

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NASSAU

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COUNTY OF NASSAU, NASSAU COUNTY  
BOARD OF ELECTIONS, JOHN A. DEGRACE, in  
his official capacity as Nassau County Republican  
Commissioner of Elections, and WILLIAM T.  
BIAMONTE, in his official capacity as Nassau County **Index No.** \_\_\_\_\_  
Democratic Commissioner of Elections,

Petitioners-Plaintiffs,

**AFFIDAVIT**

- against -

STATE OF NEW YORK, NEW YORK STATE  
BOARD OF ELECTIONS, and JAMES A. WALSH,  
DOUGLAS A. KELLNER, EVELYN J. AQUILA,  
GREGORY P. PETERSON as Commissioners  
constituting the Board,

Respondents-Defendants.

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**AFFIDAVIT OF JOHN A. DEGRACE AND WILLIAM T. BIAMONTE**

STATE OF NEW YORK )  
COUNTY OF NASSAU ) ss:

JOHN A. DEGRACE and WILLIAM T. BIAMONTE being duly sworn, deposes  
and says:

1. We are, respectively, the Republican and Democratic Commissioners of the Nassau  
County Board of Elections (the "NCBOE"). We submit this Affidavit in support of the  
Petition-Complaint in the above-captioned case.

2. The County is challenging the constitutionality of the implementation of the  
Election Reform and Modernization Act of 2005 ("ERMA") by the New York State  
Board of Elections ("SBOE"), specifically its December 15, 2009 resolutions certifying  
the use of computerized optical scan voting machines and ballot marking devices

manufactured by Election Systems & Software, Inc. (“ES & S”) and Dominion Voting Systems, Inc. (“Dominion”), as arbitrary, capricious, and contrary to law.

3.As discussed below, and in petitioners’ pleading these optical scan machines do not meet the requirements of ERMA or the New York State Constitution. As a result, if the County is forced to continue to implement ERMA and to use the certified optical scan voting machines which are unsafe, vulnerable to tampering, and which do not meet the requirements of State law, the NCBOE will be harmed, both financially and in carrying out its Constitutional duties. Moreover, the SBOE has not allowed sufficient time for local boards of elections to perform all of the preliminary steps necessary to undertake a wholesale change in the State’s voting machine technology in time for the 2010 elections. The inadequate preparation time for introducing the new machines sets the stage for disruption, disorder and potential upheaval in the upcoming electoral contests.

**A. The Powers and Duties of the NCBOE**

4.NCBOE is a local board of election organized pursuant to New York law and funded by the County of Nassau. Under New York State Election Law §§ 3-200 et seq. Local boards of elections such as NCBOE have overall responsibility for administering the election process in local election districts throughout New York State. NCBOE is therefore charged with the duty to register voters, conduct primary, general, and special elections, canvass the results, and certify the winners in Nassau County. There are approximately 900,000 registered voters in Nassau County, in 11 Assembly districts and 1162 Election Districts. Among its specific statutory duties as a local board, NCBOE is required to, without limitation:

- (a) Ensure the proper preparation and repair of voting machines (See Elec. L. § 3-302(1));
- (b) coordinate voter education programs (see Elec. L. § 3-212(4)(b));
- (c) instruct poll workers on the rights of voters at the polls and their obligation “to maintain the integrity of the franchise” (Elec. L. § 3-412(1-a));
- (d) carry out the elections including developing an action plan to increase voter registration, particularly for those groups of persons who are historically underrepresented at the polls (see Elec. L. § 3-212(4)(b));
- (e) preserve good order around the polling places and places of registration (Elec. L. § 3-402(3));
- (f) Selecting new voting systems certified for use by the SBOE pursuant to the federal Help America Vote Act (“HAVA”) and ERMA (Elec. L. §§ 7-200; 7-202);
- (g) Manually audit three percent of the voter verifiable paper ballots used in the voting machines in Nassau County elections. (Elec. L. § 9-211);
- (h) Conduct comprehensive quarterly and pre-election testing of voting machines. (Elec. L. § 7-206; 9 NYCRR 6210.2).

5. In view of their crucial role in the New York election process, the local boards should shoulder the ultimate responsibility for implementing statutory election reforms such as HAVA and its New York State counterpart, ERMA.

## **B. Procedural History of Voting System Certification**

6. In response to the controversial 2000 Presidential Election, Congress attempted to reform the national electoral process by passing HAVA. HAVA imposes certain mandates upon the manner in which States conduct federal elections. Among its other requirements, HAVA demands that voting machines meet certain minimum standards intended to protect the integrity of the election process, improve the reliability of election results, and help safeguard the voting rights of disabled and minority voters. Specifically, HAVA requires the introduction of voting machines which, *inter alia*, 1) permit voters to verify and correct their votes before their ballots are cast and counted; 2) prevent voters from selecting more than one candidate for a single office, insofar as such double-voting is prohibited for that office; 3) produce a record with an audit capacity; 4) are accessible to voters with disabilities; 5) provide alternative language accessibility; and 6) comply with federal error rate standards.

7. The duty to implement HAVA is left to the states – and their relevant subdivisions – through the passage of appropriate state legislation and the promulgation of related regulations. From the outset, the State of New York has not had an exemplary track record in meeting its HAVA obligations. The SBOE failed to implement the HAVA voting system standards and statewide voter list provisions of HAVA by the initial deadline of January 1, 2004, and was forced to obtain a waiver extending the deadline until January 1, 2006. (See 42 U.S.C. 15302(a)(3)(B)).

8. New York State, however, once again failed to meet the HAVA deadline. Instead of promptly passing implementing legislation, the New York State Legislature engaged in a protracted two and a half year-long debate over the terms of the New York State

HAVA implementation statute. Although this legislative process finally was complete, and ERMA was enacted, by July 2005, public hearing requirements caused the SBOE to miss the January 1, 2006 deadline for non-lever voting machine implementation.

9. It was not until December 15, 2009 that the SBOE finally adopted resolutions certifying the use of optical scan voting machines and ballot marking devices manufactured by Election Systems & Software, Inc. (“ES & S”) and Dominion Voting Systems, Inc. (“Dominion”) (collectively “Electronic Voting Machines”). The new machines must be fully deployed to every voting place in the State in time for the September 2010 primary elections.

**C. It is Impossible For NCBOE To Safely Implement The Use of Optical Scan Voting Machines by September 2010**

10. The orderly administration of elections will be seriously undermined if the County is forced to transition to the new technology in the compressed time-frame permitted by the SBOE. The County was unable to begin the transition process prior to December 15, 2009, when the SBOE certified machines for use. This left approximately nine months to take all of the labor-intensive, time consuming and complex steps necessary to complete the changeover. This is not sufficient time. These measures – and the estimated time it will take to complete them – include:

- (a) Procuring adequate climate controlled and electrified storage – three to six months. Until the SBOE certified the ES&S DS200 optical scan machine, the County was prevented from procuring adequate storage space ahead of time based on two unknowns: 1) the size of the system and its particular storage requirements; and 2) how many such systems will be required. Without adaptation, it is not possible for the NCBOE to use the storage space in which it

currently stores the lever voting machines because such storage space is not climate controlled or electrified, two requirements for electronic voting systems. The County will be forced to incur significant economic costs, in addition to being bound by longer-term leases, to procure such additional storage.

- (b) Procuring new trucking contractors – three to six months. The County will have to procure new trucking contractors to transport the voting machines from County storage to the polling places on Primary and Election Day. The County could not issue a request for proposals (“RFP”) for the contractor before December 15, 2009, when the systems were finally certified. In addition, the County will incur much higher costs because the trucking contractors who currently transport the lever machines do not have climate-controlled vehicles and are not capable of transporting sensitive electronic equipment.
- (c) Designing and implementing a new security system – three to six months. Nassau County’s current security system for the lever machines is inadequate for the computerized systems due to the risk of attacks by computer hackers. The County will be required to take on much greater costs in providing security for the new machines. Ironically, even this added security will be unable to adequately secure these machines due to their inherent vulnerabilities to fraud.
- (d) Programming the voting systems – one to two months. Because the NCBOE serves approximately 900,000 voters in 11 Assembly districts and 1162 Election Districts, there are thousands of different ballot combinations that must be programmed into the systems, in both English and Spanish. The County will

suffer greatly increased staffing and resource costs both in required training and the actual programming of ballots for these new machines.

(e) Recruiting and training 6,756 or more poll workers – 10 months. Nassau County has a current labor force of 5,168 poll workers and will need to hire an additional 1,588 inspectors to be HAVA-compliant. The NCBOE anticipates that the already high attrition rate of poll workers will increase when the new voting technology is introduced and that massive recruitment efforts will be necessary (poll workers are paid \$150 for a 12 - 15 hour day). Pursuant to ERMA (Election Law § 3-412(1)(a)) all of the poll workers will also need to be trained, and pass examinations, in order to operate the new voting systems. This training will be a very daunting task because many Nassau County poll workers are senior citizens, and it is likely that many of them will have minimal exposure to and comfort with computer technology. Furthermore, the NCBOE will need to train at least 200 Spanish-English interpreters in the use of the new machines. Unfortunately, until machines were certified by use, the County was unable to conduct the training and examinations necessary. Due to the short time-frame, the County will not be able to meet its statutory duties of training, substantially jeopardizing the integrity of the 2010 election cycle.

(f) Planning and implementing a public educational campaign – 10 months. As of March 2010, Nassau County has approximately 897,982 registered voters. The NCBOE is responsible for ensuring that voters are educated in the use of the systems so that they are able to exercise their right to vote. The 10-month period includes, among other activities, a “test-drive period” during which the

NCBOE can work with the chosen voting system to develop operating instructions for the public; creation of public service announcements; writing and sending instructional mailings to all registered voters in English and Spanish; and provision of hands-on demonstrations to senior citizens and other groups that are likely to have limited exposure to computers.

(g) Polling place survey and modifications – two to six months. The SBOE’s regulations provide that the vendor must survey the present polling places with the local boards of elections and “[i]f any polling places are not compatible, the vendor shall advise the jurisdiction purchasing the voting system or equipment on the methods or procedures that the said jurisdiction may use to remedy any such problem.” (9 N.Y.C.R.R. 6209.9(A)(3)). Nassau County has 397 polling places. Even assuming that the vendor and the NCBOE can accomplish the feat of surveying 10 polling places per business day, at significant cost to the County in resources, it will take approximately two months to complete the site surveys. It is unclear at this point the extent of the modifications to the polling places that Nassau County will have to make and any costs that will be necessarily incurred by the County.

(h) Acceptance testing each machine – less than one month. As described above, Nassau County must “acceptance test” each machine to ensure that it functions properly. (9 N.Y.C.R.R. 6209.10). An acceptance test is:

a test conducted by the county board and the State Board, to demonstrate that each voting system delivered, when installed in the user’s environment, meets all functional requirements and contains exactly the same components as the voting system of that type, which received certification from New York State, including but not limited to all hardware, programming (whether in the form of

software, firmware, or any other kind), all files, all file system hierarchies, all operating system parts, all off-the-shelf hardware and programming parts and any other components.

(9 N.Y.C.R.R. 6209.1(1)(a)). Proper acceptance testing is crucial. In NCBOE's experience with the ballot marking devices in 2006, nearly 8% of the new machines did not work when they were delivered from the SBOE to Nassau County. Furthermore, due to the vastly more complex testing procedures created by ERMA, the County will need additional staff and computer hardware to conduct the testing of over 1,100 computer-based machines within 72 hours of their receipt.

11. Altogether, the aforementioned post-certification, post-selection processes, if done with the requisite care and attention, will require between ten to fourteen months to complete, if not more. Although these steps are underway, the process has only just begun. The NCBOE has limited personnel and resources and, like every other state and local agency, is under severe budgetary constraints as result of the global recession. Therefore, the myriad tasks necessary to switch to the new machines in a responsible manner cannot occur simultaneously and will, of necessity, take substantial time.

12. Delivery of the new machines is imminent and the County has already begun to absorb the costs of the new machines. A significant portion of these costs will not be recoupable from federal HAVA-funding. In addition, the cost of deploying the new machines for the first time is substantially greater than what would otherwise be spent on an election using the existing lever machines. Moreover, the County necessarily will face increased costs with respect to this voting machine procurement process because of the compressed timeframe for negotiation, delivery and acceptance of the machines. Project

management costs will increase because the intensity of effort necessarily will increase. Moreover, associated contracts – including consultancy and transportation contracts – may have to be executed with only limited competition, resulting in additional increased costs to Nassau County. The County also must hire poll workers, technicians, educate voters and conduct training on an expedited basis.

**D. The SBOE Has Not Provided NCBOE With Information and Testing Procedures Necessary To Fulfill Its Statutory and Constitutional Duties**

13. ERMA and its corresponding regulations set forth a number of testing and security requirements that County boards of election must follow in implementing the new voting machines. Unfortunately, some of these requirements are impossible to meet in the short time-frames involved because the SBOE has not furnished the County with the necessary information or procedures to comply with the complex testing and maintenance scheme NCBOE is required to adhere to in using optical scanners.

14. Due to the SBOE's inaction, the County will be unable to comply with all the security procedures and may be vulnerable to compromised machines, which could sabotage the upcoming 2010 elections and abrogate the NCBOE's constitutional duty to safeguard elections.

**1. Procedures Required To Be Used for Optical Scan Voting Machines**

15. As background, the following consists of the testing and operational procedures which NCBOE must adhere to pursuant to ERMA and SBOE's regulations in order to use the optical scan machines in elections.

16. Initially, the County receives the voting machines from the vendor. Within 72 hours of receiving a voting machine from the vendor, the system is required to undergo "acceptance testing," which is to be completed prior to the use of the equipment in an

election. Testing includes “software validation,” a comparison of the software installed on the delivered system (via so-called “hash testing”) to that certified by the State board, as well as a complete functional test.

17. The software validation procedures are created by the system vendor and must be approved by the SBOE. The SBOE then must provide the most recent “hash values” to the County, which is a mathematical signature that is unique to the software certified by SBOE. However, the SBOE has not provided these values to the County nor have they provided the procedures to be used. Therefore, the County will be unable to perform this required testing in time for the receipt of machines.

18. The County is also required to conduct “pre-qualification” testing on all machines immediately prior to their use in an election and on a quarterly basis. The testing includes software validation (via “hash testing” as described above), vendor-prescribed maintenance tasks, a full functional test to insure the machine is working, and the casting of a “test deck,” a pre-assembled batch of ballots, including ballots which are improperly filled out or otherwise invalid, used to determine that the machine is processing votes in the expected manner. Again, the SBOE has not provided procedures or hash values to the County. As a result, even though machines are being delivered within weeks, the County will be unable to perform the required testing and the possibility of tampered or faulty machines becomes an imminent concern.

19. The County is required to use vendor-provided Election Management Software (“EMS”) in order to prepare the machines for use in an election, including but not limited to, setting up the ballot to be used in the election and encoding USB flash media (“flash

drives”) with the election programming. The data which is programmed to the flash drives includes candidate information for that race and the layout of the ballot.

20. The election-specific data is then transferred to the optical scan machines immediately prior to the election by County staff who insert the programmed flash drives into each voting machine.

21. Each machine receives a second, backup flash drive which also stores the election data. However, the backup flash drive only backs up the election data at the end of the night when the poll inspectors “close polling” and until then is blank.

22. The areas where the flash drives insert are locked with a tumbler lock, but the key is not unique to any one machine. The ballot drawer and case are locked with a standard key, also not unique. Both keys are available to poll inspectors at all times during Election Day. Upon information and belief, other counties do not do this and unsecure machines are put in the polling place in the “on” position.

23. The machines are then locked and delivered to the polling places. The area where the flash drives are inserted in the machine have a simple sticker seal placed across them. However, poll inspectors break this seal at the end of the night to close polling, so it does not provide security against post-election tampering.

24. The inspectors have access to all keys and thereby have access to the flash drives contained in the machine.

25. At the beginning of election day, the case containing the machine is unlocked, the machine is opened, and a zero tape is printed. The machine is then ready to accept ballots from voters.

26. The optical scan machines will not count votes that are not properly filled out, such as where the voter circles a bubble on the ballot rather than filling in the bubble, even though this is otherwise an expression of voter intent.

27. At the end of the voting, the compartment containing the primary flash drive is opened, the seal is broken, and a button is pushed to “close the poll.” The machine prints out a results tape, the primary flash drive is removed, and the machine is then locked and left at the polling place, with the backup flash drive remaining in the machines.

28. The inspector then places the tape and the drive in a bag to be delivered to the County Board.

29. The flash drives are delivered to the Board and each drive is inserted into the computers containing the tabulation software, provided by the vendor.

30. The tabulation software performs the counting and recording of the election results invisibly to County staff. The tabulation process is not visible to NCBOE staff or poll watchers.

31. The machines are then delivered to the Board for storage until the next election.

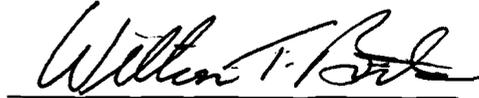
32. One of the alleged “safeguards” to the integrity of elections under ERMA is the manual audit requirement, codified in N.Y. Elec. Law Section 9- 211. This provision mandates that three percent of the voting machines shall be manually audited after every election to determine if the total votes tallied by the audited machines are consistent with hand-count of the paper ballots. As our expert affidavit explains, this is far from a being failsafe method of ensuring the accuracy of elections. At most, it most provides protection against massive failure and fraud, but will not detect localized discrepancies.

33. Moreover, even if the manual audit procedures succeed in detecting irregularities in the vote, they will not protect the electoral process from disruption. On the contrary, they will require the local boards to undertake a highly disruptive process of hand-counting paper ballots. Under the law, when the manual audits indicate fraud or failure, the local boards will be required to undertake further manual audits, perhaps even a complete manual audit of all the machines in the boards' jurisdiction. In Nassau County, this type of manual recount could place an impossible burden on the local board. In effect, the board would be compelled to regress to the era of hand counting paper ballot, a notoriously time-consuming and burdensome process, highly prone to human error and inaccuracy. For example, in the 2008 Presidential race, nearly 600, 000 votes were cast in the County of Nassau. Recounting all those ballots by hand would cause the exact same type of chaos, disruption and delay that the nation witnessed in the 2000 Presidential elections in the State of Florida Elections. .

**E. Conclusion**

34. Accordingly, the NCBOE respectfully requests that this Court grant the relief sought in the Petition-Complaint., to protect the rights of Nassau County voters, and to ensure orderly and safe elections in September 2010.

  
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John A. DeGrace

  
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William T. Biamonte

Sworn to before me this <sup>23</sup> day of March, 2010.



LAUREN ANN DUCATI  
NOTARY PUBLIC-STATE OF NEW YORK  
No. 01DU6205045  
Qualified in Nassau County  
My Commission Expires May 04, 2013

3/23/10