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Assemblyman 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 (in his official capacity) and Peter C. Harvey, Attorney General of the State of New Jersey (in his official capacity),)
Defendants.)
Docket No.)

) SUPERIOR COURT
) LAW DIVISION
) MERCER COUNTY
)
)
)
)
) CIVIL ACTION
) **COMPLAINT IN LIEU**
) **OF PREROGATIVE WRIT**
)
)

PRELIMINARY STATEMENT

1. Plaintiffs bring this lawsuit to ensure that every vote counts in the upcoming November 2004 general election, and that the Florida election debacle of 2000 is not replicated in New Jersey.

[D]espite an impoverished beginning, the right to vote has taken its place among our great values. Indeed the fact that the voting franchise was hoarded so many years testifies to its exalted position in the real scheme of

things. It is the citizen's sword and shield. 'Other rights, even the most basic, are illusory if the right to vote is undermined.' It is the keystone of a truly democratic society.

Gangemi v. Rosengard, 44 N.J. 166, 170 (1965) (quoting Wesberry v. Sanders, 376 U.S. 1, 17 (1964)).

2. Courts in this State consistently have made clear that inherent in the right to vote is the right to have one's vote counted. Electronic voting machines, otherwise known as Direct Recording Electronic voting machines (DREs), are scheduled to be used in fifteen of New Jersey's twenty-one counties. Those machines cannot be relied upon to protect the fundamental right to vote.

3.. Recent polls, including those by the New York Times/CBS News, Gallup International, the Rasmussen Report, and NBC news, show that nationally the two major party candidates, President George W. Bush (R) and Senator John Kerry (D), are consistently polling within ten points of each other, making the race neck-and-neck.¹ Polls have also indicated that in New Jersey the contested

¹ All statistics cited are from polls that are recent as of October 9, 2004. All web addresses cited in this complaint were last accessed on Oct. 10, 2004. The New York Times/CBS News Poll, September 12-16, 2004, available at <http://www.nytimes.com/ref/politics/WEB-POLLINDEX.html>; Gallup National Snapshot, available at <http://www.gallup.com/election2004/showdown/>; Rasmussen Reports Presidential Tracking Poll, available at

race may be even closer. Given that New Jersey is a "swing state," preserving the accuracy of the vote count and the intent of the voters is paramount.

4. Computer scientists, who are uniquely qualified to assess DRE technology (and who are not usually associated with political activism), have become very vocal in opposing the type of DREs being used in New Jersey. This is because there is really no way to know for certain if a computer is actually performing the function it tells you it is performing. Machine models scheduled to be used this Election Day in New Jersey have lost votes, have had technical malfunctions during elections and have attributed votes cast for one candidate to an opponent.

5. Anyone with basic knowledge of computer programming can write a software program that can disguise itself as a legitimate application and mask its malicious acts. Thus, the program can erase votes, or reallocate them from one candidate to the other, and then erase its tracks. When tested, it will not reveal its corrupt nature, and will tell the tester what the tester expects to hear.

http://www.rasmussenreports.com/Presidential_Tracking_Poll.htm;
MSNBC Election Scorecard, available at
<http://horserace.msnbc.com>.

6. Moreover, upon information and belief, DRE software and tabulation software use commercial programs such as Microsoft. Any bugs that are in that software will be transferred to any DRE that uses the product.

7. Computer scientists have determined that the only way to ensure that a computer has registered votes accurately is by having a way to independently audit the machine. The technique devised to do this is called the "Mercuri Method" of auditing. The Mercuri Method calls for a paper ballot the size of a lottery ticket to be displayed behind a transparent window. The voter's choices are printed on the paper ballot. That card is available for the voter to visually inspect. If the choices printed on the ballot reflect the voter's intent, then the voter casts her vote. The paper ballot then falls into a bin in the machine. The paper ballot is preserved and can be recounted in the event of a recount or contested election. If the ballot does not reflect the voter's choice, the voter can contact the poll worker to report the discrepancy.

8. California, Ohio and Nevada have decertified the same machines scheduled to be used in New Jersey for being too insecure to be trusted with the right to vote. They have decommissioned the machines, and required that they be retrofitted with extra

security features. They have determined that the only way to confirm that every vote counts is by utilizing a voter verified paper ballot.

9. Alaska, California, Maine, New Hampshire, and Ohio have enacted legislation requiring that DREs produce voter verified paper ballots.

10. Illinois, Oregon, and Vermont require that all votes be cast exclusively on paper ballots because DREs are too insecure. In Oregon, all voting is done by mail.

11. Plaintiffs have tried to work with Defendants Governor James McGreevey and Attorney General Peter Harvey since the summer of 2004, encouraging them to act responsibly to institute some form of security measures in New Jersey DREs. These attempts have been fruitless. Indeed, Plaintiffs Gusciora and Coalition for Peace Action presented Governor McGreevey with over 20,000 signatures from New Jersey citizens who are concerned that DREs being used in New Jersey will not count their votes accurately. Plaintiffs and their counsel also wrote additional letters to Governor McGreevey and Attorney General Harvey asking that they issue executive orders requiring that paper ballots be made available to all voters on Election Day. Defendants have issued no such executive orders.

12. As the election draws near, as a last resort, Plaintiffs seek redress from this Court to protect their fundamental right to vote.

JURISDICTION

13. This court has jurisdiction to decide Plaintiffs' claims pursuant to its power as a court of general jurisdiction to hear both state and federal law claims.

THE PARTIES

14. Plaintiff, New Jersey State Assemblyman Reed Gusciora is the State Assemblyman for Mercer County, New Jersey. Plaintiff Gusciora is currently serving his fifth term in the General Assembly. Plaintiff Gusciora has proposed legislation to require that all voting machines in New Jersey produce a voter verified paper ballot that provides an independent audit of votes in the event of a machine malfunction or recount. Plaintiff Gusciora files this suit to ensure that his vote and the votes of his constituents are accurately counted this November.

15. Plaintiff Stephanie G. Harris is a registered voter from Mercer County, New Jersey. Plaintiff Harris attempted to vote on a DRE in Mercer County, New Jersey on June 8, 2004. The machine failed to register her vote at least three times. She does not know whether her vote was registered the fourth time she pressed the DRE's "Cast Vote" button. Plaintiff Harris files this suit to ensure that her vote is accurately counted on November 2, 2004.

16. Plaintiff, The Coalition for Peace Action is a citizens organization formed in 1980 dedicated to education and advocacy on three issues: peaceful economies, global abolition of nuclear weapons, and a halt to weapons trafficking. There are over 2,500 members of the New Jersey coalition throughout the State. The majority of members are located in Central and Southern New Jersey.

17. Plaintiff, New Jersey Peace Action is a citizens organization formed in 1957 dedicated to working to eliminate nuclear weapons, reducing military spending and the support of global peacemaking. There are over 500 members of New Jersey Peace Action throughout the State. The majority of its members are located in Northern New Jersey.

18. Defendant, Peter Harvey is the Attorney General of the State of New Jersey. The Attorney General is the Chief State

Election Official for New Jersey under the "National Voter Registration Act of 1993." N.J.S.A. § 19:31-6(a) (2004). As such, he has responsibility for general supervision and administration of New Jersey election laws. As Attorney General, Defendant Harvey is sued in his official capacity, in connection with actions taken relative to this suit.

19. Defendant, James McGreevey is the Governor of the State of New Jersey. As Chief Executive Officer, the Governor is responsible for the protection of the fundamental and lawful rights of New Jersey voters. Oath of Governor, N.J.S.A. § 52:15-2(2004). As Governor, Defendant McGreevey is sued in his official capacity, in connection with actions taken relative to this suit.

FACTS

BACKGROUND

20. Fifteen counties in the state of New Jersey intend to use DREs in the upcoming November 2004 election.² New Jersey

² The inventory list posted by the Attorney General erroneously states that 16 NJ counties use DREs. The report erroneously states that Warren County uses DREs. This information is incorrect. Warren County voters vote using Op-Tech III-P Eagle optically scanned paper ballots. Office of the Attorney Gen., N.J. Dep't of Law and Pub. Safety, N.J. Voting Equipment as of

Voting Equipment Inventory As Of March 2004³. As of June, 2004, approximately 3.3 million registered voters lived in those counties. New Jersey Division of Elections, Registered Voters As Of The Close Of Registration For The Primary Election To Be Held On June 8, 2004. This year's successful "get-out-the-vote" efforts have undoubtedly swelled that number.⁴

21. Upon information and belief, the purchase of DREs by counties throughout the State of New Jersey was done with the best intentions.

22. Over 7,000 machines manufactured by Sequoia Pacific and Election Systems & Software ("ES&S") will be used on Election Day.

<http://www.njelections.org>,

March 2004, available at
http://www.njelections.org/voting_machine_co_list_doe.html.

³ Office of the Attorney Gen., N.J. Dep't of Law and Pub. Safety, N.J. Voting Equipment As Of March 2004, available at http://www.njelections.org/voting_machine_co_list_doe.html. All references in this document to voting equipment in the State of New Jersey comes from this source.

⁴ See e.g., Richard Cowen & Yung Kim, Voter Registration Crush in N.J.; Many Beat Deadline, Citing Presidential Race, THE RECORD, Oct. 5, 2004, at A01; Rudy Larini, Signing to Vote in Nick of Time - N.J. Sees Landslide of Last-Day Registrations, NEWARK STAR-LEDGER, Oct. 5, 2004, at 1; Kate Zernike & Ford Fessenden, As Deadlines Hit, Rolls of Voters Show Big Surge, N.Y. TIMES, Oct. 4, 2004, at A1.

23. Below is a list of the fifteen counties scheduled to use the DREs, the type of DREs they intend to use, and the number of registered voters in each county.

- Atlantic County: 230 Shoup Shouptronic 1242 electronic machines. As of June 8, 2004, there were 141,895 registered voters in Atlantic County.⁵
- Bergen County: 1,200 Sequoia Pacific AVC Advantage machines. As of June 8, 2004, there were 487,219 registered voters in Bergen County.
- Burlington County: 500 Sequoia Pacific AVC Advantage machines. As of June 8, 2004, there were 242,701 registered voters in Burlington County.
- Gloucester County: 520 Sequoia Pacific AVC Advantage machines. As of June 8, 2004, there were 160,083 registered voters in Gloucester County.
- Hudson County: 600 Sequoia Pacific AVC Advantage machines. As of June 8, 2004, there were 276,205 registered voters in Hudson County.
- Hunterdon County: 127 Sequoia Pacific AVC Advantage machines. As of June 8, 2004, there were 74,841 registered voters in Hunterdon County.
- Mercer County: 600 Sequoia Pacific AVC Advantage machines. As of June 8, 2004, there were 189,717 registered voters in Mercer County.
- Middlesex County: 662 Sequoia Pacific AVC Advantage machines. As of June 8, 2004, there were 391,106 registered voters in Middlesex County.

⁵ All voter data on the 15 NJ counties using DREs is from the following source: New Jersey Division of Elections, Registered Voters As of The Close of Registration for the Primary Election to be Held on June 8, 2004. Available at <http://www.state.nj.us/lps/elections/6-04-by-county.pdf>.

- Morris County: 805 Sequoia Pacific AVC Advantage machines. As of June 8, 2004, there were 290,659 registered voters in Morris County.
- Ocean County: 704 Sequoia Pacific AVC Advantage machines. As of June 8, 2004, there were 330,229 registered voters in Ocean County.
- Passaic County: 420 ES&S V-2000 machines. As of June 8, 2004, there were 234,017 voters in Passaic County.
- Salem County: 160 Sequoia Pacific AVC Edge machines. As of June 8, 2004, there were 40,245 registered voters in Salem County.
- Somerset County: 290 Sequoia Pacific AVC Advantage machines. As of June 8, 2004, there were 154,856 in Somerset County.
- Sussex County: 361 ES&S iVontronic machines. As of June 8, 2004, there were 82,624 registered voters in Sussex County.
- Union County: 500 Sequoia Pacific AVC Advantage machines. As of June 8, 2004, there were 263,068 registered voters in Union County. _____

24. Upon information and belief, none of these electronic voting machines is equipped with mechanisms that provide a voter verified paper ballot.

25. The plethora of scientific data detailing malfunctions of electronic voting machines requires that DREs not be used in the upcoming election.

The DRE Machines Scheduled For Use In New Jersey Are Insecure.

26. The exact makes and models of the machines scheduled to be used in New Jersey have been deemed insecure by the Secretaries of State in Ohio, California, Nevada and the Board of Elections of New York City.

27. In 1993, the City of New York entered into a \$60 million contract with Sequoia Pacific for the purchase of 7,000 Sequoia Pacific AVC Advantage machines. The contract was contingent on the machines' satisfying certain security standards. The machines were not certified because they were found to be insecure. New York City never purchased the machines. Over 6,500 of these same machines are being used in New Jersey in this coming election.

28. In 2003, Ohio's Secretary of State, J. Kenneth Blackwell, initiated a statewide plan to determine whether the State should use DREs. Electronic Solutions for Ohio, SPIRIT OF CITIZENSHIP & DEMOCRACY, Autumn 2003, at 1.⁶ Secretary Blackwell contracted two technology security review firms to assess the safety and reliability of four DRE vendors' systems. Blackwell, The Process of Implementing HAVA is Critical to Success,

⁶ Available at
<http://www.sos.state.oh.us/sos/pubAffairs/spirit/autumn2003.pdf>.

Electronic Solutions for Ohio, SPIRIT OF CITIZENSHIP & DEMOCRACY, Winter 2004, at 3.

29. Notably, and of relevance to New Jersey, none of the four vendors passed the security reviews of the two firms. Id. Among the DREs rejected by Ohio's study were ES&S's iVotronic and Sequoia Pacific's AVC Edge. Id. A total of 521 of the Sequoia Pacific and ES&S machines are scheduled to be used in New Jersey on November 2, 2004. Sussex County has 361 ES&S iVotronic machines that are scheduled to be used on Election Day. Salem County has 160 Sequoia Pacific AVC Edge machines that are scheduled to be used on Election Day.⁷

30. In April 2004, the Secretary of State of California, Kevin Shelley, decertified and withdrew approval of certain DRE voting machines in the fourteen counties that were scheduled to use DREs in the November 2004 election. He mandated a series of security requirements and withdrew the certification of DREs until those requirements were met. Office of the Sec'y of State, Decertification and Withdrawal of Approval of Certain DRE Voting Systems and Conditional Approval of the Use of Certain DRE Voting

⁷ For Election Day, Ohio counties already using the electronic machines are scheduled to be given "mitigating strategies to increase security, as well as to reduce risks." Chansky at 4. Specific details of these strategies or plans for their implementation are unclear at this point.

Systems.⁸http://www.ss.ca.gov/elections/ks_dre_papers/decert1.pdf.

The security requirements include: making optional paper ballots available at all polling places for voters who wish to use them; making a permanent record on CD or DVD of all votes cast; instituting parallel monitoring at the polls; DREs must meet federal and state testing and qualification; implementing technical security, physical security, and communication plans; forbidding software modifications after September 17, 2004; training poll workers; improving access for the disabled; instituting penalties for tampering; banning communications via modem; and removing all wireless or internet connections from the machines. Id.

31. The California Security Directive decertification included the Sequoia Pacific AVC Edge. Salem County will use 160 Sequoia Pacific AVC Edge machines in the November election. The California Security Directive also decertified the ES&S iVotronic. Sussex County will use 361 ES&S iVotronic machines in the November election. http://www.ss.ca.gov/elections/ks_dre_papers/decert.pdf.

32. In March 2004, the Secretary of State of Nevada issued an executive order requiring DREs to have a voter verified paper

⁸ Available at http://www.ss.ca.gov/elections/ks_dre_papers/decert1.pdf.

ballot. His executive order required that all DREs purchased in the future contain a voter verified paper ballot component.⁹

⁹ "Sequoia Voting Systems Selected to Provide Uniform Statewide Electronic Voting System for Nevada", at <http://www.sequoiavote.com/article.php?id=55>

33. Clark County, which had already been using Sequoia Pacific DREs for at least ten years, therefore was ordered to retrofit each machine with a printer to produce a voter verified paper ballot by 2006. Geoff Dornan, Heller: Clerks Must Use Sequoia Voting Machine, NEVADA APPEAL, Dec. 11, 2003.¹⁰

34. Nevada's Secretary of State also took action to ensure that DREs will record accurately the voter's will in the upcoming election. In the November 2004 election, each of Nevada's 329 polling sites is required to have at least one Sequoia Pacific AVC Edge that has been retrofitted to produce a voter verified paper ballot for all voters who wish to see physical evidence of their votes. All Sequoia Pacific AVC Edge machines in Nevada are required to be retrofitted with a voter verified paper ballot device by the 2006 election.

Electronic Voting Machines Have Failed To Accurately Read Votes Cast In Elections Throughout The Country.

35. There have been many instances in which DREs failed to read or record votes accurately. These events have also occurred in New Jersey.

36. Upon information and belief, in 2000, newly purchased Sequoia Pacific AVC Advantage machines used in South Brunswick,

¹⁰ Available at <http://www.nevadaappeal.com/apps/pbcs.dll/article?AID=200311211001>
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New Jersey failed to shut down or issue an alert when an internal malfunction occurred. This caused zero votes to be reported for certain major party candidates.

37. Plaintiff Stephanie Harris attempted to vote on a Sequoia Pacific AVC Advantage machine in Mercer County, New Jersey, on June 8, 2004 at the Hopewell Elementary School polling location. She attempted to cast her vote on the machine four times. After she believed she cast her vote, she was told to return to the booth because her vote had not registered. The poll worker on duty told her three times to return to the voting booth and press the "Cast Vote" button because her vote had not registered. She pressed it a total of four times. She has no idea whether she voted once, twice, three or four times, or not at all.

38. When she exited the voting booth the fourth time, the poll worker tentatively advised her: "I think it went through." She was not offered any alternative methods to cast her vote (such as an emergency ballot) and cannot be sure if her vote was ever properly recorded. Upon information and belief, at a meeting of the Mercer County Board of Freeholders a representative of the Mercer County Board of Elections stated that no incident reports had been filed for Hopewell.

39. Plaintiff Harris's experience is not unique. Mercer County resident Glenn Cantor had a similar experience when he attempted to vote on a DRE at the Hopewell Valley Regional School District Administration Building in Pennington, New Jersey on September 28, 2004 for a School Millage Election. Mr. Cantor made his selection on a Sequoia Pacific AVC Advantage. The screen flashed for less than a second before he pressed the "Cast Vote" button.

40. Concerned about this flash, upon his own initiative, Mr. Cantor asked a poll worker for assistance. She instructed him to vote again. She told him that he could vote multiple times, and that the DRE would only register his vote once. Mr. Cantor attempted to vote again. The second time, the screen went blank for a longer period. Nonetheless, he pressed the "Cast Vote" button. When he informed the poll worker what happened, she advised him to vote a third time. The third time he attempted to vote, Mr. Cantor saw his selection change as he pressed the "Cast Vote" button.

41. After informing the poll worker about what had happened, she explained that she had forgotten to re-set the machine after the previous voter. The poll worker is supposed to reset the machine between each voter.

42. Mr. Cantor was instructed to vote yet a fourth time. He has no assurance that his vote was tabulated correctly. He also does not know whether he voted one, two, three or four times.

43. This November, a total of 2,860,684 voters in eleven counties are scheduled to use the Sequoia Pacific AVC Advantage machines that have malfunctioned in New Jersey.

44. These features and failures of Sequoia Pacific AVC Advantage machines are not unique. As the examples below demonstrate, Sequoia Pacific and ES&S electronic voting machines have malfunctioned around the country. They have failed to record votes, attributed votes to the wrong candidates and failed to transfer tally information to the tallying software. Moreover, as was the case when Plaintiff Harris and Mr. Cantor attempted to vote, poll workers are not trained adequately to operate DREs.

A. DREs Have Failed To Register Properly All Votes Cast:

- (1) Hillsborough County, FL (August 2004).
In a primary, 12,498 voters entered the voting booth but allegedly cast no vote for state attorney. Hillsborough County's undervote rate rose as high as 17% in that election. This rate was suspiciously high. Officials suspected votes were not registering properly on the DREs, but could not meaningfully re-examine the results because no paper audit trail existed. Jeff Testerman, Voting Mystery Stirs Call For Paper Trail, ST. PETERSBURG

TIMES, Oct. 4, 2004.¹¹ The DREs were identified as Sequoia Pacific AVC Edge machines.¹¹ As previously stated, Salem County intends to use 160 of these machines.

- (2) Broward County, FL (January, 2004).
During a special election, the DREs failed to record 134 votes. Erika Bolstad, New System no easy touch for 134 voters in Broward, MIAMI HERALD, Jan. 8, 2004 at 1A.¹² The machines were identified as ES&S iVotronics.¹³ As previously stated, Sussex County intends to use 361 of these machines.
- (3) Miami-Dade County, FL (September, 2002).
In 31 precincts, the votes of 8.2% of voters who signed in at the polls were lost. About half of the 1,544 lost votes were from African Americans. Problems causing the losses included the unavailability of working machines, as well as the failure of poorly trained poll workers. American Civil Liberties Union of Florida, Analysis of September 10th Voting Fiasco in Miami Dade Demonstrates Disproportionate Impact on Racial Minorities, ACLU Says, Oct. 21, 2002.¹⁴ These machines were identified as ES&S iVotronic machines.¹⁵ As previously stated, Sussex County plans to use 361 of these machines on Election Day.

¹¹ At
http://sptimes.com/2004/10/04/Tampabay/Voting_mystery_stirs.shtml
<http://www.sptimes.com/2004/10/04>

¹¹ At <http://www.votersunite.org/info/Sequoiainthenews.pdf>

¹² Available at
<http://www.miami.com/mld/miamiherald/news/politics/7660910.htm?1c>

¹³ At <http://www.votersunite.org/info/ES&Sinthenews.pdf>

¹⁴ At
http://www.aclufl.org/news_events/archive/2002/racialimpactrelease.cfm

¹⁵ At <http://www.votersunite.org/info/ES&Sinthenews.pdf>

- (4) Palm Beach County, FL (March 2002).
A candidate lost the election by four votes. The DREs failed to register seventy-eight votes. Additionally, the machines acted erratically. Wyatt Olson, Out of Touch: You Press The Screen. The Machine Tells You Your Vote Has Been Counted. But How Can You Be Sure?, NEW TIMES, Apr. 24, 2003.¹⁶ These machines were identified as Sequoia Pacific AVC Edge machines.¹⁷ As previously stated, Salem County intends to use 160 of these machines.
- (5) Palm Beach County, FL (March 2002).
The favored candidate, who had enjoyed large leads in the polls, lost the election by a suspiciously large margin, losing even his home voting district. He contested the election, and sought to examine "inspection reports, testing protocols and codes on voting equipment." The county's attorney opposed the contest. The attorney argued that the top election official in the County would be committing a third-degree felony if she revealed the inner operations of the machine. The candidate's request was denied. (The contest suit was dismissed on other grounds.) Wyatt Olson, Out of Touch: You Press The Screen. The Machine Tells You Your Vote Has Been Counted. But How Can You Be Sure?, NEW TIMES, Apr. 24, 2003.¹⁸ These machines were identified as Sequoia Pacific AVC Edge machines.¹⁹ As

¹⁶ At <http://www.newtimesbpb.com/issues/2003-04-24/feature/html/1/index.html>

¹⁷ At <http://www.votersunite.org/info/Sequoiainthenews.pdf>

¹⁸

At <http://www.newtimes.com/issues/2003-04-24/feature.html/1/index.html>. The manufacturer argued that the software was considered a trade secret.

¹⁹ At <http://www.votersunite.org/info/Sequoiainthenews.pdf>

previously stated, Salem County intends to use 160 of the exact machines.

B. Flawed DRE Software Has Lost Votes:

- (1) Snohomish County, WA (September 2004).
Software failed in 68 out of 860 machines, causing them to malfunction. In addition, there were problems with voter "smart cards."²⁰ Paul Andrews, E-Voting Vent: You Can't Tell If It Worked, SEATTLE TIMES, Sept. 20, 2004.²¹
- (2) State of Indiana (March 2004).
ES&S installed unauthorized and uncertified software in voting machines state-wide. Karen Hensel and Loni Smith McKown, Election Commission Bails Out Voting Machine Maker In Time For May Election, Wish TV - Indianapolis, Mar. 11, 2004.²²
- (3) States of California, Indiana, Florida, Maryland, and Georgia.
Upon information and belief, ES&S installed faulty software into DREs used in elections in California, Indiana, Florida, Maryland and Georgia. As previously stated, 361 of these machines are scheduled to be used in Sussex County.

C. DRE Cartridges Failed To Record Votes:

- (1) Morris County, NJ (June 2004).
The County's tabulation systems could not read the DRE cartridges. The cartridges, rather than revealing election results, showed only zeroes. Election officials and computer experts worked through the night to correct

²⁰ Smartcards are credit card size cards that activate some DREs.

²¹ Available at http://seattletimes.nwsourc.com/html/business/technology/2002040563_paul20.html

²² At <http://www.wishtv.com/Global/story.asp?S=1706282>

the problem. Lawrence Ragonese & Kristen Alloway, Montville and Chatham Mayors Ousted, STAR-LEDGER, June 9, 2004.²³ The machines were identified as Sequoia Pacific AVC Edge machines.²⁴ Salem County plans to use 160 of these machines, with the same type of configuration.

- (2) Hillsborough County, FL (March 2003).
Precinct totals had to be manually entered after two data cartridges registered at the elections service center as "non-formatted" - that is, empty. Kathryn Wexler, Elections Chief Sees Nearly Flawless Vote, ST. PETERSBURG TIMES, March 5, 2003 at 3B.²⁵ The machines were identified as the Sequoia Pacific AVC Edge.²⁶ As previously stated, Salem County intends to use 160 of these machines, with the same type of faulty cartridges.
- (3) Hillsborough County, FL (April 2002).

²³

Available at www.nj.com

²⁴ At <http://www.votersunite.org/info/Sequoiaintheneeds.pdf>

²⁵ Available at <http://www.sptimes.com>

²⁶ At <http://www.votersunite.org/info/Sequoiaintheneeds.pdf>

Precinct totals had to be manually entered after 24 out of 26 data cartridges malfunctioned and could not transmit vote totals. Jeff Testerman, Officials Still Searching For Election Glitch: The New System Could Not Send The Tabulations To The Elections Office, ST. PETERSBURG TIMES, Apr. 6, 2002.²⁷ These machines were identified as the Sequoia Pacific AVC Edge.²⁸ As previously stated, Salem County intends to use 160 of these exact machines, with the same faulty cartridges.

D. Vote Tabulation Systems Used With DREs Have Failed To Provide Accurate Vote Totals:

- (1) Natrona County, WY (August 2004).
Primary election totals in a number of municipal races had to be changed after vote-counting software malfunctioned. Matthew Van Dusen, Clerk Changes Election Vote Totals, CASPER STAR-TRIBUNE, Aug. 21, 2004.²⁹ Natrona County uses the ES&S Unity Election Management System.³⁰
- (2) Bexar County, TX (March 2004).
The computers used to tabulate votes were not programmed to read mail-in paper ballots. Tom Bower, Bexar Computer Glitch Delays Counting Of Votes, SAN ANTONIO EXPRESS-NEWS, Mar. 10, 2004.³¹ These machines were

²⁷ Available at
http://www.sptimes.com/2002/04/06/Hillsborough/Officials_still_search.shtml

²⁸ At <http://www.votersunite.org/info/Sequoiainthenews.pdf>

²⁹ Available at
<http://www.casperstartribune.net/articles/2004/08/21/news/casper/6c2e825b3f9e154187256ef70007adbb.txt>

³⁰ At <http://www.votersunite.org/info/ES&Sinthenews.pdf>

³¹ Available at
<http://www.mysanantonio.com/news/metro/stories/MYSA10.12A.VotingProblems-31-.4ea013d9.html>

identified as ES&S iVotronic machines.³² As previously stated, 361 of these machines are scheduled to be used in Sussex County.

- (3) Bernalillo County, NM (November 2002). Software with a limited capacity to handle large amounts of data was overwhelmed by a ballot with more than 80 choices. Records showed that approximately 48,000 people voted at the early-voting sites, but initial vote totals showed no more than 36,000 votes for any candidate (including candidates for governor). Frank Zoretich, Election Results Certified After Software Blamed, ALBUQUERQUE TRIBUNE, Nov. 19, 2002, at A2.³³ These machines were identified as the Sequoia Pacific AVC Edge.³⁴ As previously stated, Salem County intends to use 160 of these machines.
- (4) Miami-Dade County, FL (April 2002). Faulty programming caused a miscount of votes by listing candidate names in a different order on absentee ballots than on the touch-screen machines. The programming error led to incorrect vote totals, causing a losing candidate to be declared a winner and a winner to be declared a loser. Technician's Error, Not Machines, To Blame In Dade County Mix-Up, MIAMI HERALD, Apr. 4, 2002 at 1A.³⁵ These machines were identified as ES&S iVotronics.³⁶ As previously stated, 361 of these machines are scheduled to be used on Sussex County.
- (5) Riverside County, CA (November 2000). A Sequoia Pacific tallying machine dropped votes from the tally. A Sequoia Pacific salesman reportedly

³² At <http://www.votersunite.org/info/ES&Sinthenews.pdf>

³³ Available at http://www.abqtrib.com/archives/news02/111902_news_vote.shtml

³⁴ At <http://www.votersunite.org/info/Sequoiainthenews.pdf>

³⁵ Available at <http://www.miami.com/mld/miamiherald/archives>

³⁶ At <http://www.votersunite.org/info/ES&Sinthenews.pdf>

intervened and "fixed" the problem. Elise Ackerman, Electronic Voting's Hidden Perils, MERCURY NEWS, Feb. 1, 2004.³⁷ The voting system used Sequoia Pacific AVC Edge touch screens.³⁸ As previously stated, Salem County intends to use 160 of these machines.

E. Poorly Trained Poll Workers And DRE Industry Technicians Have Jeopardized Votes:

- (1) Riverside County, CA (October 2003).
Software used with the Sequoia Pacific AVC Edge touchscreen machines was left unguarded on a publicly-available server. The software controls how ballots are placed on the voting machines, and the counting and storing of votes after the election. Kim Zetter, E-Vote Software Leaked Online, WIRED NEWS, Oct. 29, 2003.³⁹ As previously stated, Salem County intends to use 160 of these exact machines.

F. DRE Hardware Has Hampered Voting:

- (1) Santa Clara County, CA (March 2004).
Blind voters complained about malfunctioning audio features, that braille on the machines was installed upside-down, and that they were given instructions to press a yellow button (which are useless to blind voters). These features seriously hampered blind voters' ability to vote. Elise Ackerman, Blind Voters Rip E-Machines: They Say Defects Thwart Goal Of Enfranchising

³⁷ Available at
http://www.mercurynews.com/mld/mercurynews/news/special_packages/election2004/7849090.htm

³⁸ At <http://www.votersunite.org/info/Sequoiaintheneeds.pdf>

³⁹

At <http://www.wired.com/news/privacy/0,2848,61014,00.html>

Sight-Impaired, MERCURY NEWS, May 15, 2004.⁴⁰ These machines were identified as Sequoia Pacific AVC Edge machines.⁴¹ As previously stated, Salem County intends to use 160 of these exact machines.

The Sequoia Pacific AVC Edge Is Too Insecure To Be Trusted With Votes.

1. Among the Sequoia Pacific machines scheduled to be used in the upcoming election is the AVC Edge. Upon information and belief, based on the analysis of this machine by computer experts, the machine can be manipulated to alter election results.

2. Upon information and belief, anyone with physical access to the Sequoia Pacific AVC Edge machine for as little as five minutes, who knows the user password (which is not difficult to guess) can install a new program into the machine. That program can manipulate votes in a completely undetectable way, and can throw an election without being detected.

3. Upon information and belief, new software that manipulates votes can also be installed in the Sequoia Pacific AVC Edge machine by replacing a "chip," which is protected only by a flimsy

⁴⁰ Available at
http://www.mercurynews.com/mld/mercurynews/news/breaking_news/8673336.htm

⁴¹ At <http://www.votersunite.org/info/Sequoiainthenews.pdf>

plastic seal. Upon information and belief, anyone with physical access to the Sequoia Pacific AVC Edge machine for as little as ten minutes can replace the chip. If the chip is replaced, the new chip can re-program the machine and can cause it to give votes to a particular candidate, regardless of each voter's choice.

4. Upon information and belief, the Sequoia Pacific AVC Edge has a button on the back of the machine that allows the machine to be locked after a vote is cast. This button sets the machine for the next voter. Any poll worker can maliciously or inadvertently manipulate the election by depressing the exterior button several times and allowing a voter to vote more than once. In the event of a recount, it would be impossible to distinguish these excess votes from other votes.

5. Upon information and belief, a button on the outside of the Sequoia Pacific AVC Edge is used to shut down the machine. This relatively easy-to-access button invites tampering with the election.

6. Upon information and belief, it is easy for unauthorized users to access unencrypted data stored on memory cards; including ballot definitions and voting results. The memory card can be easily placed in a laptop and altered. It can be manipulated to

change election results. The memory card can also be corrupted on a laptop, rendering it unreadable.

The Sequoia Pacific AVC Advantage Is Too Insecure To Be Trusted With Votes.

7. Upon information and belief, the Sequoia Pacific AVC Advantage has more "security features" than the Sequoia Pacific AVC Edge, but is still an insecure system.

8. Upon information and belief, like the Sequoia Pacific AVC Edge, the Sequoia Pacific AVC Advantage software can also be reprogrammed by replacing or manipulating the cartridge on the side panel of the machine. The machine could then manipulate votes in a completely undetectable way.

9. Like the Sequoia Pacific AVC Edge, the Sequoia Pacific AVC Advantage's software can also be reprogrammed by replacing its chip. This chip is protected merely by a flimsy plastic tab. The chip can be replaced by someone who has physical access to the machine for only ten minutes. Through the chip, the machine can be reprogrammed to give votes to whichever candidate the program on the chip tells it to, regardless of each voter's choice. The chip can reprogram the machine to manipulate votes in an undetectable way, and to throw the election without being detected.

10. Upon information and belief, the Sequoia Pacific AVC Advantage has a button on the back of the machine that allows the machine to be locked after the vote is cast and set the machine for the next voter. Any poll worker can maliciously or inadvertently manipulate the election by depressing the exterior button several times and allowing a voter to vote more than once. In the event of a recount, it would be impossible to distinguish these excess votes from other votes.

11. Upon information and belief, ballot programming information in the Sequoia Pacific AVC Advantage can be manipulated easily using a keypad on the side of the voting machine or by downloading information from another cartridge. Thus, election workers, vendor staff, or anyone else with access to the DRE can change how the names of candidates are correlated with those printed on the paper that covers the button panel. Thus, a vote cast for candidate "A" by the voter, will be attributed to candidate "B" by the manipulated DRE.

The ES&S iVotronic Is Too Insecure To Be Trusted With Votes.

12. Upon information and belief, ES&S installed faulty and uncertified software in the DREs used in many states throughout the country and failed to recall the flawed software. There is no

way to be certain that the ES&S machines scheduled to be used in New Jersey are not tainted with the same faulty software.

13. Upon information and belief, the ES&S iVotronic administrator passwords could be discovered very easily. This discovery grants access to the ES&S iVotronic's software, and creates an opportunity to manipulate votes and cast multiple ballots without detection. Upon information and belief, the ES&S iVotronic software permits the user to perform an "Add To" function, which adds results from a DRE to a precinct's totals. This function does not detect when a DRE's totals are added more than once, resulting in incorrect tallies. This "Add To" function permits votes to be uploaded to counting software multiple times.

14. Upon information and belief, ES&S has not performed comprehensive security assessments on the iVotronic machines. The minimal security assessments that have been done have not focused on the infrastructure and integrity of the voting system.

Testing Of The DREs Is Insufficient To Detect Programs That Manipulate Votes.

15. Upon information and belief, the counties that purchase DREs, even those that have been certified, must perform additional

inspections of each machine on a regular basis to ensure that the machines and all software are working properly and have not been manipulated.

16. The testing of the DREs is greatly inadequate. DREs are often inspected by officials who do not have the source code of the machine and merely perform a "function test." A DRE may contain software that manipulates elections but is programmed to outsmart the tester and produce the result a tester is seeking. If the software in the machine is asked to "explain itself," it can very easily present itself as though it is legitimate software, when in fact it has only been designed to appear that way. Fraudulent software can provide a real-time clock that is read by the software. The clock instructs the program to act properly on any day except Election Day, when it will manipulate votes.

17. Upon information and belief, the current testing process in New Jersey is grossly inadequate because it does not perform in-depth security checks or examine the software of each machine thoroughly to ensure that malicious bugs have not been inserted into DREs.

The Process For Certifying Voting Machines Under N.J.S.A. §§ 19-48 Et Seq. And 19:53A-1 Et Seq. Is Not Sufficient To Ensure That DREs Will Be Secure And Capable Of Recording Every Vote.

18. New Jersey's statutes governing election law do not contemplate DREs. New Jersey's statutes speak only about ballot boxes and mechanical voting machines. Discussion within Title 19 of "electronic voting" concerns optical scanning equipment that scans paper ballots.

19. The Attorney General concedes that he has not yet implemented guidelines for DRE voting systems. HAVA-NJ State Plan, at 25 (2004). Thus, Defendant Harvey is encouraging counties to use technology on November 2, 2004 which, by his own admission, has "outpaced" current New Jersey law. See Id.

20. The procedure for inspecting and safeguarding voting machines under New Jersey law does not ensure that DREs will be secure and reliable. The statute requires that a patent law expert and two experts in mechanical engineering review and test voting machines prior to certification. N.J.S.A. § 19:48-2(2004). Upon information and belief, these experts are not necessarily qualified to certify electronic machines.

21. Defendant Harvey endorses as certified all DREs of specified makes and models. This list of "certified" machines appears on his website and is meant to provide the full list of DREs from which counties can choose. This certification process,

upon information and belief, is fundamentally flawed. Upon information and belief, the technology of DREs is such that every machine must be individually inspected and certified.

22. The certification of only a small percentage of voting machines is inadequate. Each machine could possess unique flaws in its hardware (such as wiring problems) that could cause it to malfunction. In addition, the software installed on each machine may not be identical. The State of Georgia has shown that inspection of only a small percentage of voting machines does not identify all defective machines. Accordingly, Georgia has implemented a program whereby every individual voting device is tested prior to being deployed for use. Election officials in Georgia have rejected hundreds of machines that were inappropriately configured by the manufacturers or were deemed defective. IMPLEMENTING VOTING SYSTEMS: THE GEORGIA METHOD, COMMUNICATIONS OF THE ASSOCIATION FOR COMPUTING MACHINERY, October 2004.

23. Attorney General Harvey, having admitted that the technology of DREs has passed New Jersey law by, Id. at 25, has taken no meaningful steps to update the inadequate certification process.⁴⁵ He thus has endorsed DREs that have not been thoroughly

⁴⁵ Counsel for the Plaintiffs has filed a request with the Attorney General's office under the Open Public Records Act (OPRA) for the certification reports of DREs which are intended for use on

tested for malicious software or other computer bugs that can impact the election negatively.

New Jersey Seriously Lags Behind Other States And Countries That Have Recognized The Insecurities Of DREs And Have Decertified Them And Disallowed Their Use.

24. Taking seriously the many studies pointing out the inherent unreliability of DREs, several jurisdictions have enacted legislation and/or taken executive action (as discussed above regarding Ohio, California, Nevada and New York City), requiring that any DRE being used be equipped with a paper record that can be verified by the voter before finalizing his/her vote. The paper record could be used as an independently auditable record of votes cast in the election in the event of a contest or a recount. Other states have mandated that security measures be implemented before DREs can be used. Upon information and belief, New Jersey has implemented no security measures to protect voters who use DREs.

Election Day. The purpose of the request was to determine what measures, if any, the Attorney General, as the chief elections officer of the State, has taken to ensure that DREs will be compliant with New Jersey law. That request has not been honored by the Attorney General's office, and is now the subject of separate litigation before this Court.

25. Five states have passed legislation that requires electronic voting machines to produce a voter verified paper ballot for voter verification and recount purposes. The states and their legislative actions are listed below:

Alaska: 2004 Alaska Sess. Laws ch. 154

California: S.B. 1438 2003 Sess. § 19250(b)-(e)

Maine: 2003 Me. Laws 651, *8

Ohio: OHIO REV. CODE ANN. § 3506.10 (P) (Anderson 2004);
(H) (Anderson 2004)

Oregon: OR. REV. STAT. 258.211(2003)

1. Additionally, three states have enacted legislation requiring that all votes be cast on paper ballots:

Illinois: ILL. COMP. STAT. 5/16-1(2004)

New Hampshire: N.H. REV. STAT. ANN. § 656:41 (2003)

Vermont: VT. STAT. ANN. tit. 17 § 2478 (2003)

1. Upon information and belief, Sequoia Pacific is capable of retrofitting the New Jersey DRE machines to produce voter verified paper ballots.

2. The State of Maryland commissioned two studies to examine its DREs. It then took action to remedy some of the security vulnerabilities identified in the reports.

3. The Irish government appointed the Commission on Electronic Voting to report on the secrecy, accuracy, and testing of the electronic voting system to be used in the June 2004 local and European elections. Ireland Commission on Electronic Voting, Interim Report of the Commission on Electronic Voting on the Secrecy, Accuracy and Testing of the Chosen Electronic Voting System, at 7 (April 29, 2004).⁴⁶ Six weeks before the election, the Commission recommended the rejection of all electronic voting machines. DREs were deemed too insecure and too unreliable. Id.

4.. Two days before the 2000 election, the largest in Venezuela's history, the Venezuela Supreme Court postponed the election because of problems with the ES&S iVotronic DREs that were scheduled to be used. Associated Press, Venezuela Using Untested Voting Machines, ABC NEWS 7 (July 11, 2004).⁴⁷ The machines scheduled to be used in the election were ES&S's iVotronics.⁴⁸ In New Jersey, Sussex County is currently scheduled to employ 361 iVotronic machines in the November 2004 election.

Plaintiffs And Other Citizens Across The State Have Tried Without Success To Ensure That The Vote Is Protected On Election Day.

⁴⁶ At www.cev.ie. (Last accessed on Oct. 10, 2004).

⁴⁷ Available at <http://www.wjla.com/news/stories/0704/158551.html>.

⁴⁸ ES&S in the News - A Partial List of Events, at <http://www.votersunite.org/info/ES&Sinthenews.pdf>.

5. Plaintiffs and other citizens across the state of New Jersey, justifiably, are concerned about the unreliability of DREs that lack a voter verified paper ballot. They are concerned that those machines will not count their votes. In an effort to ensure that all votes are counted, they have contacted their elected officials, Defendant Governor McGreevey and Defendant Attorney General Peter Harvey, seeking protections for Election Day.

6. Defendant Governor McGreevey and Defendant Attorney General Harvey have ignored repeated requests by New Jersey citizens, including Plaintiffs and their counsel, to institute security measures to protect their votes.

7. Plaintiff State Assemblyman Gusciora, proposed legislation in May 2004 to require voting machines in New Jersey to produce a voter verified paper ballot. Assembly Bill No. 2627, 211th Leg. (N.J. 2004) (proposed). Assemblyman Gusciora's proposal would amend N.J.R.S. 19:48-1 and P.L. 1973, c.82 to include a requirement for an individual "permanent paper record for each vote cast" that would be "made available for inspection and verification by the voter" and could be "preserved for later use in any manual audit." A.2627, 211th Leg. §§ 1(o) and 3(i). Plaintiff Assemblyman Gusciora modeled his state legislation on

federal legislation proposed by U.S. Congressman Rush Holt (D-NJ).⁴⁹

8. Plaintiff Assemblyman Gusciora, concerned that his proposed legislation would not protect voters this Election Day, has tried in vain to work with Governor McGreevey and Attorney General Harvey to make sure that voters are protected this November.

9. Plaintiff Gusciora wrote a letter on June 16, 2004, to Attorney General Harvey identifying the serious problems associated with DREs. In his letter, Plaintiff Assemblyman Gusciora also discussed that many reports have identified the serious problems associated with electronic voting, and listed the concerns that led him to introduce legislation that protects the voters' intent. Plaintiff Gusciora then requested from Attorney General Harvey plans to ensure the integrity of the upcoming

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Congressman Holt proposed legislation in May 2003 to require a voter verified paper ballot of votes cast in order to assure accuracy and reliability at the polls, called The Voter Confidence and Increased Accessibility Act of 2003, H.R. 2239 IH, 108th Cong. §§ 1 and 4(a)(2)(A)(2003). The intent of this legislation is to promote the "accuracy, integrity, and security" of the voting system. *Id.* at § 4(a)(2)(A)(2003). The legislation calls for a "permanent paper record" that can be used for a future audit of the election results, as well as an opportunity for the voter to correct errors before the paper ballot is preserved. *Id.* at § 4(a)(2)(B)(i)-(ii)(2003).

election. Letter from Reed Gusciora (D), State of New Jersey Assemblyman, Leg. District 15, to Peter Harvey, Attorney General, State of New Jersey (June 16, 2004) (hereinafter "Gusciora Letter"). The Gusciora Letter is attached to this Complaint as Exhibit A.

10. Defendant Harvey has not responded to Plaintiff Assemblyman Gusciora's concerns.

11. Mercer County Executive Brian M. Hughes wrote a letter to Attorney General Harvey on July 22, 2004 which specifically stated that Mercer County voters have no confidence in the electronic voting machines recently purchased. In his letter, County Executive Hughes stated that he supported the legislation of U.S. Congressman Rush Holt which would require a voter verified paper ballot on all electronic voting machines. He also stated that he sought funds for Mercer County to install voter verified paper ballot components on all of Mercer County's DREs. His request was supported unanimously by the Board of Freeholders. The letter also stated that Sequoia Pacific has made no progress to retrofit Mercer County's machines. The Hughes Letter is attached to this Complaint as Exhibit B.

12. Upon information and belief, Sequoia Pacific is capable of retrofitting the New Jersey DRE machines to produce voter verified paper ballots.

13. County Executive Hughes requested the support of Attorney General Harvey to obtain an executive order to allow "voters to use absentee ballots if they lack confidence in the electronic system." Defendant Harvey has not issued such an executive order.

14. Ms. Beth Feehan participated in a petition drive in which signatures of over 20,000 New Jersey voters were collected. The voters expressed their dismay with DREs that do not produce a voter verified paper ballot. Ms. Feehan, along with Reverend Robert Moore, representing Plaintiff Coalition for Peace, and Rebecca Mercuri, Ph.D., an expert in computer science, presented the petition to two members of Defendant McGreevey's staff at a rally on the steps of the New Jersey State House on July 13, 2004.

15. The public advocacy groups that participated in the petition drive and the rally include TrueMajority, Move On, Electronic Frontier Foundation, Common Cause, Democracy for America, VerifiedVoting.org, Computer Professionals for Social Responsibility, and National Committee for Voting Integrity and Working Assets.

16. On August 27, 2004, Defendant Governor McGreevey and Defendant Attorney General Harvey were presented with a letter signed by 22 public interest organizations and individuals, including Plaintiff Assemblyman Gusciora and Reverend Robert Moore, on behalf of Plaintiff The Coalition for Peace Action.⁵⁰ The letter stated that DREs should not be used in New Jersey because of "inadequate certification processes, secret source codes and software, and the lack of security." Letter from Renee Steinhagen, New Jersey Appleseed PILC, et al., to James McGreevey, Governor, State of New Jersey (August 27, 2004) (hereinafter the "Advocates Letter").

⁵⁰ The "Advocates Letter" was signed by 22 individuals and organizations; Renee Steinhagen, New Jersey Appleseed PILC; Stephen Flatow, Community Relations Committee, United Jewish Community of MetroWest; Assemblyman Reed Gusciora, District 15; Ben Cohen, True Majority; Ed Davis, Common Cause; Peter Schurman, MoveOn.org; Cindy Cohn, Electronic Frontier Foundation; Pamela Smith, VerifiedVoting.org; Craig Kaplan, American Families United, Voter Protection Project; Margaret Fung, Asian American Legal Defense Education Fund; Gary Ferdman, Business Leaders for Sensible Priorities; Laurie Lowenstein, NJ Coalition for Democracy; Cynthia Sheward, Records Manager, Clinton; Susan Waldman, Morris County NOW; Rev. Bob Moore, Princeton Coalition for Peace Action; Alan Sagner, Alan Sagner Companies; Joshua W. Denbeaux, Esq., Denbeaux & Denbeaux; Rebecca Mercuri, Ph.D., Computer Scientist; Edward Felton, Ph.D., Princeton University; Mindy Kleinberg, 9/11 Family Steering Committee; Lorie Van Auken, 9/11 Family Steering Committee; and Alison Miller, West Windsor Town Council. The Advocates Letter was copied to Attorney General Peter Harvey, James Gee and Deputy Attorney General Donna Kelly.

17. The Advocates Letter calls on the Governor (and the Attorney General) to issue an order to make paper ballots available at all polling sites to anyone who wishes to use them. The Advocates Letter is attached to this Complaint as Exhibit C.

18. The Advocates Letter has been ignored by both Defendant Governor McGreevey and Defendant Attorney General Harvey.

19. Most recently, counsel for Plaintiffs, Penny M. Venetis, Esq., sent a letter to Defendant Attorney General Harvey addressing the many risks associated with electronic voting across the country, and particularly in New Jersey. Letter from Penny M. Venetis, Esq., Rutgers University Constitutional Litigation Clinic, to Peter Harvey, Attorney General, State of New Jersey (Oct. 1, 2004) (hereinafter the "Venetis Letter").⁵¹ The Venetis Letter is attached to this Complaint as Exhibit D. The Venetis Letter describes many of the reasons that electronic voting systems are unreliable, unsafe, and untrustworthy. Ms. Venetis recommended that the Attorney General order the use of paper ballots for use this Election Day. She also asked Defendant Harvey to order that all existing machines be retrofitted to create a voter verified paper ballot, and that all machines purchased in the future be required to have paper ballot verification components. Finally, Ms. Venetis requested a meeting with Attorney General Harvey to discuss the concerns raised in her letter. She followed-up her letter

⁵¹ This letter was copied to Donna Kelly, Esq., Deputy Attorney General, State of New Jersey. 43

with telephone calls to the Attorney General's office. The Attorney General has not responded to her letter or calls.

20. The concerns discussed above are of vital importance in protecting the rights of Plaintiffs and New Jersey voters. It is mandated by our Constitution and Title 19 that votes must be accurately and properly counted by all voting methods used in New Jersey. The gross inaction and lack of response by Defendants places the integrity of the upcoming election at serious risk. This Court has the authority to intervene and should exercise that authority to ensure that every vote is counted accurately on Election Day, and that Plaintiffs' fundamental rights are protected.

CAUSES OF ACTION

COUNT ONE:

Violation Of The New Jersey Constitution's Requirement That Every Vote Be Counted.

21. Plaintiffs repeat the allegations of paragraphs 1 to 89 as if set forth herein in full, and further allege as follows:

22. Inherent in the right to vote, a fundamental right in New Jersey, is the right to have one's vote counted. Defendant

McGreevey's failure to implement security measures to ensure that every vote is counted, including updating the State's certification process to address DREs, violates Plaintiffs' rights to vote guaranteed by Article III, ¶ 3(a) of the New Jersey Constitution.

23. Inherent in the right to vote, a fundamental right in New Jersey, is the right to have one's vote counted. Defendant Harvey's failure to implement basic security measures to ensure that every vote is counted, including updating the State certification process to address DREs, violates Plaintiffs' right to vote guaranteed by Article III, ¶ 3(a) of the New Jersey Constitution.

COUNT TWO:

Violation Of New Jersey's Constitutional Guarantee Of Equal Protection.

24. Plaintiffs repeat the allegations of paragraphs 1 to 92 as if set forth herein in full, and further allege as follows:

25. DRE votes have no way of being audited independently. In the event of a recount, DRE voters have no assurance that their votes will be treated the same as ballots cast on paper ballots, optically scanned ballot cards or lever machines. In the event of a recount, the assignment of New Jersey's electoral votes will be determined by those votes that can be independently audited - non-DRE votes. Giving unequal weight to votes cast violates the equal protection guaranteed by the New Jersey Constitution at Article 1, Paragraph 1. By failing to devise a recount system that counts all votes equally, Defendant McGreevey violates Plaintiffs' right to equal protection under the law.

26. DRE votes have no way of being audited independently. In the event of a recount, DRE voters have no assurance that their votes will be treated the same as ballots cast on paper ballots, optically scanned ballot cards or lever machines. In the event of a recount, the assignment of New Jersey's electoral votes will be determined by those votes that can be independently audited - non-DRE votes. Giving unequal weight to votes cast violates the equal protection guaranteed by the New Jersey Constitution at Article 1, Paragraph 1. By failing to devise a recount system that counts all votes equally, Defendant Harvey violates Plaintiffs' right to equal protection under the law.

COUNT THREE:

Violation Of The Statutory Guidelines Concerning Vote Recounts.

27. Plaintiffs repeat the allegations of paragraphs 1 to 95 as if set forth herein in full, and further allege as follows:

28. Title 19 of the New Jersey Code lays out detailed instructions for how to recount paper ballots, optically scanned ballot cards and lever machines. No instructions are given on how to perform recounts on votes cast using DREs.

29. DRE votes cannot be audited independently. Thus there is no guarantee that they will be tabulated properly in the event of a recount. Defendant McGreevey's failure to implement procedures to ensure that all DRE votes be counted accurately in the event of a recount violates state statutes governing recounts. N.J.S.A. § 19:28-1 et seq.

30. DRE votes cannot be audited independently. Thus there is no guarantee that they will be tabulated properly in the event of a recount. Defendant Harvey's failure to implement procedures to ensure that all DRE votes be counted accurately in the event of a recount violates state statutes governing recounts. N.J.S.A. § 19:28-1 et seq.

COUNT FOUR:

Violation Of Statutory Requirement That The Voter's Intent Be Tabulated.

31. Plaintiffs repeat the allegations of paragraphs 1 to 99 as if set forth herein in full, and further allege as follows:

32. Defendant McGreevey violates the Plaintiffs' right to have their votes cast for the candidates of their choosing or for any issue on the ballot as specified by N.J.S.A. §§ 19:48-1(d), (f), 19:53A-3(b) (2004) because he has taken no action to ensure that the DREs are safe and accurate for the upcoming election.

33. Defendant Harvey violates the Plaintiffs' right to have their votes cast for the candidates of their choosing or for any issue on the ballot as specified by N.J.S.A. §§ 19:48-1(d), (f), 19:53A-3(b) (2004) because he has taken no action to ensure that the DREs are safe and accurate for the upcoming election.

COUNT FIVE:

Violation Of The Statutory Requirement That Voting Equipment Be Secure.

34. Plaintiffs repeat the allegations of paragraphs 1 to 102 as if set forth herein in full, and further allege as follows:

35. Defendant MGreevey's failure to require a voter verified paper ballot, or implement even basic security measures for DREs,

leaves the DREs highly vulnerable to tampering in violation of N.J.S.A. § 19:53A-3(g).

36. Defendant Harvey's failure to require a voter verified paper ballot, or implement even basic security measures for DREs, leaves the DREs highly vulnerable to tampering in violation of N.J.S.A. § 19:53A-3(g).

COUNT SIX:

Violation Of The Statutory Requirement That Votes Be Counted Accurately.

37. Plaintiffs repeat the allegations of paragraphs 1 to 105 as if set forth herein in full, and further allege as follows:

38. Defendant McGreevey's failure to provide any safety and security measures violates the Plaintiffs' right to have their votes accurately counted, as required by N.J.S.A. §§ 19:48-1(h), 19:53A-3(h).

39. Defendant Harvey's failure to provide any safety and security measures for DREs violates the Plaintiffs' right to have their votes accurately counted, as required by N.J.S.A. §§ 19:48-1(h), 19:53A-3(h).

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully ask this Court

1. To enjoin the use of DREs for the upcoming November 2004 election;
2. To require all DREs be retrofitted to provide a voter verified paper ballot after the November 2004 election;
3. To require that all new DREs purchased in the state require a voter verified paper ballot, produced using the "Mercuri Method;"
4. To grant reasonable attorney's fees and costs to Plaintiffs pursuant to N.J.S.A. § 10:6-2(2004).

Respectfully Submitted,

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