



If, after hearing evidence, the court finds that the preliminary elections procedures and the pressing of selections on the ExpressVote screen constitutes verification of the bar codes read by the tabulator when the voter casts his or her ballot, the plaintiffs do not seem likely to prevail on the merits and the plaintiffs are not entitled to injunctive relief. This paragraph makes up the defendants' position based on their briefs to the court.

However, if the court finds, based on the evidence, that the voter cannot verify that the ExpressVote device has printed bar codes which accurately reflect the selections made by the voter before he or she places the ballot in the tabulator, then there is no way for the voter to verify his or her race selections in a private and independent manner before casting his or her ballots. This paragraph is the plaintiffs' position and shows a substantial likelihood of success on the merits.

**B. The presence of irreparable harm**

It appears that the State of Arkansas has not had many opportunities to consider whether voting machines that fail to comply the law or the misapplication of tax dollars is an irreparable harm. However, the right to vote "is of the most fundamental significance under our constitutional structure." *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (citing *Illinois Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979)). The issues with the voting system in the case at bar severely impacts "the rights protected by the First and Fourteenth Amendments." *Id.* at 434.

When voting does not occur in the method prescribed by the legislature, such as ensuring a voter can verify the bar codes making up his or her vote selections, then there is an infringement upon that fundamental right. After all, what good is the right to vote if there is no right to verify your vote is accurate before it is cast or counted? An infringement on life, liberty, and the pursuit of happiness is always an irreparable because it something lost and while one may obtain freedom, happiness, or the right fully participate in the election process in the future, the time and votes lost cannot be recovered.

Tax dollars may only be money, but it is money that may not be capable of recovery. The Arkansas Supreme Court tacitly acknowledged this in *City of Jacksonville v. Smith* when it affirmed that irreparable harm exists in a misapplication of tax funds because the “taxpayers would bear the burden of replenishing” the improperly spent tax funds. 2018 Ark. 87, 13, 540 S.W.3d 661, 670 (2018) While this is only dicta, it is supported by a citation in that case to *Tedford v. Mears*, for the position that the citizens have a right to “protect against unlawful acts that could logically result in illegal exactions.” *Id.* (citing 258 Ark. 450, 526 S.W.2d 1 (1975)). Stated succinctly, the misapplication of tax funds is always irreparable harm when the tax dollars are logically related to the event at issue.

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### Conclusion

There is a substantial likelihood of success on the merits because the voter cannot verify that the bar codes printed on his ballot summary card accurately reflect the choices he made on the ExpressVote. There is irreparable harm because there is

an infringement by the State of the fundamental right to vote and a misapplication of tax dollars.

Respectfully Submitted,

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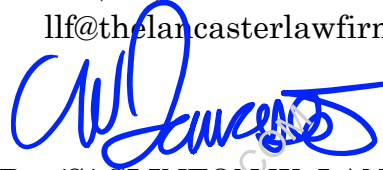
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**CERTIFICATE OF SERVICE**

By my signature above, I certify that a copy of the foregoing has been delivered by the below method to the following person or persons:

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All attorneys of Record