

COMMONWEALTH OF VIRGINIA

IN THE RICHMOND CIRCUIT COURT

COUNTY OF VIRGINIA

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IN RE ELECTION RECOUNT

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GEORGE ALLEN

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Petitioner,

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v.

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TIMOTHY KAINE

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Respondent.

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**PETITIONER’S MOTION IN SUPPORT
OF THE ENTRY OF THE RECOUNT PROCEDURAL ORDER**

Petitioner, George Allen, by counsel, respectfully submits this Memorandum in Support of entry by the Court of the Recount Procedural Order submitted to this Court. The Preliminary Order directed the parties to meet and confer regarding the substance of a Procedural Order to direct the conduct of the recount to be held on December 18 and 19, 2012. The parties conferred, exchanged several drafts of the Procedural Order, and ultimately agreed on all provisions of the Procedural Order except one: whether elections officials must perform an examination of a single malfunctioning machine’s software, memory cards, and source code by technical experts with backgrounds in election technology, computer science, and software usability. Petitioner supports access to these materials. Respondent disputes it. This Memorandum explains Petitioner’s position on the Procedural Order before the Court.

Statement of Facts

For the purposes resolving this contested access issue in the Procedural Order only, and reserving the right to dispute factual questions in any future proceedings, the parties have stipulated to the following facts:

Following the November 6, 2012 election, the State Board of Elections (SBE) completed its statewide canvass pursuant to VA. CODE § 24.2-802. On November 7, 2012, SBE certified Respondent Tim Kaine as the winner. Respondent led Petitioner Allen by 203 votes statewide. Allen then petitioned for a recount under VA. CODE § 24.2-800. The Presidential and U.S. Congressional races produced clear winners in the Commonwealth.

In the George Wythe precinct of King William County,¹ election officials discovered that one DRE machine (Machine 1) appears to have produced a significant undervote. Although voters cast 420 and 413 votes in the Presidential and U.S. Congressional races respectively, Machine 1 registered zero (0) votes in the U.S. Senate race. Machine 1 recorded two undervotes for the Presidential Race, nine undervotes for the U.S. Congressional race, and 422 undervotes for the U.S. Senate Race, indicating a clear discrepancy. *See* Appendix 1. Race totals from the two other DRE machines operating in the George Wythe district (Machines 2 and 3) produced vote totals for the U.S. Senate that closely tracked the U.S. House race proportions. Appendix 1. All three machines were in use for the full day, with voters casting ballots on each machine in roughly equal numbers. Poll workers registered a total of 1,244 voters voting in the George Wythe precinct on Election Day. The ballot displays on Machines 1-3 were identical. Machines 1-3 appeared to be working properly on Election Day—voters reported no usual problems to poll workers in George Wythe. The machine audit prior to Election Day proceeded smoothly and without incident.

¹ Counties and precincts are fictional and invented for the purposes of this scenario.

In the event of a recount, VA. CODE § 24.2-802 provides that DRE ballots be “redetermined.” VA. CODE § 24.2-802 describes the redetermination process as follows:

For direct recording electronic machines (DREs), the recount officials shall open the envelopes with the printouts and read the results from the printouts. If the printout is not clear, or on the request of the court, the recount officials shall rerun the printout from the machine or examine the counters as appropriate.

Following this procedure, recount officials attempted to “redetermine” the DRE ballots in accordance with VA. CODE § 24.2-802. The effort failed to produce a change in the tally from the malfunctioning DRE. The DRE’s tally for the U.S. Senate Race remained at zero. After the state-wide hand recount concluded, Allen narrowed Kaine’s lead to only 33 votes.

Petitioner, timely filed a Recount Petition in the Circuit Court of the City of Richmond. VA. CODE § 24.2-801. The Chief Justice of the Virginia Supreme Court appointed two judges to sit on the election court panel along with the chief justice of the circuit court in Richmond to preside over the recount and the parties negotiated a Recount Procedural Order. VA. CODE § 24.2-801.

Request for Relief

Petitioner requests this court to exercise its express power under VA. CODE ANN §24.2-802 to allow for an inspection of the contents of the malfunctioning King William County direct recording electronic device (DRE) in question (Machine 1). To determine an accurate vote-count in the November 6, 2012 General Election, Petitioner requests that this court order Machine 1 to be fully delivered for inspection to allow specialists to search for possible missing votes. VA. CODE ANN §24.2-802 states unequivocally that if “the printout [from a direct recording electronic device] is not clear, or on the request of the court, the recount officials shall rerun the printout from the machine or *examine the counters as appropriate*” [italics added]. VA. CODE

ANN §24.2-802. Petitioner therefore respectfully requests that the SBE, with this assistance of technical experts with backgrounds in election forensics and working with the King William Election Board, conduct an examination of Machine 1's software, memory cards, and source code.

The Meaning of the Term “Counters” in the Statute Should be Read Expansively

Virginia statute clearly dictates that “counters” be examined. VA. CODE ANN §24.2-802 states that “on the request of the court... the recount officials shall rerun the printout from the machine or examine the counters as appropriate.” Because of legislative misunderstanding of technology when the VA. CODE ANN §24.2-802 became law on April 8, 2002, the Allen campaign asserts that legislators included the term “counters” mistakenly assuming that DRE counters are analogous to counters in lever machines, widely in use in Virginia prior to the adoption of DRE technology. The difference however, is that “counters” in lever machines indicate voter choice (i.e., who voted for which candidate). In a DRE machine, a “counter” must mean the memory location where vote record data is stored, information accessible only through examination of the machine's software. Additionally, unlike lever machines which featured stand-alone counters much like an odometer in a car, counters in DRE machines cannot be adequately distinguished from the rest of the computing system by which the machine operates. 2002 Va. Acts 601, *also see* Tech. Aff. (10) (noting that counters in DREs are indistinguishable from the rest of the machine's software). Some voting machines contain a distinct mechanical device registering numbers in analog fashion. In the case of the modern DRE, however, the “counting” functionality consists of software mechanisms visible only by way of a diagnostic test of the full software operating the machine. *Id.* In 2002 when the legislature first crafted the

statute, its authors mistakenly assumed the existence of stand-alone “counters” that could be examined much the same as a lever machine’s counter, without a full review of the whole voting machine. Tech. Aff. (11-13). King William County’s DREs do not contain (and indeed no modern DRE contains) stand-alone counters that can be visually inspected to determine voter choice in a single race. *Id.* Because of this central misapprehension of how DREs function, to give meaning to the legislative intent, this court must order a full examination of Machine 1’s software, memory cards, and source code to determine if votes can be recovered. Tech. Aff. (13)

That §24.2-802 does not expressly grant authority to the court to examine DRE machine software is a product of the time at which the language was written rather than evidence of the Virginia Legislature’s particular intent to prohibit such action. The architects of this 2002 language did not conceive of a machine in which the counters (1) do not evince voter intent; and (2) are indistinguishable from the rest of the machine’s operational functions. The authors of the statute did, however, intend to give courts authority to ascertain the intent of Commonwealth voters to the fullest extent possible. Indeed, other jurisdictions have consistently recognized the importance of elevating voter intent over technological barriers to determining that intent. See *In re Election of U.S. Representative for Second Congressional Dist.*, 231 Conn. 602, 621, 653 A.2d 79, 90-91 (1994) (“Whatever the process used to vote and to count votes, differences in technology should not furnish a basis for disregarding the bedrock principle that the purpose of the voting process is to ascertain the intent of the voters”); *Brown v. Carr*, 130 W.Va. 455, 460, 43 S.E.2d 401, 404-405 (1947) (“[W]hether a ballot shall be counted ... depends on the intent of the voter.... Courts decry any resort to technical rules in reaching a conclusion as to the intent of the voter.”).

Consistent with this precedent, the statute implicitly authorizes this court to order the inspection of a DRE's software. The broad grant of authority to "examine the counters" must incorporate modern computer forensic techniques to adequately examine the counters such that the correct vote count may be determined. *Griffin v. Burns*, 570 F.2d 1065 (1st Cir. 1978) (Going so far as to direct that a new primary election be held in order to give voters a fair election).

Furthermore, VA. CODE ANN §24.2-802 grants this court to take actions "as appropriate" to determine voter intent. This constitutes a broad grant of judicial discretion to order the requested inspection. Given the clear defectiveness of the DRE machine at issue, this court must take every and all necessary steps to ensure Virginia voters are heard and all legally cast ballots are counted. See *Gooch v. Hendrix*, 5 Cal. 4th 266, 288 (1993) citing *Wilks v. Mouton*, 42 Cal.3d 400, 404 (1986)("[e]ven mandatory provisions [of the election laws] must be liberally construed to avoid thwarting the fair expression of popular will.") The closeness of the race in this election—and indeed its impact on the balance of power in the U.S. Senate—requires this court to act to the fullest extent of its granted authority.

The Virginia Constitution Compels This Court to Count All Votes

Ordering anything less than a full inspection of Machine 1 violates the mandate of Article II, § 3, cl. 1 of the Constitution of Virginia which requires that in "elections by the people, the following safeguards shall be maintained: Voting shall be by ballot or by machines for receiving, recording, and counting votes cast."

This constitutional safeguard commands this court's broad discretion to require a full examination of the defective DRE. Failure to do so condones voting by a machine that is *not* for receiving, recording, and counting votes cast in direct contradiction of constitutional mandate. A

malfunctioning voting machine that has not properly record and count all votes cast—as was certainly the case in King William County on November 6—robs Virginia voters of the franchise and violates their constitutional right to have their votes counted, the hallmark of democracy. Art. II, § 3 supports the Art. I, § 6 requirement that “all men having sufficient evidence of permanent common interest with, and attachment to, the community, *have the right of suffrage*” [italics added]. Va. Const. Art. II, §3 (2012). *See also Harper v. Virginia Bd. Of Elections*, 383 U.S. 663 (1966) (“the right to vote is too precious, too fundamental to be so burdened or conditioned”). To have one’s vote erased—for whatever reason—is a failure of the democratic system. *U.S. v. Classic*, 313 U.S. 299 (1941).

Here, where a malfunctioning machine arbitrarily “loses” the votes of citizens, and where those citizens and those individuals campaigning for representative office are unable to achieve a full examination of the machines to determine if those votes are in fact discernable upon inspection, the right of suffrage will have been denied.

Due Process Demands a Full Examination of the Malfunctioning Voting Machine

To deny voters a full inquiry into the status of their missing votes could be construed as a violation of those voters’ Due Process rights under the 14th Amendment of the United States Constitution. The Due Process Clause addresses “the fairness of the official terms and procedures under which the election was conducted.” *League of Women Voters of Ohio v. Brunner*, 548 F.3d 463, 478 (6th Cir. 2008), citing *Griffin*, 570 F.2d at 1078. Allowing for voters’ cast ballots to be arbitrarily erased from the record without a full and proper inquiry consistent with the Virginia Code’s statutory language as well as with the Commonwealth’s Constitution is tantamount to denying the fundamental right to vote. The denial of the suffrage

by way of lost vote without appropriate examination of the “counters” to the fullest extent possible undermines the integrity of the election such that the conduct of the election must be deemed to have reached the point of “patent and fundamental unfairness.” See *Griffin v. Burns*, 570 F.2d 1065, 1077 (1st Cir. 1978), also see *Hunter v. Hamilton County Bd. of Elections*, 635 F.3d 219, 243 (6th Cir. 2011) (poll worker error resulting in invalidation of votes a potential abrogation of due process). The Due Process clause has been extended to voting rights in instances where a portion of the electorate was disenfranchised or was significantly impaired from voting. The arbitrary erasure of hundreds of potentially determinative votes (votes that could impact the balance of political power state-wide, and potentially nationally) without adequate means to determine whether they are still accessible should be viewed as the most significant impairment of the franchise, and thus a due process violation.

Proprietary Nature of Machines Does Not Preclude Full Examination

That the DRE machines in question contain proprietary information that could be revealed upon inspection should not prevent this court from making the fullest inquiry possible into determining the actual vote count in King William County. The court in *Americans for Safe Advocacy v. County of Alameda* granted litigants proprietary information such as: (1) “All audit logs,” (2) “All redundantly stored vote data,” (3) “Complete chain of custody information for all system components and for human access to stored data,” and (4) “All logic and accuracy test reports.” *Americans for Safe Access v. County of Alameda*, 174 Cal. App. 4th 1287 (2009).

Unlike *Americans for Safe Advocacy*, the Allen campaign does not seek information held on the DRE machines in question to determine the cause of the undervote. *Id.* at 1291. Nor does it seek the information as an indictment of the use of this type of machine. *Id.* Rather, the campaign seeks a full examination of the DRE in question for the narrow purpose of determining whether

the votes or traces thereof still remain in a location on Machine 1. In that sense, the information sought is a recount in the purest sense.

This case is also distinguished from *Jennings v. Elections Canvassing Com'n of the State of Florida*, 2006 WL 5508548 (Fla. Cir. Ct. 2006). In *Jennings*, the court denied the discovery of source code to a voting system during a recount because it determined there was no “reasonable necessity to gain access to the trade secret.” *Id.* In that case, however, litigants seeking the trade secrets did not hope to determine an accurate vote count as a result of access. Rather, they sought access predominantly to determine the cause of the undervote. *Jennings v. Election Canvassing Commission of the State of Florida*, 2006 WL 5518562 (Fla. Cir. Ct. 2006) (Trial Pleading). As such, the interests in favor of granting access to the software would certainly be lessened. Here, there exists a reasonable possibility that a full diagnostic examination could result in an accurate redetermination of the vote. Tech Aff. (12). Furthermore, the election in *Jennings* was already subject to a post-election audit that may have unearthed some information relevant to the recount. The court noted that the plaintiffs “presented no evidence to demonstrate that the parallel testing was flawed and/or the results not valid.” *Jennings v. Election Canvassing Commission of the State of Florida*, 2006 WL 5508548 (Fla. Cir. Ct. 2006). In the election at issue in this case, Virginia provided no such safeguard for the DREs in question.

For the foregoing reasons, Petitioner requests that this court order a full diagnostic examination of the malfunctioning DRE machine that reported a substantial undervote in the November 6, 2012 election. Petitioner has a reasonable expectation that such an inquiry could produce the accurate vote count weighs heavily in favor of Petitioner and distinguishes this case from precedent in which other jurisdictions have denied such access to proprietary information.

Failure to allow the fullest inquiry possible would be a denial of Commonwealth citizens' right of suffrage under the Virginia Constitution and under the 14th Amendment's Due Process rights of the United States Constitution.

Respectfully submitted,

Counsel for Petitioner George Allen