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Supreme Court of Texas.
Esperanza Andrade, in her official capacity as Secretary of State for the State
of Texas
v.
NAACP of Austin, Nelson Linder, Sonia Santana and David Van Os.
No. 09-0420.

October 12, 2010.

Appearances:

Kristofer S. Monson from the Office of the Solicitor General, for petitioner.
Tim Herman from Howry Breen & Herman, LLP, Austin, TX, for respondent.

Before:

Chief Justice Wallace B. Jefferson; Nathan L. Hecht, Dale Wainwright, David M. Medina, Paul W. Green, Phil Johnson, Don R. Willett, Eva M. Guzman, and Debra H. Lehrmann, Justices.

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CHIEF JUSTICE WALLACE B. JEFFERSON: Please be seated. The Court is ready to hear argument in the second cause. 09-0420, Esperanza Andrade, in her official capacity as Secretary of State for the State of Texas v. NAACP of Austin, Nelson Liner, Sonia Santana and David Van Os.

MARSHALL: May it please the Court, Mr. Monson will present argument for the petitioner. Petitioner has reserved five minutes for rebuttal.

ORAL ARGUMENT OF KRISTOFER S. MONSON ON BEHALF OF THE PETITIONER

ATTORNEY KRISTOFER S. MONSON: May it please the Court, the Constitution requires good voting systems not perfect ones. In its plain text, places the task of balancing perfection and practicality on the legislature not the Courts. Under those two principles, plaintiff's lawsuit must be dismissed for standing and immunity grounds. Plaintiffs lack standing because as the Court recognized in *Brown v. Todd*, a voter needs to allege more than his status as a voter to establish standing. In this case, the plaintiff's affidavits assert only the same generalized policy concerns with which they have unsuccessfully lobbied the legislature for the past decade.

Neither those generalized policy concerns nor the disconnected anecdotes contained in their appellate briefing can make this an appropriate, concrete, and particularized dispute. And immunity bars, at least the bulk of plaintiff's claims because these are ultra vires claims, and the facts alleged in plaintiff's live petition describe violations of neither the Election Code nor Article Six of the Constitution.

JUSTICE DAVID M. MEDINA: Would someone who's on the ballot in the last race and maybe run again in the future, would that person have standing as Mr. Van Os contends?

ATTORNEY KRISTOFER S. MONSON: The second, the person who's lost the race?

JUSTICE DAVID M. MEDINA: Yes.

ATTORNEY KRISTOFER S. MONSON: They do have standing. That's Wood and Barry. That's the traditional Texas common law mechanism for bringing these challenges. The losing candidate seeks a recount and brings a quo warranto proceeding challenging the method of the recount. That was [inaudible] standing. And let's turn to standing. I want to make clear a distinction that I think is inherent in Justice Medina's question and I think explains the whole standing riddle in this case. This is not a case about the right to vote. This is a case about the relative policy merits of two alternative mechanisms for performing recounts after someone has voted. Plaintiffs don't allege in their affidavits that they're not going to be able to vote. They're saying they are going to be worried about hypothetical situations that would happen in a hypothetical recount while they are exercising their constitutionally protected right to vote.

JUSTICE EVA M. GUZMAN: Well if your vote cannot be properly counted, isn't the right to vote sort of inherent in part of that argument? What good does a vote do you if ultimately you can't certify the vote properly?

ATTORNEY KRISTOFER S. MONSON: Well and let's be clear; they're not alleging that their votes aren't going to be counted. That's the distinction here. This is not a suit about voting or having your vote counted.

JUSTICE EVA M. GUZMAN: Well it's the audit, the audit. If someone wanted to audit the votes that they did cast.

ATTORNEY KRISTOFER S. MONSON: Well yes, that's part of it. I mean previewing the merits of the ultra vires claim a little bit, neither the Texas Constitution nor the Election Code allows an audit of the votes. It only requires an audit of the election system and a recount of the votes, which is a separate statutory right conferred on the candidates. So I mean in some ways, yes. If you presuppose their argument the Constitution requires an audit of the vote in addition to what the Constitution actually provides which is a right to vote and have your vote counted. Then they win standing and the substance of the case. But that right is nowhere in the Election Code or the Constitution and that's really at the heart of the Court of Appeals' error. The Court of Appeals assumed that their expert's affidavit correctly described Texas law and then presumed standing because they said hey you violated Texas law. No assertion of fact in the appellate briefing or before the Trial Court substantiates a concrete and particularized injury.

CHIEF JUSTICE WALLACE B. JEFFERSON: What is the proof or do you contend you don't have to have any that the eSlate ensures the accuracy of a vote or the integrity of a vote?

ATTORNEY KRISTOFER S. MONSON: Well, I don't think at this point we have to bring up proof this isn't the case on the merits. The question here is whether the petition as drawn invokes the Court's jurisdiction to resolve a lawsuit.

CHIEF JUSTICE WALLACE B. JEFFERSON: So it's at least possible that they're right about problems that they believe might be inherent in eSlate and should the Court be concerned about that or not, or we're just not at that stage?

ATTORNEY KRISTOFER S. MONSON: Well we're not at that stage, but I think the nature of the concerns as they've articulated them are appropriate for the legislature or maybe the Travis County Commissioner's Court rather than for this Court. Let's look at it in terms of concreteness and particularity. Concreteness is easy. Justice

Waldrop explained the concreteness problem in his dissent very ably. All of their alleged harm depends on intervening hypothetical acts by third persons. That's pretty much the definition of a case over which there isn't concrete standing. Now, let's look at what makes this case particularized. And I'd like to look both at their assertions and at the remedies that they seek on page 15 of the record. There's nothing about their assertions that ties their worries about the election system to these plaintiffs. No particularized interest that they have in any election is going to be resolved by answering the questions that they've presented or giving them the injunction that they asked for which among other things asks for creating an entirely new audit provision that would require a systematic recount on the electronic validating machine compared to a paper record, something that isn't contemplated in the test statute of the Constitution.

JUSTICE DON R. WILLETT: Is there any type of voting apparatus decision that your client could make that would have standing to challenge?

ATTORNEY KRISTOFER S. MONSON: This is a hypothetical, but let's assume that the Secretary of State adopted a voting machine that you could show there was a statistical probability would result in a miscount. And so anybody's vote would be tainted by a significant statistical probability that it would not be counted. I think that's at least getting closer to standing because that's showing an imminent harm that's directly tied to the right to vote and have your vote counted, rather than an abstract policy concern about the relative merits of two different ways of performing a recount after your vote's been submitted and tabulated.

JUSTICE PAUL W. GREEN: There is a study. There is some criticism of this Travis County vote system and as I understand it there has been a request that we take judicial notice of this particular study. I don't recall seeing a response from you. What is your view of the judicial notice question?

ATTORNEY KRISTOFER S. MONSON: Well we don't oppose the judicial noticeability both because it's judicially noticeable, it's a public document, and because that document shows this is a legislative determination not a judicial one. That committee looked at all of these concerns and it's able to address the generalized non-specific policy concerns the plaintiffs have by suggesting that Travis County when it buys a new system buys one with a paper printout. But I think there's two things that are important in that study. First of all, it took 45 people looking at all of these studies in kind of a vague, political manner to balance their policy preferences and decide what would a good recommendation be for the decision-maker. And second, on page 73 in the summary in conclusion of their findings, the 45 members of the committee assert that the current Travis County system with the security measures that Travis County has enacted in addition to the eSlate system, it's, in fact, secure. The heart of their standing argument and the heart of their substantive argument has always been that the eSlate by itself creates an unreliable recount in part because it isn't safe from tampering. But the Travis County committee found that the current system as implemented, which is not by the way the system that's described in any of the standing affidavits, in Professor Wallach's expert testimony, or in the appellate briefing. They've never alleged that the Travis County system with the extra security measures violates the Election Code or the Constitution.

JUSTICE DALE WAINWRIGHT: You said that there might be standing if there's evidence of a significant statistical probability of error in counting the votes in this eSlate system. I think, is that an accurate statement of what you said?

ATTORNEY KRISTOFER S. MONSON: If you read the case log extremely aggressively, yes.

JUSTICE DALE WAINWRIGHT: How does the evidence from the respondent's expert about the DRE problems in 2004 in Collin County in '06 and Tarrant County '08, and Bexar County in '08, and several other counties, how does that impact your statement there?

ATTORNEY KRISTOFER S. MONSON: Well, those are the kind of concerns of isolated incident that you might take to the legislature. There is nothing in those isolated anecdotes that ties any particular justiciable harm

to these plaintiffs. And so that makes their claim neither concrete nor particularized. Moreover, let's take the Webb County incidents because those are the only ones that are actually in the trial court record. Everything else was introduced at the Court of Appeals record and isn't in evidence in the trial court record. It might have been mentioned in the, some of the might have been mentioned in the trial court pleadings, but Wallach's affidavit describing in the Webb County incident is the only thing that there's actually an affidavit about. In the affidavit, as described in their appellate briefing the problem was negligence on the part of poll workers. Well there's nothing about negligence on the part of poll workers that's isolated to the DRE or the eSlate system. A poll worker could spill coffee on an entire box of paper ballots rendering them ineligible and making them not part of the ballot. There's nothing isolated and special about the eSlate system that makes an allegation that sometimes polling workers mess up into the concrete or justiciable controversy appropriate for this Court to resolve.

JUSTICE DALE WAINWRIGHT: So it sounds like on one level you're arguing that the respondent's position is that any voter in a county that used the DRE system would have standing as respondents you believe are arguing to bring this type of an action and the case law just does not provide that broad a net for standing for these types of suits.

ATTORNEY KRISTOFER S. MONSON: Exactly. Or if you turn it around, if you look at what they've provided, there's no test based on these data points that can give these plaintiffs standing that wouldn't result in providing generalized standing to every person who merely alleges that they're a voter.

CHIEF JUSTICE WALLACE B. JEFFERSON: In the 33 some odd states that no longer permit these, what was the process that resulted in their prohibition? Was it, were some of those cases brought in Court and a judicial determination made or where they legislative or what?

ATTORNEY KRISTOFER S. MONSON: I don't have an exhaustive research on that done. I believe that most, I'm not aware of any case outside of the Stewart v. Blackwell case which involved punch card voting that struck down a balloting system on these grounds, but I can provide a letter with the Court summarizing the research on that issue.

JUSTICE DAVID M. MEDINA: Mr. Monson, before you run out of time could you hit that sovereign immunity issue?

ATTORNEY KRISTOFER S. MONSON: Certainly. The starting point for sovereign immunity analysis is Heinrich. The idea of Heinrich is you can sue an official for prospective injunctive relief regard, to stop that official from violating the law. But if the allegations and the petitions taken as true don't describe a violation of law, the lawsuit has to be dismissed because it's in substance one to control state action and is barred by sovereign immunity. There's two parts of this; the statutory argument and the constitutional argument. And the statutory argument is pretty easy. They don't like that the secretary certified a balloting system that doesn't require a contemporaneous paper record of each ballot cast. But the Election Code expressly contemplates exactly that kind of system. The definition section for the title says a balloting system can be wholly electronic. The minimum certification requirements for electronic balloting systems say that the minimum requirement is that it maintains an electronic ballot image of each ballot cast. And most importantly, Section 213.016 which is the provision that governs recounts when you have an electronic balloting system says to perform the recount you print out the images of the ballots from the electronic ballot images after the election is complete. The plain text of the statute forecloses their claims under the statute.

JUSTICE NATHAN L. HECHT: That doesn't seem to be like much of a recount.

ATTORNEY KRISTOFER S. MONSON: Huh?

JUSTICE NATHAN L. HECHT: That doesn't seem to be like much of a recount. It's going to give you the same

printout that there are numbers inside the system.

ATTORNEY KRISTOFER S. MONSON: Well that goes to perhaps their constitutional claim, but their lawsuit says that the Election Code as written requires a contemporaneous paper record. The Secretary of State is just here to point out that the text, the legislature chose exactly that. And so the only question that would be left substantively is is the legislature barred from choosing to have recounts that way. And under Wood, in Wood the Court held that the purity of the ballot box provision is non-justiciable.

JUSTICE NATHAN L. HECHT: But all I'm saying is that paper or no paper, if you're simply asking the machine to repeat itself it's going to give you the same number it gave you the first time.

ATTORNEY KRISTOFER S. MONSON: Sorry, let me clarify. Under 213.016 to which the Secretary of State as a matter of practice applies Chapter 214 subchapter C, you do actually have a group of commissioned election observers actually recount the votes from the paper ballots printed off of the electronic record. So it's not that the--

JUSTICE NATHAN L. HECHT: All I'm saying is the electronic record is not going to print anything different it doesn't generate in the first place.

ATTORNEY KRISTOFER S. MONSON: Well, that's true.

JUSTICE NATHAN L. HECHT: So there's no recount.

ATTORNEY KRISTOFER S. MONSON: Well, there is a recount.

JUSTICE NATHAN L. HECHT: If I look at 10 ballots and I happen to look at one of them wrong and somebody else recounts them and says well you made a mistake, that's a recount. If you ask the machine to repeat itself it's going to repeat itself.

ATTORNEY KRISTOFER S. MONSON: I'm going to pushback a little bit on that definition of recount because that's not what the Election Code says. And Election Code recount is verifying the vote count, so it's counting again.

JUSTICE DON R. WILLETT: What about the constitutional piece?

ATTORNEY KRISTOFER S. MONSON: The constitutional piece, the purity of the ballot box provision is non-justiciable. The Court held that in Barry and Wood. And so it's hard, and they don't ask the Court to strike down the Election Code, rather they seem to imply that the Election Code somehow can't be read according to its plain language because of Article six. Same thing with Section 2C. That only requires that the legislature adopt laws to deter fraud and proper influence, which isn't really even tied to the recount issue. And at any rate there's no governing legal principle as long as the--

JUSTICE NATHAN L. HECHT: Maybe I misunderstand how the machine works. But if I strike the total in an Excel spreadsheet and ask it to recalculate I'll bet you it gives me the same total a million times in a row.

ATTORNEY KRISTOFER S. MONSON: Not necessarily. There's a couple pieces to this and there's a couple different kinds of recounts that you can have under Chapter 214. It isn't just that you run what the machine did the first time again. I see I'm out of time. I'd like to take a couple seconds and completely answer your question. You can have it run again on the same software. Chapter 214 says that you can get different software and use a different accounting mechanism. So say instead of using Excel you're using Quattro Pro. They have different mathematical algorithms that you can use to count electronically. So that's two different methods of counting. And then if you choose to exercise the right to have a manual recount, then it is being recounted by people who

are looking at the records that are in the computer. Now the records may be the same as the electronic images of the ballots, that's true, but the counting method has changed. And that's what the Election Code requires is a new counting method, not an individual audit of every specific ballot cast.

CHIEF JUSTICE WALLACE B. JEFFERSON: Any further questions? Thank you, Mr. Monson.

ATTORNEY KRISTOFER S. MONSON: Thank you.

CHIEF JUSTICE WALLACE B. JEFFERSON: The Court is ready to hear argument now from the respondents.

MARSHALL: May it please the Court, Mr. Herman will present argument for the respondents.

ORAL ARGUMENT OF TIM HERMAN ON BEHALF OF THE RESPONDENT

ATTORNEY TIM HERMAN: May it please the Court, the dilemma is the same as the issues before this Court. If the Secretary of State is correct that there's no standing until injury is suffered or incurred and the defects in the machine prevent the detection of a demonstrable injury, then we'd never get back here. Secondly, with respect to sovereign immunity if what the Secretary of State says is correct that the Secretary of State because they have the, she has the statutory authority to approve electronic voting machines and because of that act it is not an ultra vires act, even if the machine doesn't comply with the statute then there is no challenge to that conduct. In response I think to Justice Wainwright's question, what if the DRE machine wasn't secret, didn't preserve the secrecy of that ballot or what if it didn't provide for write-in votes? Would a voter, given the statutory permission to seek injunctive relief, would he be unable to have standing? Would the Secretary of State be bulletproof? Well of course not. And the concession that it's a matter of degree, that is whether the machine meets certain of the statutory requirements, is an admission essentially that there is standing because both the petition in this case and the expert's testimony points out at least two statutory requirements that apply to these machines that are not met by this DRE machine. And those two are that, and this was pointed out independently by the Court of Appeals, the machine in order to be approved it must operate safely, efficiently, and accurately. Secondly, it must be capable of providing records from which the operation of the voting system may be audited.

JUSTICE DEBRA H. LEHRMANN: Can I ask you, are you saying that every voter in Travis County under your analysis would have standing?

ATTORNEY TIM HERMAN: Any voter who is forced to use this DRE machine that has been certified by the Secretary of State in excess of her statutory authority would have standing.

JUSTICE DEBRA H. LEHRMANN: Okay. And what about the--

JUSTICE DALE WAINWRIGHT: So that's all voters.

ATTORNEY TIM HERMAN: Yes, sir.

JUSTICE DALE WAINWRIGHT: The last two elections.

JUSTICE DEBRA H. LEHRMANN: And what about the particularized injury aspect of that?

ATTORNEY TIM HERMAN: Well, the particularized injury, it's I think as Justice Guzman pointed out. It's not just the right to vote as the Secretary of State would have you believe. And as the Court of Appeals pointed out, the right to vote is pretty hollow. The right to vote is meaningless unless you're also assured that that vote that you cast is going to be counted appropriately. So just like the Court of Appeals points out numerous federal cases, but one in particular that with all respect the Secretary of State is absolutely mischaracterized in her brief--

ing. *Stewart v. Blackwell*, there the Secretary of State in their brief indicates that it is only based upon this detailed statistical analysis and affidavits that the Court reached the standing issue favorably for the voters. But let me just read to you. It says plaintiffs' standing does not depend on any injuries suffered in the previous election, but rather on the probability that their votes will be miscounted in upcoming elections.

JUSTICE EVA M. GUZMAN: How do the pleadings support this imminent or sufficiently likely aspect of the argument?

ATTORNEY TIM HERMAN: Well, the pleadings in our case they indicate two things. And I would take issue with the Secretary of State. They state that the machine is inherently unreliable because of its susceptibility to manipulation and the inability or unwillingness of the maker of the machine to provide the underlying software and programs and so forth to the Secretary of State. And incidentally I would point out in answer to your question that on page nine of the Secretary of State's brief, she acknowledges that remand is appropriate for at least the propositions that Hart make all of their information available to the Secretary of State. So what we're talking about is really a question of degree. Who says that in response to the Secretary of State's argument, who says what degree of statistical probability would give someone standing? That's why we're not here talking about the merits.

JUSTICE PAUL W. GREEN: But you can't, there is no way and I haven't seen it in the briefing any attempt to show any kind of concrete particular injury by the plaintiff's in this case. It's a broad, all voters' kind of an injury and hypothetical at that.

ATTORNEY TIM HERMAN: Well, it's not hypothetical in this sense. The Secretary of State exceeded her statutory authority in approving this machine. And we get back to the circular nature of the Secretary of State's argument. First of all, the machine just as Justice Hecht pointed out, if you're going to audit somebody who keeps their books by QuickBooks, you don't go in and say reprint last year's P&L because it's going to be exactly the same as the one you're auditing.

JUSTICE EVA M. GUZMAN: How does a contemporaneous record though make that process any different? It would seem the machine would give you the same record in either case, so how does getting a contemporaneous record of the vote change?

ATTORNEY TIM HERMAN: That's the problem is the fundamental issue really since whatever it is, 1787 I guess, is that every voter is entitled to cast his vote. And in determining, having spent two weeks in Florida for our past governor looking at paper ballots, the issue is ascertaining voter intent.

JUSTICE PAUL W. GREEN: And it's a pretty inexact science.

ATTORNEY TIM HERMAN: Well, it was down there.

JUSTICE PAUL W. GREEN: And when human factors come in it's quite different. But you haven't really answered the question. I mean you are not attempting to make a particularized injury case here. And my question is can you cite any other case at this jurisprudence which, where standing was allowed in the absence of a particularized concrete injury?

ATTORNEY TIM HERMAN: Oh, well there are numerous cases, Your Honor, and they're in our brief. But *Blum* is a case, *B-L-U-M v. Lanier* I think it was, and there are numerous other cases.

JUSTICE DALE WAINWRIGHT: But in those cases, correct me if I'm wrong, the challengers weren't just voters; they signed the petition for the proposition that was on the ballot.

ATTORNEY TIM HERMAN: That's exactly right.

JUSTICE DALE WAINWRIGHT: And we said if they were just voters it wasn't enough.

ATTORNEY TIM HERMAN: That's exactly right in that case particularly Justice Wainwright. But *Stewart v. Blackwell* is a federal case. I can't remember, I think it's out of the Ninth Circuit, no it's out of the Seventh Circuit, I guess. *Webber and Wexler*, all cases sided by the Court of Appeals where the same issues essentially were addressed. All of those voters had standing. It's not only that, the statute itself, the Election Code 273.081 confers standing on anyone who is even in danger of being harmed by the conduct or failure to observe the provisions of the Election Code.

JUSTICE PAUL W. GREEN: An imminent harm kind of analysis.

ATTORNEY TIM HERMAN: No, well it says in danger of being harmed. I don't think in that sense given that the Secretary of State has exceeded her statutory authority that there's a requirement that you would have to show the kind of imminent harm that you would in an injunction case.

JUSTICE PHIL JOHNSON: So how much would you have to show? What is the danger of being harmed? What standard?

ATTORNEY TIM HERMAN: Well, if a voter could demonstrate as these voters have that they're forced to use a machine which does not comply with the Election Code then they would be in danger of being harmed.

JUSTICE PHIL JOHNSON: Okay, so what is that standard? I mean what is danger of being harmed? I mean just to use some machine? Let's assume the machine works right. Is there any proof that the machine doesn't work right?

ATTORNEY TIM HERMAN: Absolutely.

JUSTICE PHIL JOHNSON: Do you have to prove the machine doesn't work right or it will not work right in their instance probably. There has to be some standard.

ATTORNEY TIM HERMAN: Absolutely. And the question really on the merits is whether or not this machine complies with the standards that are articulated in the Election Code. The plaintiffs have pled that it does not and that the Secretary of State has exceeded her statutory authority and has committed an ultra vires act.

CHIEF JUSTICE WALLACE B. JEFFERSON: But in just about I would say in every single election in a community of any size there are going to be errors. There are going to be lines that are too long, there are going to be ballots that are confusing, there are going to be typos. The butterfly ballot, which one am I voting for, straight ticket, etc. And if there is standing in each one of those cases, any time you can find an error in the ballot or the process, elections are going to come to a halt. So why isn't it better to funnel those sorts of complaints into the legislative process and let the political fights work out the outcome?

ATTORNEY TIM HERMAN: Well, I would answer it this way Justice Jefferson. The legislature has passed the Election Code. They've stated what a machine has to have, the characteristics it has to have and they've vested in the Secretary of State the discretionary authority to approve only those machines that meet that criteria, okay. So, so--

JUSTICE DON R. WILLETT: But they've also twice considered and refused to pass legislation that would have required DRE machines to produce a contemporaneous paper record. They've considered that; they've for one reason or another, good or bad, declined to enact it. And how should that factor in to our decision-making?

ATTORNEY TIM HERMAN: It shouldn't at all because you're dealing with the statute as it comes to you.

You're dealing with the Secretary of State's conduct as it comes to you. The fact that I mean wisdom of the legislature, some people would characterize--

CHIEF JUSTICE WALLACE B. JEFFERSON: Careful.

ATTORNEY TIM HERMAN: Alright, I'll stay away from that. But what I would say seriously in response to your question Justice Willett is that is that that should have no impact on the decision of this Court.

JUSTICE DON WILLETT: What about the Election Code provision that's on the books that does permit the use of ballot images from DREs to conduct a recount?

ATTORNEY TIM HERMAN: Oh, I don't dispute that there and if you look at the statute, the way it's constructed and the way the legislature had put it together, there is a provision for electronic recounts, there is a totally separate provision for manual recounts. And the argument that the manual recount, which requires among other things that the original ballot be present is rendered meaningless if you accept the Secretary of State's position that if it is garbage in, it's garbage out; you recount the garbage and that's what you have. It's totally illusory and keep, please with all do respect, keep in mind that our allegation audit is not, I mean audit is a term of art. Audit means, it is defined in the dictionary as an official examination and verification of accounts and record.

JUSTICE DALE WAINWRIGHT: Counsel, Section 122.011A of the Elections Code provides the criteria that a voting system must comply with to be sued. A voting system may not be used in an election unless the system, and there's 11 requirements here. Which of those requirements is not satisfied by eSlate?

ATTORNEY TIM HERMAN: There are at least two.

JUSTICE DALE WAINWRIGHT: Okay, which are they?

ATTORNEY TIM HERMAN: That's subdivision Three, which requires that the machine operate safely, efficiently, and accurately. And 11 is capable of providing records from which the operation of the voting system may be audited. Now--

JUSTICE DALE WAINWRIGHT: Secretary of state makes a point of saying that that requires an audit of the voting system not of the actual votes, and say that you go array at least in that regard in the argument.

ATTORNEY TIM HERMAN: Well, what the provision says is that it's capable of providing records from which the operation of the voting system may be audited. So it would be nonsensical to take the position that if the machine produced a record saying that it was in working order on November the 2nd that that would satisfy that. In any recount or audit you're required, if you're going to audit you have to verify. And to verify you have to make sure that the original entry that is being counted was valid and was authentic. I mean that's out of Webster's. You can't do it with this machine. But the point is.

JUSTICE DALE WAINWRIGHT: I'm confused. You don't challenge the constitutionality of the Elections Code, correct?

ATTORNEY TIM HERMAN: No.

JUSTICE DALE WAINWRIGHT: You're saying the Secretary of State didn't comply with it. Section 11 regard, or subsection 11 of the section we're talking about requires that the system be capable of providing records from which the operation of the voting system may be audited. Do you think records means paper records?

ATTORNEY TIM HERMAN: Well I think that's what it means, but that's an issue for the trial court.

JUSTICE DALE WAINWRIGHT: Well then I'm also looking at 213.016 with regard to a recount, the recount committee can determine how many members must be present "during the printing of the images" from the system. That doesn't sound like a separate contemporaneous paper trail of the vote. It says the printing of images from the system. Why does that necessarily require again, a paper trail?

ATTORNEY TIM HERMAN: Well, we say that it does Justice Wainwright, but that would be a matter for the trial court based upon testimony about, I think anyone would agree that I mean as in any contract that some of these provisions may be ambiguous. But the point is what's before the Court is standing and sovereign immunity.

JUSTICE DALE WAINWRIGHT: But the Secretary of State argues that you're really not alleging that cognizable claim because you're alleging a violation of the statute that the Secretary has clearly met according to its reading.

ATTORNEY TIM HERMAN: Right. What the Secretary of State is saying, like this Court held in Heinrich is that even if you look at their pleadings and if you look at the evidence that was before the trial court to which there was no controverting evidence I might add, but if you look at that that taking all of that, that they still don't have a claim, okay? And again, just for the purposes of illustration, let's just say that the machine didn't preserve the secrecy of the ballot or as the Secretary has noted, there were substantial statistical problems in the counting of the vote with this machine. Then he says okay, we'd have standing. Those qualities, those characteristics are also required. So if we came in and we alleged not number three or number 11, but if we alleged number two then we'd have standing? That's what he's saying.

JUSTICE DALE WAINWRIGHT: Well I think he's arguing something different. On your write-in example, if you were to interpret that write-in as requiring that someone have a number two lead pencil to write-in and that that's not allowed and the Secretary of State says but we do allow write-in it's just electronic. That's what he's talking about; the interpretation of these statutory provisions, which we can look at and read as a matter of law, can't we?

ATTORNEY TIM HERMAN: Well, I don't know if you can for this only. For example, on most of them yeah, either it keeps it secret or it doesn't. The write-in, of course that's an example that's not at issue here. But if there were a provision to allow a legitimate write-in vote where the intent of the voter was ascertainable and capable of being validated and authenticated and in your example it would be more than likely, then we wouldn't have a claim. But here we have pleadings and we have expert testimony that the machine is not accurate and we have expert testimony that the records that this machine produces do not make a meaningful audit or make an audit which satisfies the fundamental requirements of a person's right to vote. And that encapsulates the position of the plaintiffs and the respondents before this Court. So maybe it does, maybe it doesn't, but we've pled it. We have the right to plead it and all we want is to go back to the trial court and sort it out. But the fact, I mean to take the Secretary's position, she could approve a machine that met none of these qualities and no one would have standing. The case would never get up here, right, because nobody would have standing.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, Mr. Herman. Are there any additional questions? Thank you, the Court will hear rebuttal.

REBUTTAL ARGUMENT OF KRISTOFER S. MONSON ON BEHALF OF PETITIONER

JUSTICE NATHAN L. HECHT: Counsel, I was confused about your answer to Justice Wainwright's and Justice Willet's questions earlier about when voters would have standing and that we were just talking about.

ATTORNEY KRISTOFER S. MONSON: And that goes to the core of my response. You would have standing

if the allegation is that the system doesn't count your vote or you're prevented from voting. So for example, the constitution in itself executing provision requires that ballots be secret.

JUSTICE NATHAN L. HECHT: That doesn't, how does that meet the particularity requirement? You just say it doesn't have to be met.

ATTORNEY KRISTOFER S. MONSON: Well, okay. I think it might not. I'm not conceding that the Stewart v. Blackwell statistical particularity theory works. I'm just saying that even under that theory, they don't win. Now Stewart v. Blackwell, just to get this out of the way was a Sixth Circuit case in which the judgment has been vacated that the dissent castigated for relying on the non presidential passages of Bush v. Gore. So that's why I'm not going to embrace it and say that that's the test for standing.

JUSTICE NATHAN L. HECHT: Well in fairness, I did read your brief to say no voters would ever have standing.

ATTORNEY KRISTOFER S. MONSON: That's not the case.

JUSTICE NATHAN L. HECHT: But I don't take that to be your position here.

ATTORNEY KRISTOFER S. MONSON: Not at all, no. Our position is that if you, let's take another example that I think illustrates when you do have standing. Reapportionment case under the federal constitution. In that case because your legal theory, it self manifests the fact that your vote is going to be diluted. It isn't possible for any voter to cast a vote that is given constitutional protection because they are all diluted. That means that there's a particularized injury to every voter because there's going to be a problem anytime anybody casts a vote in the upcoming election. That's different from this case where they're just stringing together anecdotes of times that things have gone wrong and said well maybe something's going to happen.

JUSTICE NATHAN L. HECHT: So it boils down to concrete injury.

ATTORNEY KRISTOFER S. MONSON: Absolutely.

JUSTICE NATHAN L. HECHT: But I mean the particularity goes out of it, out of the equation if there is a significant concrete injury.

ATTORNEY KRISTOFER S. MONSON: Yes. I think they're two sides to the same coin. It's hard to extract, I think that they're useful as analytical tools for looking at the problem, but I don't really see them as separate prongs that stand independently.

JUSTICE DAVID M. MEDINA: Mr. Herman said a couple of times that the intent of the voter must be ascertainable. What does that mean to you?

ATTORNEY KRISTOFER S. MONSON: Well, I'm not sure in part because that's not what, the Election Code doesn't say anything about determining the intent of the voter in this context. The Election Code requires an audit of the voting process.

JUSTICE DAVID M. MEDINA: I think he's talking about in a recount.

ATTORNEY KRISTOFER S. MONSON: Well, and it requires a recount, which is a confirmation of the vote count.

JUSTICE DAVID M. MEDINA: Right.

ATTORNEY KRISTOFER S. MONSON: So that's a recounting of the vote. And it requires an audit of the election system which to answer some of the concerns that Justice Wainwright was raising is provided for in the current system by a paper record of major election events against which the electronic ballots can be compared to see if there's been a problem in the operation of the system. But in neither case is there a right, just because Webster's defines the word audit differently than the legislature has defined it in the Election Code to independent verification of every vote cast. I mean to take it a step further, on the plain language of their petition they ask for the rights to verify, each voter to verify whether his own vote was counted. But as the court recognized in the 1890s, if you could go back and identify your own ballot once it's been cast, the constitutional requirement of an anonymous ballot would be forfeited. I mean every, their legal theory, their entire standing argument depends on the presupposition that their legal theories are correct. That's the problem with the Court of Appeals' approach to the standing issue.

JUSTICE NATHAN L. HECHT: Well if the machines won't count the votes right that's a concrete injury.

ATTORNEY KRISTOFER S. MONSON: If the machines can't count the votes right, yes.

JUSTICE NATHAN L. HECHT: And so do you agree they've alleged that just on the pleadings?

ATTORNEY KRISTOFER S. MONSON: No, they have not alleged that. They have only alleged that a hypothetical recount would be subject to doubt.

JUSTICE NATHAN L. HECHT: But if they had alleged that I guess your position would then be still they have to come up with something to show that the allegations have some substance to them.

ATTORNEY KRISTOFER S. MONSON: Yes.

JUSTICE NATHAN L. HECHT: To get as far as standing.

ATTORNEY KRISTOFER S. MONSON: It shouldn't be enough for them to say I'm interested in knowing what the statute means because I'm worried about it and my concern about what the statute means gives me standing to come to court. If all you have is an abstract policy concern about what a statute means, you should go and ask the legislature to look at it in a committee and not bring it to court.

JUSTICE DALE WAINWRIGHT: How does Section 273.081 affect your standing analysis or have you incorporated it already into your position? Explain to Justice Hecht.

ATTORNEY KRISTOFER S. MONSON: Putting aside all the questions about whether it creates a cause of action, I mean I think that there's a--

JUSTICE DALE WAINWRIGHT: Just about standing.

ATTORNEY KRISTOFER S. MONSON: About standing, it only requires a cause of action on its face if there's a violation or a threatened violation. If what's being alleged isn't a violation of something that's in the Election Code you don't trigger it and you don't have to look at the threatened harm element to see if there's statutory standard.

JUSTICE DALE WAINWRIGHT: What if what they alleged does just constitute harm or danger of being harmed without an infraction of the Election Code?

ATTORNEY KRISTOFER S. MONSON: I guess I just don't, the text ties the harm to harm caused by the violation of the Election Code. I mean that's the only way to read it, so I'm having a hard time thinking of when

you can invoke 237.081 if your harm wasn't tied to a violation of the code.

CHIEF JUSTICE WALLACE B. JEFFERSON: Any further questions? Thank you, Counsel. The cause is submitted, the Court will take another brief recess.

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