue delay in commencing an action ... can also defeat a claim of irreparable harm necessary for the issuance of a preliminary injunction." Warner Lambert Co. v. McCrory's Corp., 718 F. Supp. 389, 394 (D.N.J. 1989). In the case at bar, plaintiffs have waited literally to the last moment to seek relief from the court.

2. REASONABLE LIKELIHOOD OF SUCCESS ON THE MERITS

In order to demonstrate a reasonable probability of success on the merits, "the movant must clearly and convincingly establish that the material facts are not in dispute and the legal claim upon which the application is based is settled or free from doubt." Sherman, supra, 330 N.J. Super. at 645. While the material facts in this case are not in dispute, the legal claim upon which the application is based is not settled in plaintiffs' favor. The examination of voting machines and their certification of approval is conducted by the Secretary of State, pursuant to N.J.S.A. 19:48-2. N.J.S.A. 19:48-2 states in pertinent part that:

> The **certificate of approval**, or a certified copy thereof, **shall be conclusive** evidence that the kind of machine so examined complies with the provisions of this subtitle, **except that the action of the Secretary of State in approving such machine may be reviewed by the Superior Court** in a proceeding in lieu of prerogative writ.
>
> [Ibid. (emphasis added).]

Although N.J.S.A. 19:48-2 expresses that the findings regarding voting machines are conclusive, the statute provides a mechanism for review by the Superior Court. The language in the statute evidences an intent by the Legislature to, at a minimum, establish a rebuttable presumption in favor of the Secretary of State's approval; thereby placing the burden on the challengers to prove otherwise.

Plaintiffs submit that the five voting systems in the 15 Counties are allegedly "unreliable" and do not count all the votes cast. This claim is not based on any specific or direct evidence that these systems have failed to accurately record the votes cast in numerous prior New Jersey elections. While plaintiffs rely on research studies from other jurisdictions, in essence, plaintiffs submit that the machines are inherently flawed because there is no voter-verifiable paper trail. In support of this claim, plaintiffs raise several arguments under State law and also assert an equal protection argument. None of these arguments warrant emergent relief.

On the matter of State law, plaintiffs first claim that State law does not provide for, or allow, a certification process for DREs. This is not the case. New Jersey law requires that no voting machines can be used in any public election unless it has been certified for use by the State, after a determination by a State examination committee that the machine satisfies specific criteria. N.J.S.A. 19:48-1, et seq. This statute generally requires that a voting machine must ensure a voter is able to cast votes in all elections to which he or she is entitled; preserving the secrecy and the accuracy of all votes cast. N.J.S.A. 19:48-1, et seq.

N.J.S.A. 19:53A-1 et seq., which was enacted in 1973, references electronic voting systems and generally provides for

the voting machine requirements set forth in Chapter 48. Notably, N.J.S.A. 19:53A-2(b) specifically provides that: "The provisions of this act shall be controlling with respect to elections where electronic voting systems are used, and shall be liberally construed to carry out the purpose and intent of this act." Ibid. The five voting systems at issue here were certified in accordance with Chapter 53A, which is plainly applicable to all electronic voting systems. Therefore, plaintiffs' argument that the State law does not provide for DRE certification must be rejected.

Plaintiffs further challenge the statutory composition of the State's examination committee. N.J.S.A. 19:48-3 refers to a panel of three examiners: a patent attorney and two mechanical experts. This objection in regard to the Shouptronic, and the Sequoia Advantage AVC machines comes too late to bear any meaning, as these machines have been subjected to "real life" application in the State for an overwhelmingly significant period of time. Indeed, the Shouptronic has been used in Atlantic County for every election since 1983. That is the longest record in the County for touchscreen voting and not one election in that time has been overturned or subjected to question because of malfunction. The Sequoia Advantage was first used in the State in Bergen County over 12 years ago, with

a record similar to that in Atlantic County. The same holds true for the other Sequoia Advantage Counties.

Furthermore, the State represents that it has been the administrative practice, for the State's examination of voting machines since the 1990's, to include experienced personnel in the field of computers. (See Certification of Richard Woodbridge, Esq.). Thus, the State certified the Sequoia Edge and the ES&S machines after the required statutory review and certification by a panel that included computer experts. Furthermore, the State submits that it requests a copy of the ITA ("Independent Testing Authority") certification for a system's hardware and software and that the ITAs examine voting systems in accordance with the voluntary standards recognized by the Federal Election Commission. (Ibid.)

In response to criticism of the State's procedure for certifying a voting machine model, as opposed to applying the certification process for each and every voting machine to be purchased by a county, the State has submitted multiple certifications from local election officials. Importantly, the County Commissioners of Registrations' certifications attest that each machine under their care and custody is subjected to pre-election testing before every election to assure workability and reliability. As a result, the State submits these records

of machines "in the field" should carry far greater weight, than plaintiffs' unsupported concerns.

The court rejects the equal protection arguments regarding recounts. While the plaintiffs assert that the electronic voting machines do not satisfy the State's statutory recount procedures, as there is no "physical evidence of voter intent" because of a lack of a voter-verified paper trail, the same position could be equally applied to lever machines. Plaintiffs assert that a recount of these machines will be a "recitation of a biased technician's conclusion" (Brief, p.96). The suggestion that mischief or fraud is evident is unwarranted. N.J.S.A. 19:28-1 et seq. creates a procedure for recounts by election officials who take an oath of office to exercise their duties and responsibilities in a bi-partisan manner. N.J.S.A. 19:53B-1, et seq.

Further, the argument regarding the recount procedure ignores the fact that a DRE, such as the Sequoia Advantage, is capable of producing an audit trail which randomly produces the various ballot images, and which can be compared to the election night tape (from the cartridge), as well as the tape generated results from the internal memory at the close of the polls. (Certification of Sequoia and ES&S).

Plaintiffs claim that the State's machines are inherently “unreliable” are insufficient to establish a reasonable

probability of success on the merits. Plaintiffs rely on newspaper articles and other publications regarding alleged voting machine problems in other jurisdictions, and theoretical dissertations of the possibility of voting machine failure. (Plaintiffs' Complaint, paragraphs 1, 4, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 21, 22, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 47, 48). Regarding the evidentiary use of such material, it is well-settled law that newspapers or newspaper articles are not ordinarily admissible as evidence of the facts stated therein. 29 Am. Jur. 2d, Evidence, s885. This rule was followed in State v. Otis Elevator Co., 10 N.J. 504, 509 (1952), and was reiterated in Sheitelman, Inc. v. Hoffman, 106 N.J. Super. 353 (App. Div. 1969). As noted in Sheitelman, a court is not permitted to consider these under the business records exception to the hearsay rule:

> A newspaper article is a product of the newspaper business, as distinguished from a record maintained for the purpose of systematically conducting the business itself. While the accuracy of reporting is highly desirable from the standpoint of the newspaper -reading public, inaccuracy of reporting bears no direct relationship to the newspaper publishing business itself. Generally, there is no legal obligation on a newspaper reporter to give such an accurate account of the subject upon which he reports as would vouch for its truthfulness. Compare Fagan v. Newark, 78 N.J. Super. 294 (App. Div. 1963).

[Sheitelman, Inc., supra, 106 N.J. Super. at 357.]

The court is not satisfied that the plaintiffs have established that the voting machines utilized within the State of New Jersey do not meet the certification requirements of Title 19, or, as argued above, that these certification requirements are inherently inadequate to assure the electorate a secure and accurate tally of ballots cast. Simply put, there is overwhelming evidence presented by the defendants to refute these conclusions. While the certifications of Rebecca Mercuri and Andrew Appel outline the various machines used in this State, they have not provided any examples where a voting machine has been proven to fail New Jersey voters, nor present any credible evidence to conclude one machine will fail on November 2, 2004.

Plaintiffs also cite to American Association of People With Disabilities et al. v. Shelley, 324 F. Supp.2d 1120 (C.D. Cal. 2004) to support their suggestion that the issuance of paper ballots to replace electronic voting machines has found favor with the courts. (Exhibit T, Letter from Penny Venetis to Peter C. Harvey, Attorney General of New Jersey, dated October 1, 2004). Their reliance upon this case is misplaced for several reasons. The voting system at issue in the aforementioned case was the Diebold Accu-Vote-TSx system, which had been

conditionally approved for use in California in November, 2003. Id. at 1124. The Accu-Vote-TS Direct Recording Electronic (hereinafter referred to as "DRE") voting system had been approved for use in California in 1999.

In response to reports of difficulties encountered throughout the state during the March 2004 primary election, the Secretary of State conducted a review of DREs in use in California, which identified problems in the areas of testing and certification of software, reliability, accuracy, training and security. Ibid. It was only after this process had been completed, and public hearings conducted by California's Voting System and Procedures Panel, a body charged with reviewing proposed voting systems and modifications and making recommendations to the Secretary of State regarding certification that actions were taken. Ibid.

Obviously, the situation that exists in New Jersey is strikingly distinguishable from that of California. First, there has been no reported system-wide difficulties reported with any of the types of voting machines used in this State. The California Secretary of State acted upon the basis of actual problems with that State's voting machines. Plaintiffs have presented no real problems with New Jersey's voting system, as there are none. Lastly, it should be noted that American Association of People With Disabilities, supra, was

decided in early July 2004. It was noted by the court in that case that the Secretary of State gave notice of public hearings regarding the possible decertification of the DRE machines and that those hearings occurred on April 21, 22, and 28, 2004, with the decertification of the system announced on April 30, 2004. There can be no valid analogy between that time frame and the case at bar. Here, the State is a mere week from an election, for which record numbers of new voters registered and in which an unprecedented volume of voter turnout is expected.

Finally, it should be stressed that plaintiffs' entire claim rests on their conjecture that problems may arise with the voting systems currently in place. Yet the Supreme Court has made clear that "a claim is not ripe for adjudication if it rests upon contingent future events that may or may not occur as anticipated and indeed may not occur at all." Texas v. United States, 523 U.S. 296, 300 (1998). There is no probability of success for plaintiffs' claim. There is no justification for judicial action.

The courts should intervene in the electoral process only when there is a deprivation of rights. Indeed, the election cases relied upon by plaintiffs, as examples of judicial intervention in election matters, do not support their cause. In each of those cases, the Court made specific findings of a machine failure, or that voters were improperly rejected. See

In re Application of Moffet, 142 N.J. Super. 217 (App. Div. 1976); Maguire v. Smith, 131 N.J. Super. 395 (Law Div. 1974). There is no such proof here. There is no justification whatsoever for the Court to now inject itself into the November 2, 2004 General Election. Any such intervention at this point in the electoral process will create harm where there has been none established.

Plaintiffs, however, cite to N.J.S.A. 19:48-3.2 and N.J.S.A. 19:48-3.13 to argue that the Attorney General has the authority to issue a directive that paper ballots be used by all voters during the November 2, 2004 General Election. These provisions of Title 19 were designed to provide for the use of emergency ballots should specific voting machine malfunctions occur. In relevant part, N.J.S.A. 19:48-3.2 states that:

> No ballots shall be prepared or used at any election in any election district under the provisions of this act other than such ballots as are required for use in voting machines emergency ballots for use if a voting machine fails to operate, as provided in P.L. 1992, c. 3 (C.19:53B-1 et al.) and provisional ballots for use by certain voters who no longer reside at the place from which they are registered, as provided in P.L. 1999, c. 232 (C.19:9-2 et al.)
>
> [Ibid.]

Further, N.J.S.A. 19:48-3.13 does not permit the Attorney General to issue an order to permit the use of paper ballots by all voters on November 2, 2004. That provision directs that:

> No ballots other than ballots required for use in voting machines, emergency ballots for use if a voting machine fails to operate and provisional ballots for use by certain voters who no longer reside at the place from which they are registered, as provided in P.L. 1999, c. 232 (C.19:9-2 et al.) shall be prepared or used at any election in any election district.
>
> [N.J.S.A. 19:48-3.13.]

Therefore, while the use of emergency ballots is provided for by statute, they are to be used when there has been a specific malfunction of a voting machine. These statutes do not provide for statewide use of emergency ballots based on speculative concerns about broad categories of voting machines.

Nor would the issuance of an Executive Order be proper where there is insufficient evidence that the voting systems in the 15 counties are inherently unreliable. Plaintiffs' submissions simply do not establish the harm that they allege. In the absence of such proofs, they are not likely to succeed on the merits in obtaining the judicial relief they seek. For this reason, their application to require the use of paper ballots on November 2, 2004 is denied.

Like all administrative decisions, the State's certification of voting machines is entitled to a presumption of

validity, with the burden on the party challenging the decision to demonstrate that the it is arbitrary, capricious, unduly onerous or otherwise unreasonable. The Supreme Court of New Jersey has repeatedly held that administrative agency decisions are entitled to a presumption of correctness and that the burden is on the party challenging the agency action to overcome this presumption. In re Musick, 143 N.J. 206, 216 (1996); In re March 24, 1992 Order, 132 N.J. 209, 221 (1993); Hills Dev. Co. v. Township of Bernards, 103 N.J. 1, 45 (1986); Dougherty v. Dep't of Human Servs., 91 N.J. 1, 6 (1982); N.J. Guild of Hearing Aid Dispensers v. Long, 75 N.J. 544 (1978). The Appellate Division has faithfully applied these principles. As that court recently explained, "[t]here is a strong presumption that an agency decision is valid. One challenging that decision has a heavy burden of proving the contrary and demonstrating that the decision was arbitrary, unreasonable or capricious." In re Tax Credit of Pennrose, 346 N.J. Super. 479, 486 (App. Div. 2002). Accord Coalition for Quality Health Care v. Dep't of Banking & Ins., 348 N.J. Super. 272, 301 (App. Div.), certif. denied, 174 N.J. 194 (2002).

The burden of proof does not shift to the administrative agency decision maker merely because the challenging party claims an interference with a constitutional right. Indeed, in the seminal case on the burden of proof in challenges to

administrative decisions, the challenging parties raised both equal protection and due process claims. Long, supra, 75 N.J. at 554-55. Similarly, in Hills Dev. Co., supra, the court approved a statute that places on the challenging party the burden to prove that administrative agency decisions violate the State Constitution's affordable housing mandates. 103 N.J. at 45. The Attorney General is vested with the authority to certify voting machines for use in this State. His decision in this regard falls within the broad range of administrative agency actions that are entitled to a presumption of validity and a concomitant placement of the burden of proof on the challengers of those decisions.

3. IN THE BALANCING OF INTERESTS, THE VOTERS' RIGHT TO A SECURE, ORDERLY ELECTION MUST BE PARAMOUNT.

Contrary to plaintiffs' allegations, the relief they seek from this Court will not serve the voters in the 15 counties. Rather, the relief sought will not only adversely affect millions of voters in the 15 counties, but will have a ripple effect throughout the State and perhaps beyond its borders on November 2, 2004. This is not an overstatement. The relief requested does not involve a simple matter of printing more ballots. Rather, it would require restructuring and revising the voting process for millions of voters in less than a week. Taken to its most basic level, this process requires training

personnel, acquiring and distributing supplies, and establishing procedures that can be harmonized in an orderly fashion and secure manner.

In New Jersey, voters are divided geographically into a voting unit know as an election district. N.J.S.A. 19:4-10. The voters within each district are assigned to a polling place (there can be more than one election district within a polling place), and four or six board workers are assigned to conduct the election for each election district. N.J.S.A. 19:6-1. In the 15 counties, thousands of board workers are required for November 2, 2004 (Exhibits HH to WW, certifications of the County Boards of Election). In order to assure an orderly election, board workers must be trained. N.J.S.A. 19:50-1.

As the certifications of the various County Boards of Election attest, the board worker training process takes weeks, if not months, depending upon the individual county. For the November 2, 2004 General Election, board workers have been trained to process the vast majority of the voters who vote on the voting machines. Emergency ballot use is part of the training, but these ballots are used infrequently. Most election districts are supplying 30 emergency ballots for use. N.J.S.A. 19:53B-1(c). Furthermore, if emergency ballots are used, the board workers, by law, are required to count them at the polling place after the close of the polls. N.J.S.A.

19:53B-13. Counting approximately 30 ballots at the end of the night can be reasonably discharged, but if plaintiffs prevail, some district board workers could be faced with counting close to 1,000 emergency ballots at the close of the polls, consistent with the above-noted statutory mandate. The County Boards have certified that it would be impossible to fully re-train these board workers as to the new voting process. There is simply no time to do so.

In addition, the relief sought would require a massive printing of paper ballots. Thirteen of the County Clerks have certified that millions of ballots would have to be printed. (Exhibits U to GG, certifications of county clerks). As Gloucester County Clerk James Hogan states, "this is an impossibility" at this point in time. Each paper ballot would also require an envelope. The costs of the materials would be exorbitant, running into the millions of dollars."

There also is no set procedure in place to provide for the proper storage of the thousands of paper ballots that would be in the polling places. (See Certification of Dennis Kobitz). There is no feasible way for officials to secure thousands of paper ballots in such a short time frame. Thus, the equities simply do not support plaintiffs' request that this court order an exclusive paper process in polling places for over three million voters, when it will be an impossibility to get all the

necessary materials, train board workers and develop a security system in the polling places that will assure no ballot is lost or misplaced.

Wholesale revamping of the voting process will not benefit the voters. It will undoubtedly result in confusion, delay and lost votes. The vast majority of voters in 15 affected counties have been using their voting systems for a number of years. They expect to use these machines on November 2, 2004. All of the notices to the voters: sample ballots, newspaper ads, and polling place signs, inform them they will be voting by machine in the polling place. Delays in the polling places on November 2, 2004 must be expected as board workers will now need to explain to each and every voter the new voting procedures, thus causing long lines and unreasonable waiting time. Further, there will be no way to guarantee all voters will be able to cast their ballots in private as each election district is typically only provided one privacy screen for emergency or provisional ballots.

Balancing the respective interests, there is no question that the voters will suffer much greater harm if the relief requested is granted. By waiting until 13 days before the General Election to file their application, plaintiffs' request invites nothing short of chaos.

Plaintiffs' reliance on the New Jersey Supreme Court's decision in New Jersey Democratic Party v. Samson, 175 N.J. 172 (2002) is misplaced. In that case, the Court did order a reprint of the General Election ballots and resending of the absentee ballots, in order to assure voters full choice. Id. at 176-77. The decision was made, however, with the understanding that the reprinting would not unduly interfere with the orderly administration of the election. This is not the case here. A court-ordered remedy to revamp the voting procedures in the polling places will wreak havoc on November 2, 2004. The Samson case, therefore, supports the State's strenuous opposition to plaintiffs' application.

Finally, as recently as September 14, 2004, the Maryland Court of Appeals affirmed a Circuit Court decision that denied the same relief sought in plaintiffs' application. Schade, supra. Memorandum Opinion, (Circuit Court for Anne Arundel County, Case No. C-04-97297 attached hereto). In that case, plaintiffs originally filed suit in April 2004 questioning the security and reliability of the Diebold Accu-Vote TS Electronic Voting System, and moved for a preliminary injunction authorizing, inter alia, voters "with little or no faith in the Diebold system to have an alternative paper ballot option." Id. at 2. The Diebold machine had been criticized by several reports.

In response, thereto, the State of Maryland has commissioned its own review and instituted several procedures. The Court refused to enjoin the use of Maryland's electronic voting machines and authorize the use of paper ballots. Notably, the Court observed "all experts agree the use of paper ballots is the least accurate of all systems and lends itself to the most chicanery" and that "the paper ballot, as far back as the early 1800's, was insecure and could be manipulated very easily." Id. at 3. Far from securing the integrity of the ballots to be in the upcoming General Election, the Court held that ballots could cast the election into chaos.

In balancing the interests, the Court held:

> on balance ... the hypothetical harm to the Plaintiffs outweighs the real harm to the Defendants. As pointed out, it is not just a question of printing ballots, but rather, of advertising the use of the ballots, educating the public, training the election judges and developing a security system for the paper ballots, all of which takes time, of which there is precious little.
>
> [Id. at 5, 6; (emphasis added).]

The Schade Court ruled that granting relief two months before the Presidential Election would cause "much confusion and [was] clearly against the public interest." Id. at 6. As the Court in Schade understood, an election is an orderly process which requires a coordination of effort between state, county and municipal personnel, the education of voters and board workers,

delivery of equipment, and the security of the integrity of the ballots before, during and after the election. Ibid.

Here, plaintiffs are seeking relief within days of the Presidential Election. The Schade Court denied relief recognizing that there was "precious little" time. Here there is none.

As noted above, courts have in the past recognized that, particularly in the context of elections, it may be necessary to proceed with a scheduled election even in the face of possible constitutional violations. In Jackman v. Bodine, 44 N.J. 312 (1965) the Court quoted approvingly the language of the Reynolds Court, that

> Under certain circumstances, such as where an impending election is imminent and a state's election machinery is already in progress, equitable considerations might justify a court in withholding the granting of immediate effective relief in a legislative apportionment case, even where the existing apportionment scheme was found invalid. In awarding or withholding immediate relief, a court is entitled to and should consider the proximity of a forthcoming election and the mechanics and complexities of state election laws and should act and rely upon general equitable principles. With respect to the timing of relief, a court can reasonably endeavor to avoid a disruption of the election process which might result from requiring precipitate changes that could make unreasonable or embarrassing demands on a State in adjusting to the requirements of the court's decree.

[Id. at 314.]

Finally, in Jackman v. Bodine, 49 N.J. 406 (1967) the Court refused to disrupt an election scheduled to be held four months hence saying:

> Again, we are confronted with an imminent election, and since a reconsideration could entail the subject of Assembly districting throughout the State, we deem it unwise to direct that that task be undertaken before the November 1967 election....As has been noted so frequently in this area, it is imperative that government continue, and to that end deviations which might otherwise be fatal will be tolerated for the time being.
>
> [Id. at 419.]

In sum, the balance of equities clearly favors denial of the relief requested. As the certifications submitted by the State demonstrate, switching to a system of paper ballots at this late date in 15 counties is logistically impossible. The speculative concerns regarding electronic voting machines pales in comparison with the very real threat of voter confusion and an inability to conduct an orderly and secure election process on November 2, 2004.

IV.

CONCLUSION

For all of the reasons set forth herein, the application for injunctive relief is denied. At this juncture, the cross-motion to dismiss the complaint is denied, without prejudice.