

No. 1170216

IN THE SUPREME COURT OF ALABAMA

Ex parte Secretary of State John Merrill and Ed
Packard, *Petitioners.*

(In re: Virginia Tuggle, et al.,

Plaintiffs,

v.

Alabama Secretary of State John Merrill and Director of
Elections Ed Packard,

Defendants.)

(CORRECTED) STATE DEFENDANTS' PETITION
FOR AN EMERGENCY WRIT OF MANDAMUS
TO THE CIRCUIT COURT OF MONTGOMERY COUNTY
(Circuit Judge Roman Ashley Shaul, CV-2017-901909)

Steve Marshall (MAR083)
Attorney General

James W. Davis
Deputy Attorney General

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INTRODUCTION

Plaintiffs filed a civil action seeking preservation of digital images purportedly stored in voting machines around the state. The only Defendants to this case - Secretary of State John Merrill and a member of his staff - do not have authority to make changes to voting machines or to require local officials to do so. Plaintiffs therefore do not have standing to bring this action.

The Circuit Court granted a TRO or preliminary injunction to the Plaintiffs that provides as follows:

All counties employing digital ballot scanners in the Dec. 12, 2017 election are hereby ORDERED to set their voting machines to save ALL PROCESSED IMAGES in order to preserve all digital ballot images. This order applies to those machines that have such a setting and does not apply to any machine that does not allow for processed images to be saved.

See Order, attached as Ex. 3. The Court further ordered Secretary Merrill to transmit the order to local officials. (While the order is styled as a motion for preliminary injunction, it appears to be more in the nature of a TRO; counsel for defendants participated in a hearing but, as for a TRO, the matter was heard before defendants were served and with no real opportunity to gather or present evidence or file written argument.)

It is not costly or difficult for Secretary Merrill to make a transmission to Probate Judges, but the Circuit Court's order does more than that. It purports to order Counties, which are not parties, to take action that the Secretary believes is impossible to complete before the election and which will disrupt the election. The order will cause confusion among local election officials who are not party to this suit and who will be unsure of their obligations. Moreover, because the Circuit Court lacks jurisdiction, the order is a nullity and should be vacated.

Secretary Merrill thus asks that this court issue an emergency writ of mandamus vacating the injunction and requiring the Circuit Court to dismiss this action over which the Court has no jurisdiction. State v. Property at 2018 Rainbow Drive, 740 So. 2d 1025, 1029 (Ala. 1999).

Should this Court determine that an appeal is an appropriate vehicle to have this matter reviewed, and in light of the emergency nature of this matter, Defendants respectfully ask that this petition be treated as an appeal.

STATEMENT OF THE FACTS

1. At least some voting machines take a digital image of voters' paper ballots, and presently most machines do not retain that image. Instead, the paper ballots are preserved in the event of an election contest or other need to examine the records.

2. It is the Secretary of State's understanding that voting machines are programmed to either save the digital image or not. To change a machine's program would require a third-party vendor, ES&S, to go to 2000 machines around the state.

3. The voting machines are under the authority of the Probate Judges, not the Secretary of State, and the Secretary of State is not party to the contracts between Probate Judges and ES&S to maintain and program the voting machines.

4. On December 7, 2017, Plaintiffs filed this civil action against the Secretary of State and the Director of Elections, asking that digital images of ballots taken by voting machines be preserved. The plaintiffs asked for emergency relief, including a temporary restraining order. See Complaint, attached as Ex. 1.

5. The Circuit Court scheduled a hearing for 9:00 a.m. on Monday, December 11, 2017, the day before a special election for United States Senate. Although Defendants have not yet been served, counsel for the Secretary was notified of the hearing and appeared.

6. The Circuit Court heard argument at the hearing, including that Plaintiffs lack standing, that the Defendants are not proper parties, and that the Court has no jurisdiction.

7. After the hearing, Defendants filed a motion to dismiss on grounds including a lack of standing. See Motion to Dismiss, Ex. 2.

8. This afternoon, the Circuit Court entered an order granting a "preliminary injunction" in favor of the Plaintiffs. The entire text of the order is as follows:

ORDER GRANTING A PRELIMINARY INJUNCTION

On December 7, 2017 Plaintiffs filed a request for a preliminary injunction in this cause. On December 8, 2017, the Court set this matter for a hearing to be held on December 11, 2017 at 9AM. At that hearing counsel for Plaintiffs, the Attorney General's office and the Secretary of State's office appeared. Defendants opposed the relief requested, primarily on the grounds that they are not the proper parties. After hearing arguments and reviewing the filings, it appears that Plaintiffs and similarly situated voters would suffer irreparable and immediate harm if digital ballot images are not

preserved. Some of the important facts relevant to the decision are:

1. A highly contested election is being held in which there is a reasonable belief that the results may be close;

2. There was little argument, although somewhat contested, that the law at issue requires digital images to be preserved as a matter of Alabama law and Federal law;

3. The Secretary of State's Office, although alleged to be an improper party, does have the ability to provide election information to election officials as a matter course and routinely does so; and,

4. Importantly, all parties agreed that the relief requested would only require nominal resources and cost on the part of Defendants. Therefore, even if the Secretary of State were an improper party, the only action being requested of him at this point is to send a communication through a system that already exists and is routinely used.

It is therefore ORDERED that a preliminary injunction be issued to Defendants (and their officers, agents, servants, employees and attorneys) are it is further ordered that Defendants communicate and send to all probate judges and election officials in the State of Alabama, the following ORDER:

All counties employing digital ballot scanners in the Dec. 12, 2017 election are hereby ORDERED to set their voting machines to save ALL PROCESSED IMAGES in order to preserve all digital ballot images. This order applies to those machines that have such a setting and does not apply to any machine that does not allow for processed images to be saved.

Sending a copy of this order to the above stated election officials will be deemed sufficient notice and compliance with this Court's order.

This case is set for a full hearing on December 21, 2017 at 1:30 PM, in courtroom 4A, Montgomery County Courthouse, to consider whether the injunction should be made permanent and/or whether some other form of relief is appropriate.

9. The Circuit Court has scheduled a hearing on Defendants' Motion to Dismiss for December 21, 2017.

STATEMENT OF THE ISSUE

May a Circuit Court purport to order non-party elections officials to reprogram voting machines the day before the election, when the action was filed solely against the Secretary of State who lacks authority to direct such action, and when the order has the potential to cause confusion and chaos before a major election?

REASONS THE WRIT SHOULD ISSUE

"The writ of mandamus is a drastic and extraordinary writ, to be issued only when there is: 1) a clear legal right in the petitioner to the order sought; 2) an imperative duty upon the respondent to perform, accompanied by a refusal to do so; 3) the lack of another adequate remedy; and 4) properly

invoked jurisdiction of the court." Ex parte Carter, 807 So.2d 534, 536 (Ala. 2001) (internal citations omitted).

The Court has jurisdiction to consider this petition. "Mandamus review is available where the petitioner challenges the subject-matter jurisdiction of the trial court based on the plaintiff's alleged lack of standing to bring the lawsuit." Ex parte HealthSouth Corp., 974 So.2d 288, 292 (Ala.2007). See also Ex parte Hurst, 914 So. 2d 840 (Ala. 2005) (reviewing and vacating temporary restraining order on a petition for writ of mandamus).

Defendants have a clear legal right to have this action dismissed and the injunction denied. When a plaintiff without standing purports to commence a civil action, the Circuit Court may take no action other than dismissing the suit, and any other action taken by the Court is null and void.

I. Plaintiffs lack standing and the Circuit Court lacks jurisdiction.

When a party without standing purports to commence an action, the trial court acquires no subject-matter jurisdiction. Ex parte Alabama Educ. Television Com'n, 151 So. 3d 283, 286 (Ala. 2013). In order to establish standing, Plaintiffs must have suffered (i) an "injury in fact" that

was (ii) caused by ("fairly traceable to the actions of") the defendant and (iii) that can be redressed by the defendant. Id. at 287. Plaintiffs fail all three prongs of the standing test.

To support standing, an injury must be "actual or imminent, not 'conjectural' or 'hypothetical.'" Id. Plaintiffs say only that "[w]ithout the preservation of these digital ballot images, Defendants' rights to a fair and accurate election could be denied." Complaint ¶18. But Plaintiffs do not say how the election will be impacted. It is entirely speculative that any party would wish to contest an election, or that there would be any other need to examine the ballots, and if so, then the paper ballots will still exist and will be the best evidence.

Nor is any injury "fairly traceable" to the actions of the Secretary of State. The Secretary of State and his staff do not direct the actions of local elections officials, who have authority over the voting machines. Rather, the Secretary merely offers "uniform guidance" to those officials. Ala. Code § 17-1-3. He could do no more than request that local officials preserve, or not preserve, the digital copies. If the local elections officials do not

comply, the Secretary has no recourse against them. Probate judges, who are the chief elections officials of a county and who deal with such matters as voting machines, are members of the State's Judicial Branch of government and are not subject to officers of the Executive Branch. See Ala. Const. art VI § 139(a); Ala Const. art. VI § 149.

For the same reason, Secretary Merrill and his staff cannot redress Plaintiffs' alleged injury. Any request by the Secretary of State is just that - a request - and he cannot require local elections officials to take these actions.

Because Plaintiffs lack standing, any action taken by the Circuit Court other than dismissal, including an order granting a TRO, is "null and void." State v. Property at 2018 Rainbow Drive, 740 So. 2d 1025, 1029 (Ala. 1999).

II. Plaintiffs are not entitled to emergency injunctive relief.

A plaintiff seeking a TRO has the burden of demonstrating that (1) plaintiff will suffer irreparable harm without the TRO, (2) plaintiff has no adequate remedy at law, (3) plaintiff has at least a reasonable chance of success on the

merits, and (4) the hardship imposed on the defendant by the TRO will not unreasonably outweigh the benefit accruing to the plaintiff. Lott v. Eastern Shore Christian Center, 908 So. 2d 922, 927 (Ala. 2005).

Plaintiffs have not shown a likelihood of success on the merits. Plaintiffs cannot prevail in an action where they have no standing.

Plaintiffs have not shown irreparable injury. There is no plausible allegation that the failure to preserve electronic images of ballots, when the paper ballots will exist, will cause them imminent harm. Moreover, as noted above, the Secretary of State merely offers guidance to elections officials. How he provides guidance, and the type of guidance the Secretary provides, is surely a discretionary act. Courts are rightly reluctant to require state officials to exercise their discretion in a particular way. See McDowell-Purcell, Inc. v. Bass, 370 So. 2d 942 (Ala. 1979) (“The writ of mandamus will not lie to compel” a state official to exercise his discretion in a particular way.).

The equities also weigh against the Plaintiffs. An order of this sort which purports to direct non-party election officials to make major last-minute changes to the machines

is likely to cause confusion and is likely to disrupt election activities. While the Secretary is only ordered to transmit the Circuit Court's injunction, election officials will likely read it to require action on their part. The harm to the public will far outweigh any benefit to the Plaintiffs.

CONCLUSION

For these reasons, Defendants ask that this Court issue a writ requiring the Circuit Court to vacate its injunction and dismiss this action.

Respectfully submitted,

Steven T. Marshall
Attorney General

s/ James W. Davis
James W. Davis (ASB-4063-I58J)
Deputy Attorney General

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Counsel for the Secretary of State
and Director of Elections Ed
Packard

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of December,
2017, a copy of the foregoing petition has been served on
the following recipients:

Hon. Roman Ashley Shaul
Circuit Court of Montgomery County
Montgomery County Courthouse
251 S. Lawrence St.
Montgomery, Alabama 36104

Priscilla Black Duncan
P.B. Duncan & Associates, LLC
472 S. Lawrence, Suite 204
Montgomery, AL 36104

s/ James W. Davis
Of Counsel



IN THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA

PAMELA MILES, DAN DANNENMUELLER,	}	
VICTORIA TUGGLE and DR. PAUL HARD,	}	
Plaintiffs,	}	
V.	}	CV-2017-
JOHN MERRILL, in his personal and	}	
professional capacity as Secretary of State,	}	
and ED PACKARD, Administrator of	}	
Elections	}	
of Alabama	}	

COMPLAINT

PRELIMINARY STATEMENT

1. Defendants John Merrill and Ed Packard are failing to carry out their duties to instruct county election officials to preserve all election materials as required by law. Specifically, Defendants, according to information provided by them, indicate they do not and will not instruct election officials in each of the Alabama counties to preserve digital ballot images created by digital voting machines used throughout the state even though they are instructing such county officials to preserve "write-in" digital ballots.
2. As a result of Defendants' failure to comply with Alabama's public records law, digital ballot images used for tabulating votes and possible post-election adjudication will be destroyed following the December 12, 2017 special election for United States Senate in Alabama. The issue continues to be ripe through all elections scheduled in 2018.

3. Plaintiffs believe the failure of defendants to require that all election materials including digital ballot images violates Alabama's public records law and infringes upon their right to a fair and accurate election.

JURISDICTION AND VENUE

4. This Court has jurisdiction and venue over this matter because Montgomery County is the seat of government in Alabama.

PARTIES

5. Plaintiff Pamela Miles is a resident of Madison County. She is a registered voter in Alabama.
6. Plaintiff Dan Dannemueller is a resident of Elmore County. He is a registered voter in Alabama.
7. Plaintiff Paul Hard is a resident of Montgomery County. He is a registered voter in Alabama.
8. Plaintiff Victoria Tuggle is a resident of Cullman County, She is a registered voter in Alabama.

BOND

Plaintiffs argue that bond is inappropriate in this matter as the only remedy applied for is that the Defendants order county election officials to press a button ordering "all" images will be saved. This can be effectuated with electronic mail.

The Defendants have been notified this action was pending, and have not responded.

STATEMENT OF FACTS

Defendants Fail To Preserve Digital Ballot Images Created By Voting Equipment Used in Alabama Elections.

9. Alabama counties use election equipment manufactured by Election System and Software (ES&S), a company based in Omaha, Nebraska. More than 80% of the state will be using DS200 and DS850 digital scanners to count the votes in the December 12, 2017 special election for United States Senate.

10. Voters in Alabama cast either a paper ballot that is fed through either a DS200 or DS850 digital scanning device or by an M100 optical scanning device, depending upon the county. Digital scanners count the digital images of the ballots rather than the paper ballots themselves while optical scanners count the paper ballots. Ballot images are therefore in the chain of custody and constitute public records.

11. Digital ballot voting machines provide three options on the machine with respect to the handling and preserving of digital ballot images:

- * None
- * All Processed Images
- * Processed Write-in Images Only

12. Defendants have confirmed that in previous elections and in the December 12, 2017 special election, they have instructed and are instructing election officials of all Alabama counties using the ES&S DS200 or similar digital ballot scanning devices to preserve “Processed Write-in Images” only. As a result, county election officials or workers under their supervision automatically destroy all other digital ballots following the election.

13. Digital ballots are a “public record” pursuant to Alabama law which defines the term *public records* to “include all written, typed or printed books, papers, letter, documents and maps made or received in pursuance of law by the public officers of the state, counties, municipalities and other subdivisions of government in the transactions of public business...” Ala. Code (1970) § 41-13-1.

14. Alabama election officials are required to save ballots and other election materials for six (6) months in the case of state elections and twenty-two (22) months in federal elections.

CLAIM FOR RELIEF

Alabama Public Records Law

14. Plaintiffs incorporate by reference each and every allegation contained in the preceding paragraphs as is fully set forth herein.

15. The Alabama statute defining “public record” states that “the term ‘public records’ **shall include all** written typed or printed books, papers, letters, documents and maps **made or received in pursuance of law by public officers** of the state, counties, municipalities and other subdivisions of government **in the transaction of public business** and shall include any record authorized to be made by any law of this state belonging or pertaining to any court of record **or any other public record authorized by law** or any paper, pleading, exhibit or other writing filed with in or by any such court, office or officer. Ala. Code (1970) § 41-13-1.

16. Alabama election officials have an affirmative duty to preserve ballot images under Federal statute, 52 USC 20701 which requires the retention of all records, papers, and materials by officials of elections, including ballots. Digital ballot images fall within the category of such records since they are ballots that are used for tabulating election results.

17. Defendants violate Alabama's public records law and Plaintiffs' right to a fair and accurate election by failing to instruct county election officials to preserve all ballot images.

18. Without the preservation of these digital ballot images, Defendants' rights to a fair and accurate election could be denied.

WHEREFORE, Plaintiffs pray this Court will issue a temporary restraining order to order Defendants to inform county election directors to preserve digital ballot images or files of the December 12, 2017 special election for United States Senate.

Plaintiffs further pray this Court will set a date within 10 days of the execution of said restraining order for an evidentiary hearing on a preliminary injunction in this cause.

Plaintiffs further pray that upon a final hearing of this cause, the Court will declare that Defendants have a duty to preserve and instruct Alabama county election officials to preserve all digital ballot images and files produced in the State of Alabama.

Respectfully submitted, this 7th day of December, 2017

/s/ Priscilla Black Duncan (DUN033)

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AlaFile E-Notice

03-CV-2017-901909.00

Judge: HON. ROMAN ASHLEY SHAUL

To: JAMES W DAVIS
JimDavis@ago.state.al.us

NOTICE OF ELECTRONIC FILING

IN THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA

VICTORIA TUGGEY ET AL V. JOHN MERRILL, SECRETARY OF STATE ET AL
03-CV-2017-901909.00

The following matter was FILED on 12/11/2017 12:48:04 PM

D001 JOHN MERRILL, SECRETARY OF STATE

D002 PACKARD ED

MOTION TO DISMISS PURSUANT TO RULE 12(B)

[Filer: DAVIS JAMES WILLIAM]

Notice Date: 12/11/2017 12:48:04 PM

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STATE OF ALABAMA

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03-MONTGOMERY

 District Court
 Circuit Court

CV2

VICTORIA TUGGEY ET AL V. JOHN MERRILL,
SECRETARY OF STATE ET AL

CIVIL MOTION COVER SHEET

Name of Filing Party: D001 - JOHN MERRILL, SECRETARY OF
STATE
D002 - PACKARD ED

Name, Address, and Telephone No. of Attorney or Party. If Not Represented.

JAMES W DAVIS
501 Washington Ave.
Montgomery, AL 36130
Attorney Bar No.: DAV103

 Oral Arguments Requested
TYPE OF MOTION**Motions Requiring Fee**

- Default Judgment (\$50.00)
Joinder in Other Party's Dispositive Motion
(i.e. Summary Judgment, Judgment on the Pleadings,
or other Dispositive Motion not pursuant to Rule 12(b))
(\$50.00)
- Judgment on the Pleadings (\$50.00)
- Motion to Dismiss, or in the Alternative
Summary Judgment (\$50.00)
- Renewed Dispositive Motion (Summary
Judgment, Judgment on the Pleadings, or other
Dispositive Motion not pursuant to Rule 12(b)) (\$50.00)
- Summary Judgment pursuant to Rule 56 (\$50.00)
- Motion to Intervene (\$297.00)
- Other _____
pursuant to Rule _____ (\$50.00)

*Motion fees are enumerated in §12-19-71(a). Fees
pursuant to Local Act are not included. Please contact the
Clerk of the Court regarding applicable local fees.

Local Court Costs \$ 0 _____

Motions Not Requiring Fee

- Add Party
- Amend
- Change of Venue/Transfer
- Compel
- Consolidation
- Continue
- Deposition
- Designate a Mediator
- Judgment as a Matter of Law (during Trial)
- Disburse Funds
- Extension of Time
- In Limine
- Joinder
- More Definite Statement
- Motion to Dismiss pursuant to Rule 12(b)
- New Trial
- Objection of Exemptions Claimed
- Pendente Lite
- Plaintiff's Motion to Dismiss
- Preliminary Injunction
- Protective Order
- Quash
- Release from Stay of Execution
- Sanctions
- Sever
- Special Practice in Alabama
- Stay
- Strike
- Supplement to Pending Motion
- Vacate or Modify
- Withdraw
- Other _____
pursuant to Rule _____ (Subject to Filing Fee)

Check here if you have filed or are filing contemporaneously
with this motion an Affidavit of Substantial Hardship or if you
are filing on behalf of an agency or department of the State,
county, or municipal government. (Pursuant to §6-5-1 Code
of Alabama (1975), governmental entities are exempt from
prepayment of filing fees)

Date:
12/11/2017 12:46:57 PM

Signature of Attorney or Party
/s/ JAMES W DAVIS

*This Cover Sheet must be completed and submitted to the Clerk of Court upon the filing of any motion. Each motion should contain a separate Cover Sheet.

**Motions titled 'Motion to Dismiss' that are not pursuant to Rule 12(b) and are in fact Motions for Summary Judgments are subject to filing fee.

IN THE CIRCUIT COURT OF
MONTGOMERY COUNTY, ALABAMA

VICTORIA TUGGLE, <i>et al.</i> ,)	
<i>Plaintiffs,</i>)	
v.)	
JOHN MERRILL, in his personal and)	No. 03-CV-2017-901909.00
official capacity as ALABAMA)	
SECRETARY OF STATE, <i>et al.</i> ,)	
<i>Defendants.</i>)	

**DEFENDANTS’ MOTION TO DISMISS AND
OPPOSITION TO PLAINTIFFS’ MOTION FOR A
TEMPORARY RESTRAINING ORDER**

Defendants John Merrill, sued in his personal and official capacity as Alabama Secretary of State, and Ed Packard, Administrator of Elections, pursuant to Rule 12(b)(1) and 12(b)(6) of the Alabama Rules of Civil Procedure, move to dismiss Plaintiffs’ claims against them and oppose Plaintiffs’ Motion for a Temporary Restraining Order.

Plaintiffs filed this action seeking an order requiring local elections officials to preserve electronic copies of paper ballots. However, assuming such preservation is required, Plaintiffs did not sue the officials with the authority over those records. Moreover, Plaintiffs have not shown that there is any need for these records or that any failure to preserve them will cause imminent harm. Plaintiffs therefore lack standing, and as a result this Court lacks jurisdiction. For these and other reasons,

the Complaint should be dismissed and Plaintiffs' motion for a TRO should be denied.

1. Plaintiffs lack standing to bring these claims against these Defendants.

When a party without standing purports to commence an action, the trial court acquires no subject-matter jurisdiction. *Ex parte Alabama Educ. Television Com'n*, 151 So. 3d 283, 286 (Ala. 2013). In order to establish standing, Plaintiffs must have suffered (i) an "injury in fact" that was (ii) caused by ("fairly traceable to the actions of") the defendant and (iii) that can be redressed by the defendant. *Id.* at 287. Plaintiffs fail all three prongs of the standing test.

To support standing, an injury must be "actual or imminent, not 'conjectural' or 'hypothetical.'" *Id.* Plaintiffs say only that "[w]ithout the preservation of these digital ballot images, Defendants' rights to a fair and accurate election could be denied." Complaint ¶18. But Plaintiffs do not say how the election will be impacted. It is entirely speculative that any party would wish to contest an election, or that there would be any other need to examine the ballots, and if so, then the paper ballots will still exist and will be the best evidence.

Nor is any injury "fairly traceable" to the actions of the Secretary of State. The Secretary of State and his staff do not direct the actions of local elections officials, who have authority over the voting machines. Rather, the Secretary merely

offers “uniform guidance” to those officials. Ala. Code § 17-1-3. He could do no more than *request* that local officials preserve, or not preserve, the digital copies.

For the same reason, Secretary Merrill and his staff cannot redress Plaintiffs’ alleged injury. Any request by the Secretary of State is just that – a request – and he cannot require local elections officials to take these actions.

Because Plaintiffs lack standing, any action this court takes other than dismissal, including an order granting a TRO, is “null and void.” *State v. Property at 2018 Rainbow Drive*, 740 So. 2d 1025, 1029 (Ala. 1999).

2. Plaintiffs’ action comes too late to impact this election

Plaintiffs’ proposed order filed today, without having been shown to the defendants, asks that local officials be ordered to set their machines to save all digital images (Defendants believe this request is inconsistent with the Court’s instructions). If that is the relief Plaintiffs seek, it is too late to achieve it. Even if Secretary Merrill had authority to require such steps (he does not), and even if it were proper for the Court to issue orders to local elections officials who are not parties (it is not), such relief would require reprogramming around 2000 voting machines. To attempt such a task at this late date risks interfering with an election.

3. Courts should not order State officials to exercise discretion in a particular way.

As noted above, the Secretary of State merely offers guidance to elections officials. *How* he provides guidance, and the type of guidance the Secretary provides, is surely a discretionary act. Courts are rightly reluctant to require state officials to exercise their discretion in a particular way. *See McDowell-Purcell, Inc. v. Bass*, 370 So. 2d 942 (Ala. 1979) (“The writ of mandamus will not lie to compel” a state official to exercise his discretion in a particular way.).

4. Ed Packard is not a proper Defendant for additional reasons.

Finally, Ed Packard, Director of Elections, is not a proper party. As a member of Secretary Merrill’s staff, under the Secretary’s direction, any claims against Mr. Packard are entirely redundant (and they fail for the same reasons that the claims against Secretary Merrill fail).

5. Plaintiffs are not entitled to a temporary restraining order.

A plaintiff seeking a TRO has the burden of demonstrating that (1) plaintiff will suffer irreparable harm without the TRO, (2) plaintiff has no adequate remedy at law, (3) plaintiff has at least a reasonable chance of success on the merits, and (4) the hardship imposed on the defendant by the TRO will not unreasonably outweigh the benefit accruing to the plaintiff. *Lott v. Eastern Shore Christian Center*, 908 So. 2d 922, 927 (Ala. 2005). Here, as discussed above, plaintiffs have not shown that

they will suffer harm, and without standing they cannot prevail on the merits. And, assuming this Court can require non-parties to reprogram voting machines, imposing that burden at the eleventh hour, even if possible to perform, would disrupt elections activities and possibly the election itself. Plaintiffs' motion should be denied.

* * *

For these reasons, this Court lacks jurisdiction and Plaintiffs claims fail as a matter of law. Without jurisdiction, any action taken by the Court other dismissal would be a nullity. The claims should be dismissed and Plaintiffs' motion for a TRO denied.

Respectfully submitted,

Steven T. Marshall
Attorney General

s/ James W. Davis
James W. Davis (ASB-4063-I58J)
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CERTIFICATE OF SERVICE

I certify that on December 11, 2017, I electronically filed the foregoing notice with the Clerk of the Court using the court's electronic filing system, which will send notice to:

Priscilla Black Duncan
P.B. Duncan & Associates, LLC
472 S. Lawrence, Suite 204
Montgomery, AL 36104

s/James W. Davis
Of Counsel



AlaFile E-Notice

03-CV-2017-901909.00

Judge: HON. ROMAN ASHLEY SHAUL

To: DAVIS JAMES WILLIAM
JimDavis@ago.state.al.us

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IN THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA

VICTORIA TUGGEY ET AL V. JOHN MERRILL, SECRETARY OF STATE ET AL
03-CV-2017-901909.00

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MONTGOMERY COUNTY, ALABAMA
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MONTGOMERY, AL, 36104

334-832-1260



IN THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA

VICTORIA TUGGEY,)	
PAUL HARD,)	
PAMELA MILES,)	
DAN DANNENMUELLER ET AL,)	
Plaintiffs,)	
)	
V.)	Case No.: CV-2017-901909.00
)	
JOHN MERRILL, SECRETARY OF)	
STATE,)	
PACKARD ED,)	
Defendants.)	

ORDER GRANTING A PRELIMINARY INJUNCTION

On December 7, 2017 Plaintiffs filed a request for a preliminary injunction in this cause. On December 8, 2017, the Court set this matter for a hearing to be held on December 11, 2017 at 9AM. At that hearing counsel for Plaintiffs, the Attorney General's office and the Secretary of State's office appeared. Defendants opposed the relief requested, primarily on the grounds that they are not the proper parties. After hearing arguments and reviewing the filings, it appears that Plaintiffs and similarly situated voters would suffer irreparable and immediate harm if digital ballot images are not preserved. Some of the important facts relevant to the decision are:

1. A highly contested election is being held in which there is a reasonable belief that the results may be close;
2. There was little argument, although somewhat contested, that the law at issue requires digital images to be preserved as a matter of Alabama law and Federal law;
3. The Secretary of State's Office, although alleged to be an improper party, does have the ability to provide election information to election officials as a matter course and routinely does so; and,
4. Importantly, all parties agreed that the relief requested would only require nominal resources and cost on the part of Defendants. Therefore, even if the Secretary of State were an improper party, the only action being requested of him at this point is to send a communication through a system that already exists and is routinely used.

It is therefore ORDERED that a preliminary injunction be issued to Defendants (and their officers, agents, servants, employees and attorneys) are it is further ordered that Defendants communicate and send to all probate judges and election officials in the State of Alabama, the following ORDER:

All counties employing digital ballot scanners in the Dec. 12, 2017 election are hereby ORDERED to set their voting machines to save ALL PROCESSED IMAGES in order to preserve all digital ballot images. This order applies to those machines that have such a setting and does not apply to any machine that does not allow for processed images to be saved.

Sending a copy of this order to the above stated election officials will be deemed sufficient notice and compliance with this Court's order.

This case is set for a full hearing on December 21, 2017 at 1:30 PM, in courtroom 4A, Montgomery County Courthouse, to consider whether the injunction should be made permanent and/or whether some other form of relief is appropriate.

DONE this 11th day of December, 2017.

/s/ HON. ROMAN ASHLEY SHAUL
CIRCUIT JUDGE