

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NASSAU

-----X  
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 Democratic Commissioner of  
Elections,

Index No. 10 - 005821

**NOTICE OF  
PETITION-  
COMPLAINT**

Petitioners-Plaintiffs,

- 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.

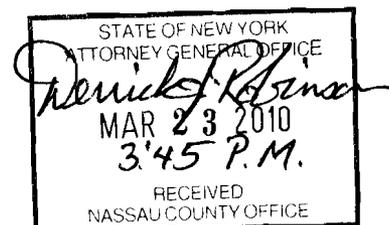
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To the above named respondents-defendants:

PLEASE TAKE NOTICE that upon the annexed petition-complaint of petitioners-plaintiffs County of Nassau, Nassau County Board of Elections, John A. DeGrace and William T. Biamonte ("petitioners"), duly verified on March 23, 2010, and the attached affidavit of John A. DeGrace and William T. Biamonte sworn to on March 23, 2010, and the affidavit of Alexander Shvartsman sworn to on March 19, 2010, the undersigned will move the Supreme Court, County of Nassau, at an IAS Part to be assigned, to be held at the New York State Courthouse at 100 County Seat Drive, Mineola, New York on the 20th day of April, 2010 at 9:30 in the forenoon of that day, or as soon thereafter as counsel can be heard:

For a judgment pursuant to Article 78 and § 3001 of the CPLR:

- a. declaring that the New York Election Reform and Modernization Act ("ERMA") statute violates Article I, Section I of the New York State Constitution and is therefore unenforceable;
- b. declaring that the ERMA statute violates Article II, Section 8 of the New York State Constitution and is therefore unenforceable;



- c. declaring that ERMA violates the New York State Constitution by requiring local boards of elections to use electronic voting machines that delegate the sovereign function of supervising elections to private parties;
- d. declaring that ERMA violates the New York State Constitution by requiring local boards of elections to use electronic voting machines that violate the right to cast a secret ballot;
- e. declaring that respondents actions are violative of voter intent the New York State Civil Rights Act;
- f. that respondents actions in certifying machines on December 15, 2009 are arbitrary, capricious, an abuse of discretion and contrary to law;
- g. that, in the event petitioners-plaintiffs must comply with ERMA that they not be required to deploy the new ERMA optical scan voting machines until the Fall of 2011 at the earliest.

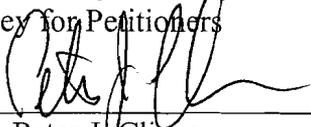
PLEASE TAKE FURTHER NOTICE, that an Answer and supporting affidavits, if any, must be served at least five (5) days before the aforesaid date of hearing, whereupon reply affidavits shall be served one day prior to said date.

Dated: March 23, 2010  
Mineola, New York

Yours, etc.,

JOHN CIAMPOLI  
Nassau County Attorney  
Attorney for Petitioners

By: \_\_\_\_\_

  
Peter J. Clines  
Deputy County Attorney  
One West Street  
Mineola, New York 11501  
(516) 571-3015

REQUEST FOR JUDICIAL INTERVENTION

**PAID**

Supreme COURT, Nassau COUNTY

For Clerk Only

INDEX NO. 10/

DATE PURCHASED:

March 23, 2010

MAR 23 2010  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE

~~County of Nassau v. New York State~~ County of Nassau, Nassau County Board of Electors, John DeGrace, in his official capacity, and William T. Binante, in his official capacity.

IAS entry date

Judge Assigned

RJI Date

~~At~~ State of New York, New York State Board of Electors, James A. Walsh, Douglas A. Kellner Esq., J. Aquila, Gregory P. Peterson, et al. Complainants

NATURE OF JUDICIAL INTERVENTION (check ONE box only AND enter information)

- Request for preliminary conference
- Note of issue and/or certificate of readiness
- Notice of motion (return date: \_\_\_\_\_)
- Relief sought
- Order to show cause (clerk enter return date: \_\_\_\_\_)
- Relief sought
- Other ex parte application (specify: \_\_\_\_\_)
- Notice of petition (return date: April 20, 2010 )
- Relief sought- Declaring the NY Election Reform and Modernization Act unconstitutional.
- Notice of medical or dental malpractice action (specify: \_\_\_\_\_)
- Statement of net worth
- Writ of habeas corpus
- Other (specify: \_\_\_\_\_)

NATURE OF ACTION OR PROCEEDING (Check ONE box only)

MATRIMONIAL

- Contested -
- CM
- Uncontested -
- UM

- Corporate -
- CORP
- Insurance (where insurer is a party, except arbitration) -
- INS
- UCC (including sales, negotiable-instruments)
- UCC

COMMERCIAL

- Contract -
- CONT

- \*Other Commercial -
- OC

STATE OF NEW YORK  
ATTORNEY GENERAL'S OFFICE  
*William T. Binante*  
MAR 23 2010  
3:45 PM.  
RECEIVED  
NASSAU COUNTY OFFICE

**ATTORNEY(S) FOR PETITIONER:**

<u>Self Rep.*</u>	<u>Name</u>	<u>Address</u>	<u>Phone #</u>
X	Office of Nassau County Attorney John Ciampoli	One West Street, Mineola, New York 11501	516-571-3015
<input type="checkbox"/>			

**ATTORNEY(S) FOR DEFENDANT(S):**

<u>Self Rep.*X</u>	<u>Name</u>	<u>Address</u>	<u>Phone #</u>
	NY State Attorney General Assistant Attorney General Valerie Singleton	One West Street, Mineola, New York 11501	516-248-3302

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\*Self Represented: parties representing themselves, without an attorney, should check the "Self Rep." box and enter their name, address, and phone # in the space provided above for attorneys

REAL PROPERTY

[ ] Tax Certiorari - TAX  
[ ] Foreclosure - FOR  
[ ] Condemnation - COND  
[ ] Landlord/Tenant - LT  
[ ] \*Other Real Property - ORP

[ ] \*Products Liability - PL

[ ] Environmental - EN  
[ ] Asbestos - ASB  
[ ] Breast Implant - BI  
[ ] \*Other Negligence - OTN  
[ ] \*Other Tort (including intentional) - OT

OTHER MATTERS

[ ] \* \_\_\_\_\_ -OTH

\* If asterisk used, please specify.

TORTS

Malpractice  
[ ] Medical/Podiatric - MM  
[ ] Dental - DM  
[ ] \*Other Professional - OPM  
[ ] Motor Vehicle - MV

SPECIAL PROCEEDINGS

[ ] Art. 75(Arbitration) -ART75  
[ ] Art. 77 (Trusts) - ART77  
[X] Art. 78 - ART78  
[ ] Election Law - ELEC  
[ ] Guardianship (MHL Art. 81) - GUARD81  
[ ] \*Other Mental Hygiene - MHYG  
[ ] \*Other Special Proceeding -OSP

Check "YES" or "NO" for each of the following questions:

Is this action/proceeding against a

YES NO YES NO  
[X] [ ] Municipality: [ ] [X] Public Authority:

YES NO  
[ ] [x] Does this action/proceeding seek equitable relief?  
[ ] [X] Does this action/proceeding seek recovery for personal injury?  
[ ] [X] Does this action/proceeding seek recovery for property damage?

Pre-Note Time Frames:

(This applies to all cases except contested matrimonial and tax certiorari cases)

Estimated time period for case to be ready for trial (from filing of RJ1 to filing of Note of Issue):

[x] Expedited: 0-8 months [ ] Standard: 9-12 months [ ] Complex: 13-15 months

Contested Matrimonial Cases Only: (Check and give date)

Has summons been served? [ ] No [ ] Yes, Date \_\_\_\_\_

Was a Notice of No Necessity filed? [ ] No [ ] Yes, Date \_\_\_\_\_

INSURANCE CARRIERS: \_\_\_\_\_

RELATED CASES: (IF NONE, write "NONE" below)

Title

NONE

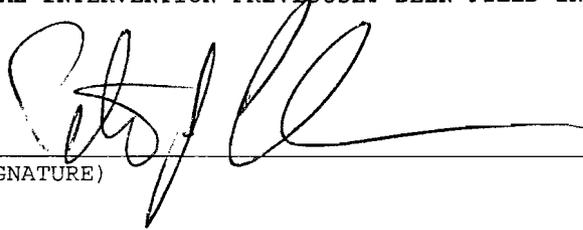
Index#

Court Supreme Court County of Nassau

Nature of Relationship-

I AFFIRM UNDER PENALTY OF PERJURY THAT, TO MY KNOWLEDGE, OTHER THAN AS NOTED ABOVE, THERE ARE AND HAVE BEEN NO RELATED ACTIONS OR PROCEEDINGS, NOR HAS A REQUEST FOR JUDICIAL INTERVENTION PREVIOUSLY BEEN FILED IN THIS ACTION OR PROCEEDING.

Dated:



\_\_\_\_\_  
(SIGNATURE)

\_\_\_\_\_  
(PRINT OR TYPE NAME)

John Ciampoli By DCA Peter J. Clines  
(ATTORNEY FOR PETITIONER)

ATTACH RIDER SHEET IF NECESSARY TO PROVIDE REQUIRED INFORMATION

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NASSAU

-----X  
COUNTY OF NASSAU, NASSAU COUNTY  
BOARD OF ELECTIONS, JOHN DEGRACE, in his  
official capacity as Nassau County Republican  
Commissioner of Elections, and WILLIAM T.  
BIAMONTE, in his official capacity as Nassau  
County Democratic Commissioner of Elections,

Petitioners-Plaintiffs,

- 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.  
-----X

Index No. 10-005821

**VERIFIED PETITION-  
COMPLAINT**

**RECEIVED**  
MAR 23 2010  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE

The County of Nassau, the Nassau County Board of Elections hereby allege as their petition for declaratory judgment pursuant to section 3001 and Article 78 of the New York State Civil Practice Laws and Rules ("CPLR") and allege the following in support:

**PRELIMINARY STATEMENT**

1. This lawsuit challenges the constitutionality of state legislation that jeopardizes the integrity of New York's electoral process by discarding highly-regarded lever voting machines that have served the state reliably for nearly a century and substituting computerized voting technology that is notoriously vulnerable to systemic hacking, tampering, manipulation and malfunction. Acting pursuant to the New York Election Modernization and Reform Act ("ERMA"), respondent New York State Board

STATE OF NEW YORK  
ATTORNEY GENERAL OFFICE  
*Derrick L. Rosen*  
MAR 23 2010  
3:45 PM.  
RECEIVED  
NASSAU COUNTY OFFICE

of Elections (“SBOE”) has required localities to select computerized optical scan machines that, in significant ways, combine the worst security vulnerabilities of both nineteenth century paper balloting and twenty-first century computer technology. This mandated technology leaves the door wide open to traditional voter fraud schemes inherent in paper balloting while at the same time employing a technology that is susceptible to a battery of hitherto unknown computerized threats, including computer viruses, malware, moles, worms, time bombs and Trojan horses – all of which can be employed to manipulate the vote count in innumerable ways including altering the outcome of races, switching candidate voting totals, dropping votes from certain candidates and adding votes for others. Moreover, computerized tampering can be perpetrated in a way that evades detection by even the most sophisticated testing protocols and scrupulously-followed security procedures. In addition to their vulnerability to deliberate tampering and attack, the computerized machines and the related software are prone to undetectable malfunction which can have an equally devastating effect on the reliability of elections. The new technology is susceptible to far greater inaccuracies than the lever machines, and because they depend upon paper ballots are far more difficult to audit. The resulting risk of widespread disenfranchisement and subversion of the democratic process is repugnant to the New York State Constitution.

2. Not only do the computerized optical scan machines pose a grave threat to the security and accuracy of elections, they also employ an opaque technology that deprives the public of a transparent electoral process and strips election officials of their ability to supervise the conduct of elections in the state and insure their integrity. Mandatory duties

of the Elections Commissioners will instead be performed by outside vendors and computer programmers in contravention of law.

3. This violates the constitutional mandate of bipartisan administration of elections and effectively delegates the undelegable official duty of electoral oversight to private vendors, software engineers and computer technicians. Finally, wholly apart from the flaws in the technology, the SBOE has applied the ERMA legislation in a manner that is arbitrary, capricious, and unlawful, by failing to approve and certify the new machines until it was too late for local boards to effectively take all of the complex technical and logistical steps necessary to safely deploy them.

#### **THE PARTIES**

4. Petitioner-Plaintiff County of Nassau is a municipal corporation organized and existing pursuant to the laws of the State of New York.

5. Petitioner-Plaintiff Nassau County Board of Elections (“NCBOE”) is one of 58 local boards of elections in New York State. NCBOE is responsible for carrying out the elections in Nassau County. This responsibility includes, but is not limited to:

- a. Purchasing voting systems and related equipment and supplies, maintaining and repairing voting systems, and storing voting systems (New York State Election Law (“Elec. Law”) §§ 3-226(1); 4-136), including the inspection and testing of any new voting equipment prior to acceptance and use;
- b. Ensuring the proper preparation and repair of voting systems (Elec. Law § 3-302(1));
- c. Coordinating voter education programs (see Elec. Law § 3-212(4)(b));

- d. Teaching poll workers the rights of voters at the polls and their obligation “to maintain the integrity of the franchise,” (Elec. Law § 3-412(1-a));
- e. Carrying 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. Law § 3-212(4)(b));  
and
- f. Preserving good order around the polling places and places of registration (Elec. Law § 3-402).
- g. Selecting new voting systems approved by the State Board of Elections pursuant to the Help America Vote Act and ERMA, 2005 Laws of New York Ch. 101. (See Elec. Law Section 7-200; Section 7-202).
- h. Manually audit three percent of the voter verifiable of the voting machines used in Nassau County elections. (Elec. Law Section 9-211.)

6. Petitioner-plaintiff John A. DeGrace is the Nassau County Republican Election Commissioner.

7. Petitioner-plaintiff William T. Biamonte is the Nassau County Democratic Election Commissioner.

8. Respondent-defendant New York State is a state of the United States and is subject to the Constitutions and laws of the United States and the State of New York.

9. Respondent-defendant SBOE is an agency of the Executive Department of the State of New York, and is responsible for, among other things, taking official action on behalf of the State to comply with the requirements of the Help America Vote Act of

2002 (“HAVA”), 42 USC §§ 15301-15545, and the ERMA and the New York Election Law and regulations, including certifying voting systems for use by local boards of elections (Elec. Law § 7-200(1)).

10. Respondents-defendants James A. Walsh, Douglas A. Kellner, Evelyn J. Aquila, Gregory P. Peterson, constitute the Commissioners of the SBOE pursuant to the provisions of the Election Law and each is sued in his official capacity.

### **JURISDICTION AND VENUE**

11. This Court has jurisdiction over this matter pursuant to section 3001 and Article 78 and of the CPLR.

12. This Court is the proper venue for this dispute because the issues are triable in Nassau County Supreme Court and the material events in this proceeding took place in Nassau County. (CPLR § 506).

#### **A. New York Election Law recognizes the importance of secure elections**

13. The right to vote is the cornerstone of American democracy. Implicit in that right is the understanding that the vote should be private, that the vote should be secure, and that the vote should be counted as it was intended when it was cast by the voter.

14. The New York Constitution and the New York Election Law recognize the importance of private, secure, and fair elections and protect the franchise by requiring highly transparent procedures carried out in a bipartisan manner.

15. Section 9 of Article II of the Constitution broadly states that “All elections ought to be free; and no person by force of arms, malice, menacing, or otherwise, should presume to disturb or hinder any citizen of this state in the free exercise of the right of suffrage.”

16. Accordingly, Section 8 of Article II of the Constitution requires that “[a]ll laws creating affecting regulating or affecting boards or officers charged with the duty of qualifying voters, or of distributing ballots to voters, or of receiving, recording or counting votes at elections, shall secure equal [bipartisan] representation . . .”

17. The bipartisan composition of local boards of elections provides critical checks and balances necessary to ensure the public that one party does not have an unfair advantage over the other parties.

18. The law is particularly protective of the integrity of the vote canvass and, recognizing that counting votes poses the greatest risk of fraud,<sup>1</sup> requires the utmost transparency.

19. Election Law section 9-102, “Canvass; general provisions for,” provides that, after the polls close on Election Day, election inspectors canvass the lever machine vote “by opening the counting compartments in the presence of the watchers and all other persons who may be lawfully within the polling place, giving full view of all the counter numbers.” The chairman of the board of inspectors reads aloud the votes “under the scrutiny of an inspector of a different political party.” *Id.*

20. Election Law section 9-100 also mandates that a reliable count be completed on election night:

At the close of the polls the inspectors of election shall, in the order set forth herein, lock the machine against voting, account for the paper ballots, canvass the machine, cast and canvass all the ballots, canvass and ascertain the total vote and they shall not adjourn until the canvass be fully completed.

21. These laws requiring bipartisan participation were enacted to counter widespread

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<sup>1</sup> See *Metz v. Maddox*, 189 N.Y. 460, 468 (1907).

election fraud in the 19<sup>th</sup> Century in which a single political party would control the vote counting process, parties would buy votes, and voters were intimidated due to the lack of secrecy in casting the ballot.

22. Much of this fraud was possible due to the inherent vulnerabilities in paper ballots.

23. Prior to the 1890s, New York voted on paper ballots that were printed and distributed by political parties. Under this system of voting, party officials were able to exclude opposing parties' candidates' names from their party's ballots (commonly referred to as "tickets") and intimidate voters by printing ballots on colored paper so that the poll observers would know the voter's vote before he or she placed the ballot in the ballot box.<sup>2</sup>

24. The chaos this produced along with other kinds of electoral fraud caused a committee of the New York State Assembly to declare in 1858, "Of late years, fraud and simulation at the ballot-box have become extensive and enormous. No sane man will deny this; no man can controvert this fact; the evidence of its existence is as manifest and notorious as any well-known truth."<sup>3</sup>

25. In 1875, the infamous William M. "Boss" Tweed testified before New York City's board of alderman that when he wanted a particular man elected, he would announce the results of the election without counting the ballots or change the ballots themselves to reflect the result he wanted.<sup>4</sup>

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<sup>2</sup> See generally Lawrence D. Norden, *A Lesson in Legislative Drafting: How Mistakes in 1899 Haunt New York's Quest for New Voting Machines in 2008*, 18 ALB. L.J. SCI. & TECH. 627, 635 (2008).

<sup>3</sup> ANDREW GUMBLE, STEAL THIS VOTE, 76 (2005).

<sup>4</sup> ANDREW GUMBLE, STEAL THIS VOTE, 87 (2005).

26. In 1890, amid cries for election reform from the public, New York passed the Ballot Reform Act (L. 1890, ch. 262 § 16), which banned the use of ballots printed by political parties and adopted the “Australian ballot,” invented by William Robinson Boothby, an Australian electoral commissioner and sheriff.

27. “[T]he Australian ballot included four essential protections: 1) the ballots were printed and distributed at public expense; 2) they contained the names of all the candidates duly nominated by law, either by party convention or petition of voters (a “blanket ballot”); 3) they were distributed only by election officers at the polling place (“exclusive” or “official ballot”); and 4) there were detailed provisions for compartments and other physical arrangements to ensure secrecy in casting the vote.”<sup>5</sup>

28. Indeed rampant corruption continued after the adoption of the Australian ballot because paper ballots were easily manipulated or destroyed.<sup>6</sup>

29. Poll workers manipulated votes by “assisting” voters who were illiterate or could not understand the ballot.<sup>7</sup>

30. Boxes of paper ballots could be stolen and official Election Day receipts could be manipulated to make it appear that everything was in order. This is precisely what happened in the New York City mayoral elections in 1905. Three ballot boxes, which had been accounted for in the official records, were found hidden in a barbershop and a

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<sup>5</sup> John C. Fortier & Norman J. Ornstein, *Symposium: Election Reform: The Absentee Ballot and the Secret Ballot: Challenges For Election Reform*, 36 U. MICH. J.L. REFORM 483, 488 (Spring 2003).

<sup>6</sup> *See id.* at 636; *see also* M.J. Stephey, *Ballots in America*, TIME (Nov. 3, 2008) (In the 19<sup>th</sup> Century, paper ballots were “more likely to be destroyed or manipulated than counted.”), at <http://www.time.com/time/politics/article/0,8599,1855857,00.html> (last visited Feb. 4, 2010).

<sup>7</sup> John C. Fortier & Norman J. Ornstein, *Symposium: Election Reform: The Absentee Ballot and the Secret Ballot: Challenges for Election Reform*, 36 U. MICH. J. L. REFORM 483, 491 (Spring 2003).

tailor's shop. The hidden ballot boxes contained uncounted votes for William Randolph Hearst, a third party challenger, who ultimately lost the election.<sup>8</sup>

31. The tactic of using a "chain ballot," also known as the "Tasmanian dodge," to influence elections was also prevalent in the 19<sup>th</sup> Century. Chain ballots worked as follows: A vote buyer gives a ballot that has already been marked to a registered voter who deposits it into the ballot box. The registered voter then gives the unmarked ballot received from the poll worker back to the vote buyer who then pays the registered voter.<sup>9</sup>

32. In New Jersey, vote buyers gave vote sellers carbon paper in order to verify how a voter voted on a paper ballot; upon presentation of the carbon-duplicated ballot to the vote buyer, the vote seller would receive two dollars.<sup>10</sup>

33. In some precincts, election officers would stick pencil leads under their fingernails and use them to spoil ballots cast for the disfavored candidate when the ballots were canvassed.<sup>11</sup>

34. In light of this fraud, at the end of the 19<sup>th</sup> Century, election reformers urged New York State to do away with paper ballots and adopt gear-and-lever voting machines ("lever voting machines").

35. A few years after the first demonstration of a lever voting machine in a 1892 Lockport, New York, town election, the New York State Legislature passed a law allowing the implementation of lever voting machines statewide. (L. 1899, ch. 466).

36. Nassau County purchased its first lever voting machine in the late 19<sup>th</sup> Century

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<sup>8</sup> TRACY CAMPBELL, DELIVER THE VOTE: A HISTORY OF ELECTION FRAUD 140-42 (2008).

<sup>9</sup> TRACY CAMPBELL, DELIVER THE VOTE: A HISTORY OF ELECTION FRAUD 137-38 (2008).

<sup>10</sup> ANDREW GUMBLE, STEAL THIS VOTE, 117 (2005).

<sup>11</sup> ANDREW GUMBLE, STEAL THIS VOTE, 117 (2005).

and purchased its current lever voting machines from the Automatic Voting Machine Company in the early 20<sup>th</sup> Century. It has used them until this year with very few problems.

37. The operation of a lever voting machine is relatively simple, as follows:

The voter enables the machine with a lever that also closes a privacy curtain. The voter pulls down selected levers to indicate choices. When the voter exits the booth by opening the privacy curtain with the handle, the voted levers are automatically returned to their original horizontal position. As each lever returns, it causes a connected counter wheel within the machine to turn one-tenth of a full rotation. The counter wheel, serving as the “ones” position of the numerical count for the associated lever, drives a “tens” counter one-tenth of a rotation for each of its full rotations. The “tens” counter similarly drives a “hundreds” counter. If all mechanical connections are fully operational during the voting period, and the counters are initially set to zero, the position of each counter at the close of the polls indicates the number of votes cast on the lever that drives it. Interlocks in the machine prevent the voter from voting for more choices than permitted.<sup>12</sup>

38. This simple construction and mechanical operation of a lever machine enables them to be serviced and inspected by a bipartisan team of Nassau County employees. Most of the repairs are done in-house.

39. If a lever machine has been tampered with, it will normally be detectable by the trained naked eye. For example, if one party has tampered with a gear in order to cause a counter to stick on Election Day, the other party’s inspector would be able to see the tampering. Moreover, even if the lever machine jams, it is generally possible to rely upon the accuracy of the county until the malfunction occurred, *i.e.*, the machine remains true.

40. Although breakdowns occur occasionally at the poll sites, Nassau’s bipartisan

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<sup>12</sup> Mary Bellis, *The History of Voting Machines*, About.com:Inventors at <http://inventors.about.com/library/weekly/aa111300b.htm?once=true&> (last visited Feb. 1, 2010).

staff is usually able to fix the lever machines within a matter of five minutes on-site.

41. In New York State, even where there was a critical failure of a lever machine which was outcome determinative of an election, testing of the machine, together with the testimony of voters, resulted in the correction of the erroneous returns and the seating of duly elected candidate. *See People v. Delgado*, 16 A.D.3d 473, 475 (2d Dep't 2005).

42. Overall, Nassau County Board of Elections staff and voters alike trust the lever machines and have grave concerns about replacing them with electronic optical scan voting systems that are prone to malfunction and are vulnerable to hardware problems, software mistakes and malfunctions, system crashes, computer hacking and the rudimentary techniques for committing fraud used in the 19<sup>th</sup> Century.

**A. The Federal Help America Vote Act and New York Election Reform and Modernization Act**

43. On October 29, 2002, President George W. Bush signed the Federal Help America Vote Act (“HAVA”), 42 U.S.C. §§ 15301-15545, into law in response to the chaos surrounding the 2000 presidential election, particularly Florida’s use of computer voting systems that read punch-card ballots.

44. HAVA’s primary purposes are to minimize election fraud and to improve disabled voter accessibility. Title III of HAVA (sections 301 to 303) sets forth certain “uniform and nondiscriminatory election technology and administration requirements” that apply to elections for Federal office.<sup>13</sup>

45. HAVA requires that each voting system used in an election for federal office shall permit a voter to verify his or her vote before a vote is counted; provide the voter with an opportunity to change his or her vote; and notify the voter of the effect of casting

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<sup>13</sup> 42 U.S.C. §§ 15481-15483.

multiple votes for more than one candidate for a single office. The voting system must also produce a record with an audit capacity, be accessible to voters with disabilities, provide alternative language accessibility, and comply with federal error rate standards.<sup>14</sup>

46. HAVA does not mandate the replacement of lever voting machines, so long as they meet the voting system requirements set forth in section 301.<sup>15</sup> HAVA actually states that lever voting machines may be retained so long as they are capable of meeting HAVA's requirements for voting systems. 42 U.S.C. § 15481(a)(1)(A).

47. In 2004, SBOE Commissioner and Co-Chair, Douglas A. Kellner acknowledged that lever voting machines satisfied all but one of HAVA's requirements. He stated:

The Federal Help America Vote Act, 42 USC §§15301 *et seq.*, will require substantial changes in election administration for the 2006 elections. [HAVA] sets minimum standards for voting machines. Our lever machines satisfy all but one of those standards, that there be at least one machine at each poll site that is 'accessible for individuals with disabilities, including non-visual accessibility for the blind and visually impaired, in a manner that provides the same opportunity for access and participation (including privacy and independence) as for other voters.'

(In 2008, New York State satisfied HAVA's accessibility requirement by deploying at least one accessible machine in each poll site.)

48. Even though HAVA does not require the replacement of lever voting machines, the New York State enacted the Election Reform and Modernization Act of 2005 ("ERMA," Chapter 181 of the Laws of 2005), requiring the replacement of lever voting machines with electronic, computerized voting systems when they have been approved by the Board of Elections. (L. 2007, Ch. 506, § 11). The voting systems that replace lever machines must be either a Direct Recording Electronic machine with a voter verifiable

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<sup>14</sup> 42 U.S.C. § 15481(a).

<sup>15</sup> *See* 42 U.S.C. §§ 15481-15483.

paper trail (“DRE”) or an Optical Scan Voting System.<sup>16</sup>

49. Upon information and belief, when it adopted ERMA, the New York State Legislature made no findings that lever voting machines were insecure, vulnerable to significant operational problems or produced unreliable election results, or in any other way violated the requirements of HAVA.

50. In June 2006, the New York Board of Elections promulgated regulations imposing additional requirements on voting systems entitled “Voting System Standards,” pursuant to its rule-making authority under Election Law section 3-102(1). Among other things, these rules require that voting systems conform to the Federal Election Assistance Commission’s 2005 Voluntary Voting System Guidelines.

51. New York State has imposed additional requirements on voting systems and their manufacturers that are not required by other states, including the retention of a paper record, Elec. L. § 7-202(j), the “full face ballot requirement” that voting systems “provide a full ballot display on a single surface,” 9 N.Y.C.R.R. § 6209.2(a)(1), 6209.6(a), and submission of commercial off-the-shelf software source codes, Election Law § 7-208; 9 N.Y.C.R.R. § 6209.6(f)(10).

52. Under the Election Law, local boards of elections are authorized to adopt only such voting systems that have been certified by the SBOE.<sup>17</sup>

53. Prior to certifying a voting system for use by the local boards, the SBOE must examine a prospective system to ensure that it complies with the requirements of the Election Law, the New York Voting Systems Standards (Part 6209 of Title 9 N.Y.C.R.R.), and the 2005 Voluntary Voting System Guidelines.

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<sup>16</sup> See Elec. L. § 7-202(4).

<sup>17</sup> Elec. L. § 7-200(1).

54. The examination process and subsequent certification by the Board of Elections has been plagued by with problems and substantially compromised calling into question the security and functionality of the voting systems that were ultimately certified.

55. The New York Voting Systems Standards provide, “All laboratory testing shall be conducted or verified by independent testing authorities [“ITA’s”] appropriately certified by the National Association of State Election Directors, the EAC or approved by the commissioners of the State Board.”<sup>18</sup>

56. On February 1, 2006, the SBOE contracted with Ciber, Inc., an ITA accredited by the National Association of State Election Directors (“NASSED”), which is not a federal governmental entity.

57. Before Ciber began testing voting systems for potential use in New York, from July 17 to 22, 2006, the United States Election Assistance Commission (“EAC”) performed an interim assessment of Ciber, Inc., pending implementation of the full EAC Accreditation Program.

58. The EAC is an agency of the United States established pursuant to HAVA to provide technical assistance in voting technologies.<sup>19</sup>

59. The July 2006 EAC interim assessment of Ciber reported that:

CIBER has not shown the resources to provide a reliable product. The current quality management plan requires more time to spend on managing the process than they appear to have available and it was clear during the assessment visit that they had not accepted that they have a responsibility to provide quality reviewed reports that show what was done in testing. The ITA Practice Director indicated during the assessment that their difficulties were that corporate CIBER did not allow for the personnel resource time for quality management functions but there may be other alternatives for allocating the

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<sup>18</sup> 9 NYCRR § 6209.6(d).

<sup>19</sup> 42 USC §§ 15321-15330.

resources.

In addition, during review, ITA Practice Director indicated that the testing for a product tends to either use vendor developed tests or new tests developed specifically for the product—they have no standard test methods defined. This makes their testing dependent on the vendor input and vulnerable to unique vendor interpretations rather than a core validated set of internal reference for training and testing.<sup>20</sup>

60. The report recommended that Ciber, Inc. stop testing voting systems unless it could get “the support of Wyle or a commitment from corporate CIBER to provide management assistance in getting the quality system functioning and fuller reporting of results with a review in 120 days.”<sup>21</sup> In August 2006, the EAC granted interim accreditation to two ITAs; Ciber did not receive interim accreditation.<sup>22</sup> EAC re-assessed Ciber from December 6 to 8, 2006, and found improvements; however, it ultimately terminated Ciber’s application for interim accreditation.<sup>23</sup>

61. Due in part to this problem, it became clear that New York would not be able to replace its lever voting machines by September 1, 2007, which was the deadline for implementation originally set forth in HAVA. The state added a new section to ERMA which provides that lever voting machines shall be replaced when new voting systems

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<sup>20</sup> Steven V. Freeman, Assessor, EAC Interim Accreditation, Independent Test Authorities, Assessment Report, Ciber and Wyle, at 3, *available at* [http://www.eac.gov/voting%20systems/docs/accreditation-docs-interim-ciberwyleassessmentjuly2006.pdf/attachment\\_download/file](http://www.eac.gov/voting%20systems/docs/accreditation-docs-interim-ciberwyleassessmentjuly2006.pdf/attachment_download/file).

<sup>21</sup> *Id.*

<sup>22</sup> Letter from Donetta Davidson, EAC Chair, to the Secretary of State (June 13, 2007), *available at* [http://www.eac.gov/voting%20systems/docs/lettersstakeholdersciber.pdf/attachment\\_download/file](http://www.eac.gov/voting%20systems/docs/lettersstakeholdersciber.pdf/attachment_download/file).

<sup>23</sup> Press Release, EAC, Commission Votes to Terminate CIBER Interim Accreditation (June 13, 2007), *available at* [http://www.eac.gov/News/press/docs/06-13-07-commission-votes-to-terminate-ciber-interim-accreditation-application/attachment\\_download/file](http://www.eac.gov/News/press/docs/06-13-07-commission-votes-to-terminate-ciber-interim-accreditation-application/attachment_download/file).

have been certified by the board as being compliant with Election Law 7-202.

62. Because of the problems with Ciber, the SBOE was forced to abandon the progress it had made in testing the systems and restart the process with a new vendor, SysTest Labs, LLC. (“SysTest”).

63. Like Ciber, the EAC found that SysTest’s testing practices were seriously flawed.

64. On August 8, 2008, the United States Department of Commerce, National Institute for Standards and Technology (“NIST”), sent a letter to SysTest raising a serious concern that SysTest may be engaging in “improper behavior between an independent testing laboratory and its client” by “allowing and inviting manufacturers to play an inappropriate role in the development of test plans.”<sup>24</sup>

65. On October 28, 2008, NIST notified SysTest of its decision to suspend its accreditation of SysTest’s electronic voting testing program due to “SysTest’s lack of properly documented and validated test methods;” “[t]esting conducted by unqualified or untrained personnel;” and “[i]mproper assurances made to manufacturers regarding testing outcomes.”<sup>25</sup>

66. On October 29, 2008, the Federal Election Assistance Commission notified SysTest of its intent to suspend its Voting System Test Laboratory accreditation.<sup>26</sup>

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<sup>24</sup> Letter from Jon M. Crickenberger, NIST/NVLAP Program Manager, to James Nilius, Senior Director, Senior Director VSTL, SysTest Labs, Aug. 8, 2008, *available at* <http://vote.nist.gov/NVLAP/SysTest-102808.pdf> (last visited Feb. 2, 2010).

<sup>25</sup> Letter from Jon M. Crickenberger, NIST/NVLAP Program Manager, to Mark Phillips, Vice President of Compliance Services, SysTest Labs, Incorporated, Oct. 28, 2008, *available at* <http://vote.nist.gov/NVLAP/SysTest-102808.pdf> (last visited Feb. 2, 2010).

<sup>26</sup> Letter from Jon Brian Hancock, Director, Testing and Certification Program, Election Assistance Commission to Mark Phillips, Vice President of Compliance Services, SysTest Labs, Incorporated, Oct. 29, 2008, *available at* <http://vote.nist.gov/NVLAP/SysTest-102808.pdf> (last visited Feb. 2, 2010).

67. After SysTest's accreditation was suspended, the New York State Board of Elections continued to work with SysTest, although the testing itself was temporarily stopped.

68. During this time, before voting systems were certified, the New York State Board of Elections asked local boards to decide which system to adopt.

69. On March 5, 2009, the EAC lifted the suspension of SysTest's Voting System Test Laboratory accreditation.

70. Around December 2009, SysTest completed its testing of Election Systems & Software's ("ES&S") Unity Suite 3.0.0.0 Voting System and DS-200 v.2.1.0.0 ("ES&S Voting System") precinct-based optical scan system, the AutoMARK Voter Assist BMD, and the Dominion Democracy Suite 3.0.3 Voting System, in accordance with Election Law section 7-201.<sup>27</sup>

71. Shortly thereafter, the Citizen's Election Modernization Advisory Committee met to review the results of the test. (ERMA requires the establishment of a Citizen's Election Modernization Advisory Committee which "shall have access to each machine or system submitted for examination and assist the state board of elections in the examination of the voting machines or systems pursuant to this section by recommending which machines or systems meet the requirements of section 7-202 of this title and the Federal Help America Vote Act." The SBOE is required to take the recommendation into consideration when determining whether to certify a system.)

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<sup>27</sup> SBOE Adopted Resolutions, *available at*  
[http://www.elections.state.ny.us/SBOE/hava/Voting\\_Machines/Testing/ESSScannerResolutionFinal12152009.pdf](http://www.elections.state.ny.us/SBOE/hava/Voting_Machines/Testing/ESSScannerResolutionFinal12152009.pdf);  
[http://www.elections.state.ny.us/SBOE/hava/Voting\\_Machines/Testing/AutoMARKResolutionFinal12152009.pdf](http://www.elections.state.ny.us/SBOE/hava/Voting_Machines/Testing/AutoMARKResolutionFinal12152009.pdf);  
[http://www.elections.state.ny.us/SBOE/hava/Voting\\_Machines/Testing/DominionResolutionFinal12152009.pdf](http://www.elections.state.ny.us/SBOE/hava/Voting_Machines/Testing/DominionResolutionFinal12152009.pdf)  
(last visited Feb. 1, 2010).

72. On December 10, 2009, the New York State Citizen Election Modernization Advisory Committee voted on whether to recommend approval of the voting systems that had completed the state's testing program.

73. On December 15, 2009, the Commissioners of the New York State Board of Elections certified Election Systems & Software's ("ES&S") Unity Suite 3.0.0.0 Voting System and DS-200 v.2.1.0.0 ("ES&S Voting System") precinct-based optical scan system, the AutoMARK Voter Assist BMD, and the Dominion Democracy Suite 3.0.3 Voting System, (collectively "Electronic Voting Machines") in accordance with Election Law section 7-201 (the "Certification Resolutions").

Although dismissing the problems, Commissioner Kellner noted that there were "technical security and documentation issues" with the certified systems, suggesting that the problems may be crucially important.<sup>28</sup>

74. After certifying voting systems that did not fully comply with the law, the SBOE forced local boards to decide between the systems in an extremely short timeframe that did not allow for public demonstrations and hearings. This timeframe, which was during the winter holiday period, effectively denied the public any opportunity to be heard on the kind of new voting system that may be in use for decades.

75. In addition, NCBOE staff was not provided with a meaningful and private opportunity for a hands-on inspection and comparison of the two certified systems, so it was forced to rely on vendor promotional materials. A sample voting system was not delivered to the NCBOE until January 27, 2010, roughly two weeks *after* it made its decision.

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<sup>28</sup> *Id.* 25, ¶ 6-7.

76. On January 11, 2010, after intense pressure from the SBOE to finalize its choice, the NCBOE notified the SBOE of its decision to purchase the ES&S Unity Suite 3.0.0.0 Voting System and DS-200 v.2.1.0.0 precinct-based optical scan system and the AutoMARK Voter Assist BMD.

77. Although ES&S appeared to be the better choice of the two voting systems, it is still far less than ideal because there have been numerous problems with ES&S optical scan systems. These problems include problems with model DS200 certified by the SBOE.

78. ES&S is currently the subject of a federal antitrust suit as a result of its acquisition of voting system vendor Diebold, Incorporated on September 2, 2009.<sup>29</sup> According to the complaint, as of the acquisition, ES&S will serve more than 68% of all U.S. election precincts.<sup>30</sup>

79. In 2008 in Pinellas County, Florida, 12 ES&S DS200 optical scanners had to be replaced; some optical scan systems experienced paper jams and some screens froze.<sup>31</sup>

80. In 2008 in Pasco County, Florida, five ES&S D200 optical scan systems malfunctioned.<sup>32</sup>

81. In 2009 in New York, a source code error was discovered by one County Board of

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<sup>29</sup> *Hart Intercivic, Inc. v. Diebold, Inc. et al.* C.A. No. 1:09-cv-678 (D.C. Del. 2009).

<sup>30</sup> *Id.*, Complaint ¶ 33.

<sup>31</sup> Steve Bousquet, et al. *Voter turnout worst in 10 years*, St. Petersburg Times (Aug. 27, 2008) available at <http://www.tampabay.com/news/politics/elections/article785994.ece> (last visited Feb. 11, 2010).

<sup>32</sup> Steve Bousquet, et al. *Voter turnout worst in 10 years*, St. Petersburg Times (Aug. 27, 2008) available at <http://www.tampabay.com/news/politics/elections/article785994.ece> (last visited Feb. 11, 2010).

Elections in pre-election testing. The New York State Board of Elections told counties that they should reconfigure the ballots so that the error would not cause problems. Some Counties never performed testing to reveal the problem. Others did not reconfigure the ballots and their optical scan voting systems stopped functioning.<sup>33</sup>

82. In addition, optical scan systems have been responsible for a whole host of problems at the polls.

83. In Cleveland, some voters in 2004 waited in 14-hour lines due to delays caused by optical scan voting systems.<sup>34</sup> No figures are available to demonstrate the number of voters who were too discouraged by the long lines to exercise their franchise.

84. In Florida in 2004, thousands of voters had to wait in line for hours in order to vote according to media reports.<sup>35</sup> Again, no figures are available to demonstrate the number of voters who were too discouraged by the long lines to exercise their franchise.

85. Long lines and delays at the polls naturally deter voters with limited time from voting.<sup>36</sup>

86. Nassau's limited experience with electronic voting systems suggests that they are less reliable and more subject to tampering than lever voting machines.

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<sup>33</sup> Douglas A. Kellner, Transcript, Meeting of the New York State Board of Elections (Dec. 15, 2009).

<sup>34</sup> Deborah Hastings, Associated Press, *Poll Workers Struggle with E-Ballots*, Nov. 7, 2006, [http://www.boston.com/news/nation/articles/2006/11/07voting\\_machines\\_woes\\_cause\\_early\\_delays](http://www.boston.com/news/nation/articles/2006/11/07voting_machines_woes_cause_early_delays).

<sup>35</sup> David Karp et al., *Biggest Voting Gripe: Long Lines*, ST. PETERSBURG TIMES, Nov. 3, 2004, *available at* [http://www.sptimes.com/2004/11/03/Tampabay/Biggest\\_voting\\_gripe\\_.shtml](http://www.sptimes.com/2004/11/03/Tampabay/Biggest_voting_gripe_.shtml).

<sup>36</sup> *See, e.g.*, Tracy Idell, *Voting Problems Minor, But Frustrating*, San Antonio Express, Nov. 11, 2004, *available at* <http://www.votersunite.org/article.asp?id=3650> (uncharged batteries in voting systems caused a two-hour delay in opening a polling place and dozens of voters had left in frustration or because they were late for work).

87. In 2008, Nassau County ordered and received the Dominion Democracy Suite 3.0.3 Voting System, which it used as a disabled accessible ballot marking device (“BMD”).

88. In 2008, 85% of the 156 Dominion machines shipped to Nassau County from the State Board of Elections had substantial operational flaws that rendered them unusable or required major repairs, even though they had passed the state’s testing procedures. 29 had physical defects or damages, such as a broken side of a printer. 62 failed diagnostic training because of problems with the USB cord and printer. And 42 failed Nassau’s acceptance testing for a variety of reasons, such as nonresponsive key pads and battery failure. And these observations were made before the County was able to fully test the reliability and accuracy of the systems’ source code.

89. In addition, Nassau’s staff discovered a serious—and obvious—security flaw in all of the Dominion machines even though they passed the state’s testing procedures. There was a long open slot in the ballot box that would allow for persons to literally stuff the ballot box with fraudulent ballots.

90. The SBOE’s reaction when Nassau called this to their attention was complete surprise. Upon information and belief, the vendor was required to correct this problem after Nassau County brought it to the SBOE’s attention.

91. BMDs have only been used by a handful of voters.

92. Even though they have been scarcely used, there have been problems in the polling sites: buttons have fallen off, batteries have started to smoke. All of these problems occurred despite the fact that they were tested and authorized by the SBOE.

93. Optical scan voting systems are also vulnerable to malicious interference as

numerous computer scientists have opined.

94. Fraud, even on a small scale, could have devastating effects in Nassau County.

95. As at least one election historian has observed: “A general rule about election fraud is a rather simple one: The smaller the election, the easier it is to steal. Local elections are easier to corrupt than state elections; state elections are easier to corrupt than national ones.”<sup>37</sup>

96. In Nassau County, elections have been extremely close and are, therefore, extremely vulnerable to even the slightest fraud. It is axiomatic that the closer an election is, the more vulnerable it is to fraud.

97. In 2009, incumbent Thomas R. Suozzi lost the election for County Executive by 386 votes out of 254,345 votes cast, a margin of about .15%.

98. In 2009, incumbent David L. Mejias lost the election for County Legislator 14<sup>th</sup> District by 170 votes out of 14,674 votes cast a margin of about 1.2%.

99. Despite passing certification tests, the ES&S voting system can be easily manipulated in a host of ways.

100. The 19<sup>th</sup> Century tactics for committing fraud with paper ballots can be easily replicated in the 21<sup>st</sup> Century.<sup>38</sup> The fact that ballots are pre-printed on special stock with machine-readable codes at the bottom is no obstacle even if an official ballot cannot be obtained from a local board employee prior to the election. For example, on the morning of Election Day, a campaign operative who is a registered voter can obtain a real ballot

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<sup>37</sup> TRACY CAMPBELL, *DELIVER THE VOTE: A HISTORY OF ELECTION FRAUD* 24 (2008).

<sup>38</sup> Tracy Campbell, *The Delicate Art of the Vote*, University of Kentucky College of Arts and Sciences Web site, <http://www.as.uky.edu/academics/insideout/Pages/default.aspx?list=Election%202008%20-%20An%20Arts%20and%20Sciences%20Viewpoint&highlight=3>.

from the poll site, pretend to spoil it, and return a counterfeit spoiled ballot to an unsuspecting poll worker in exchange for a new ballot. The operative can then vote and take the first unspoiled ballot, which is still blank, to a copy machine and copy it onto the correct type of paper with the optical scan machine-readable codes. The operative can then buy votes the same way chain voting was carried out in the 19<sup>th</sup> century.

101. In addition to mechanical malfunction and the risk of fraud, paper ballots present problems in discerning voter intent because voters are prone to making mistakes when they mark a paper ballot. Under the ES&S DS200 voters fill in an oval indicating their choice on the paper ballot. But voters may do other things like putting an X in the circle instead of filling it in; putting a check mark in the circle instead of filling it in; or circling the name, even though, to most of us, it seems patently obvious that what you are supposed to do is fill in the oval. This may pose a problem during the audit or if a recount is necessary.<sup>39</sup>

102. Indeed, the New York State Court of Appeals has recently observed that “[t]he technology is not foolproof, however, and the [optical scan] machine is sometimes unable to record the votes identified on the ballot for various reasons, including deviation by the voter of the recommended manner of marking the boxes on the form, causing some ballots to be rejected as unreadable.” Stewart v. Chautauqua County Board of Elections, et al., 2010 NY Slip Op 01530, at 10 (2010).

103. New York is an “intent of the voter” state. See Hosley v. Valder, 160 A.D.2d 1094, 1096 (3d Dep’t 1990). These scanners can not be programmed to read otherwise

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<sup>39</sup> STEVEN FREEMAN & JOEL BLEIFUSS, WAS THE 2004 PRESIDENTIAL ELECTION STOLEN? 43 (2006) (In 2000, hundreds of Florida voters circled, underlined or checked the name of their presidential candidate of choice instead of filling in an oval on the optical scan ballot; such voters were not counted).

valid ballots nor can they detect markings outside the ballot which would serve to render a ballot void.

104. All of this points to the fact that the new optical scan voting equipment will not comply with New York Law and will provide election results which are dubious at best.

105. The use of paper ballots also opens the door to 19<sup>th</sup> Century election fraud techniques that lever voting machines put an end to.<sup>40</sup> In other jurisdictions, these techniques have been used in recent years to control the elections. It takes no stretch of the imagination to apply these techniques to paper ballots read by optical scan voting systems.

106. Absentee ballots were the source of massive fraud in the 1997 election of Xavier Suarez as mayor of Miami. Suarez was removed from office after it was discovered that he had forged signatures, paid vote brokers, and tampered with ballots, among other things.<sup>41</sup>

107. In Dillon County, South Carolina, local Democratic Party workers were paid \$10 for each correctly cast absentee ballot, part of which they shared with the voters.<sup>42</sup>

108. In Alexandra County, North Carolina, county employees were convicted of conspiring to cast absentee ballots taken out in the names of nursing home residents.<sup>43</sup>

109. A county welfare director was convicted of distributing welfare food vouchers

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<sup>40</sup> Tracy Campbell, *The Delicate Art of the Vote*, University of Kentucky College of Arts and Sciences Web site, <http://www.as.uky.edu/academics/insideout/Pages/default.aspx?list=Election%202008%20-%20An%20Arts%20and%20Sciences%20Viewpoint&highlight=3>.

<sup>41</sup> *In Re: The Matter of the Protest of Election Returns and Absentee Ballots in the November 4, 1997 Election for the City of Miami, FL*, 707 So. 2d 1170, (3d Dist. Ct. Of App. Fla. 1998).

<sup>42</sup> *U.S. v. Carmichael*, 685 F.2d 903 (4<sup>th</sup> Cir. 1984).

<sup>43</sup> *U.S. v. Odom*, 736 F.2d 104 (4<sup>th</sup> Cir. 1984).

to voters in return for their promises to vote absentee for certain local candidates in the Democratic primary election.<sup>44</sup>

110. In 2009, several Clay County, Kentucky officials were charged with vote buying, among other things.<sup>45</sup> The indictment charged that political candidates pooled \$150,000 to buy votes and that election officials changed votes on the voting systems. Clay County uses an ES&S electronic voting system.

111. In addition to problems inherent in computerized voting systems and paper ballots, the SBOE's expedited timeframe for implementation unduly puts the franchise at risk.

112. In a 2009 report, the SBOE stated that proper implementation requires a great deal of time and effort such as surveying poll sites, drawing floor plans for placement of scanners and privacy booths in the poll sites, and securing new poll sites if existing sites cannot accommodate the new systems; providing extensive training to staff working with Election Management System software; conducting extensive pre-election testing and validating the results of that testing; hands-on training of all Election Day workers; coordinating the safe return of voting system memory cards and keys and paper ballots; and ensuring that voting system storage facilities are "ultimately true service centers and not just warehouses." SBOE, On-Site Review of 2009 General Election Pilot Project (Nov. 3, 2009) (*available at* [http://www.elections.state.ny.us/nysboe/hava/2009\\_on\\_site\\_pilotreview.pdf](http://www.elections.state.ny.us/nysboe/hava/2009_on_site_pilotreview.pdf)).

113. In addition to procedures the state has identified, boards have to educate the public and candidates about the new systems, procure trucking contractors for

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<sup>44</sup> *U.S. v. Garcia*, 719 F.2d 99 (5<sup>th</sup> Cir. 1984).

<sup>45</sup> *USA v. Maricle et al.*, 6:09-cr-00016-DCR, (E.D. Ken. 2009).

transportation of the sensitive new equipment to and from the polling place, recruit new poll workers who are comfortable with computer technology, and design new security systems and procedures to ensure that these systems are kept safe from malicious interference.

114. All of these steps require a minimum of 10 months. Yet the September primary elections are less than six months away.

**Unlike Lever Voting Systems, Computerized Voting Systems Have Been Demonstrated to Be Easily Vulnerable to Reprogramming Without Detection**

115. For over a century lever machines have proven to be especially resistant to tampering. Not only must each individual lever machine be separately manipulated, making any scheme to rig the outcome of elections difficult and time-consuming, but the physical evidence of lever machine tampering is usually highly visible and therefore easy to detect.

116. Whereas tampering on a lever voting machine is plainly visible, tampering of software is hidden, making it often impossible to detect. “This is a classic computer security problem. Whoever gets into the machine first wins. So if the Trojan horse software is in there first, you ask it to test itself -- it will always lie to you and tell you everything is fine. And no matter what testing code you try to add after the fact, it’s too late. It can now create a world where the testing software can’t tell that the machine has been compromised, even though it has...”<sup>46</sup>

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<sup>46</sup> Dan Wallach, Rice University computer security expert has examined electronic voting systems since 2001, and has testified about voting security issues before government bodies in the U.S., Mexico, and the European Union. Quote from *Peering through the chinks in the armor of high-tech elections*, May 27, 2007 <http://www.votersunite.org/info/PeeringThruChinks.asp>

117. The use of software-based voting systems therefore inserts a hitherto non-existent vulnerability to voting in New York; the risk of widespread, systematic fraud.

118. A precinct-based optical scan voting machine, like the ES&S DS200 that was certified for use by SBOE, consists of an Election Management System (EMS) contained on a central computer and a number of optical scan voting terminals at the precincts themselves where voters cast their ballots.

119. The EMS system programs all the optical scan voting terminals with data specific to that election, i.e. ballot configuration, candidates running, etc., and uses a memory card of some kind (such as a USB flash drive) to transfer this information from the EMS system to the individual scanners.

120. While local board of election officials will be responsible for the ballot programming on the computer where the EMS system resides, the operation of the software inside the EMS computer is not observable to them.

121. A compromised EMS computer could not only alter the programming of the ballot and tabulation functions of EMS, but could alter the programming of every optical scanner in a jurisdiction, despite New York's "closed network" requirement. In fact, the use of removable memory cards forms a "network" of its own, originating from the central EMS computer, and no transmission of data via internet, radio waves, or other wireless means would be necessary to commit wide-scale fraud.

122. Vulnerability to attack also flows from the individual optical scanners to the EMS system, where an attack against a single machine has the potential of compromising the EMS and could impact a large number of votes. This very vulnerability was recognized in California's source code review for a Diebold system in 2007:

An attack could plausibly be accomplished by a single skilled individual with temporary access to a single voting machine. The damage could be extensive malicious code [that] could spread to every voting machine in polling places and to county election servers.<sup>47</sup>

123. The very nature of this system repeatedly exposes the election results to undetectable outcome-determinative exploits for which the certification process is not a barrier.

[F]unctionality – the critical elemental to be certified during the certification process – can be modified every time an election is prepared. Functionality is downloaded separately into each and every machine, via memory card, for every slection. With this design there is no way to verify that the certified or even standard functionality is maintained from one voting machine to the next.<sup>48</sup>

124. Concerns with the security of electronic voting systems is not an issue unique to New York, but have been well-documented since the rise of electronic voting machines in the last decade.

125. In 2003, the Congressional Research Service, reviewed scientific studies of different voting systems and found that:

The ballot itself consists of redundant electronic records in the machine's computer memory banks, which the voter cannot see.... [I]f the machine recorded a result in its memory that was different from what the voter chose, neither the voter nor an observer would know....

The same is true with a computerized counting system when it reads punch cards or optical scan ballots. Even if the ballot is tabulated in the precinct and fed into the reading device in the presence of the voter, neither the voter nor the poll worker manning the reader can see what it is recording in its memory.<sup>49</sup>

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<sup>47</sup> California Secretary of State, *Source Code Review of the Diebold Voting System*, July 20, 2007 (available at [http://www.sos.ca.gov/elections/voting\\_systems/ttbr/diebold-source-public-jul29.pdf](http://www.sos.ca.gov/elections/voting_systems/ttbr/diebold-source-public-jul29.pdf)).

<sup>48</sup> Harry Hursti, Black Box Voting, *Security Alert: July 4, 2005, Critical Security Issues with Diebold Optical Scan Design* (available at <http://blackboxvoting.org/BBVreport.pdf>).

<sup>49</sup> CRS Report for Congress, 2003, *supra*.

126. A 2006 report commissioned by California's Secretary of State found that optical scanners can be attacked without detection:

There would be no way to know that any of these attacks occurred; the canvass procedure would not detect any anomalies, and would just produce incorrect results. The only way to detect and correct the problem would be by recount of the original paper ballots.<sup>50</sup>

127. In 2006, the University of Connecticut published its assessment of the ease with which election results can be falsified on an optical scanner:

An Accu-Vote Optical Scan can be compromised with off-the-shelf equipment in a matter of minutes even if the machine has its removable memory card sealed in place. The basic attack can be applied to effect a variety of results, including entirely neutralizing one candidate so that their votes are not counted, swapping the votes of two candidates, or biasing the results by shifting some votes from one candidate to another....

Such vote tabulation corruptions can lay dormant until Election Day, thus avoiding detection through pre-election tests.... [V]oters could be unaware of any discrepancies between their cast votes and the internally recorded votes.<sup>51</sup>

128. In July 2007, a report commissioned by Florida's Secretary of State, found that optical scanners could be subverted without detection. With only brief access to a machine, someone can replace a memory card with one preprogrammed to read one candidate's votes as counting for another. "The attack can be carried out with a reasonably low probability of detection...."<sup>52</sup>

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<sup>50</sup> California Voting Systems Technology Assessment Advisory Board (VSTAAB), *Security Analysis of the Diebold AccuBasic Interpreter*, February 14, 2006 available at [http://ss.ca.gov/elections/voting\\_systems/security\\_analysis\\_of\\_the\\_diebold\\_accubasic\\_interpreter.pdf](http://ss.ca.gov/elections/voting_systems/security_analysis_of_the_diebold_accubasic_interpreter.pdf) (confirming the findings of Hursti 2005, *infra*)

<sup>51</sup> Univ. of Connecticut Voting Technology Research Center, *Security Assessment of the Diebold Optical Scan Voting Terminal*, October 30, 2006 available at [http://voter.engr.uconn.edu/voter/Report-OS\\_files/uconn\\_report-os.pdf](http://voter.engr.uconn.edu/voter/Report-OS_files/uconn_report-os.pdf)

<sup>52</sup> Florida Dept. of State, Security and Assurance in Information Technology Laboratory (SAIT) *Software Review and Security Analysis of the Diebold Voting Machine Software*, July 27, 2007 available at <http://election.dos.state.fl.us/pdf/SAITreport.pdf>

129. The July 2007 Florida SAIT study also detailed how an optical scanner could be exploited to compromise election results:

Flaws in the Optical Scan software enable an unofficial memory card to be inserted into an active terminal. Such a card can be preprogrammed to swap the electronically tabulated votes for two candidates, reroute all of a candidate's votes to a different candidate, or tabulate votes for several candidates of choice toward a different candidate.<sup>53</sup>

130. In December 2007, Ohio Secretary of State Jennifer Brunner released her Evaluation and Validation of Election Related Equipment, Standards and Testing (EVEREST) study,<sup>54</sup> which showed that memory cards in optical scanners could be disabled without the software indicating a problem.

131. Computer scientist Harri Hursti, who subverted the zero count on an optical scanner, concluded that corrupted optical scanners could survive “scrutiny of almost anything short of a full manual recount.”<sup>55</sup>

132. Hursti also demonstrated how in a one-step process the EMS central tabulator’s accuracy and safeguard could be easily subverted so as to:

[M]odify the election results reports so that they do not match actual vote data.... produce false optical scan reports to facilitate checks and balances.... [and] mimic votes from many precincts at once while transmitting votes to the central tabulator....<sup>56</sup>

133. More recently, in 2008 a “red-team”<sup>57</sup> was commissioned by the California Secretary of State to conduct an in-depth analysis of optical voting terminals, and the ES&S Unity 3.0.1.1 Voting System in particular (a similar version to the EMS software

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<sup>53</sup> Florida SAIT, July 27, 2007, *supra*.

<sup>54</sup> Ohio Secretary of State, webpage providing links to EVEREST Testing Reports <http://www.sos.state.oh.us/sos/info/everest.aspx?Section=3180>

<sup>55</sup> Hursti, *supra*

<sup>56</sup> Hursti, *supra*.

<sup>57</sup> A team without access to the source code of the equipment or any support from the vendor.

certified for use in New York). The team revealed more than a dozen attacks exploiting vulnerabilities at the cryptographic level, the removal media, the EMS, and in the voting terminal, including forging audit logs in the EMS.<sup>58</sup>

134. However, malicious attacks aren't the only security issues present in the machine. In fact, outright failures of voting equipment cause disenfranchisement of voters and chaos amongst election workers who simply don't understand why the machine is failing because of its invisible workings. In 2009 for example, repeated failures of a voting terminal in New York's 23<sup>rd</sup> congressional district cast doubts about the results in that election.

135. Ultimately, even New York's rigorous certification process cannot "ensure the integrity and security of the voting machine or system," NY Election Law § 7-202(1), because such testing can only reveal the presence of errors, or "bugs," but cannot ascertain that the software system itself is correct and contains no flaws.

136. Optical scanners and the EMS system software contains hundreds of thousands of lines of code (not including the substantial software in underlying operating systems) and testing only subjects code to several possible scenarios of failure and structural review (e.g., whether the code itself is formatted in proper coding formats and "looks" correct). Clearly, testing that does not find errors in such limited sets of scenarios does not prove that the system is flawless or does not contain artfully crafted malicious code which avoids those scenarios.

137. Furthermore, pre-election testing by local boards is inherently flawed because such testing only proves the absence of error or tampering during the pre-election test and

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<sup>58</sup> Jacob D. Stauffer, F.C.M.G.F.R.T.P.M, Red Team testing of the ES&S Unity 3.0.1.1 Voting System, February 15, 2008.

for those pre-selected ballots that are run through the scanner. This kind of testing cannot detect the presence of error, does not prove that there are no errors, and cannot demonstrate that the voting system will accurately count votes during the election because tampering could still ensue at the conclusion of pre-election testing or be programmed to avoid this kind of predictable testing (such as by way of a “time bomb,” code which activates only at specific times, such as during election day, and which deletes itself at the conclusion of election day).

138. As noted by prominent computer scientist Dan Wallach:

[R]egardless of whether the software [...] is improved to better resist attacks, bugs will always occur and the risk of tampering cannot be overcome. In particular [...] while ‘logic-and-accuracy testing’ can sometimes detect flaws, it will never be comprehensive; important flaws will always escape any amount of testing.<sup>59</sup>

139. Upon information and belief, the SBOE will be sending any updates, patches, or other modifications of the voting system software via a common carrier, such as UPS or Fed-Ex.

140. Unfortunately, this procedure does not create a secure chain of custody between the software sent by the SBOE and that received by the local boards of election.

141. By contrast, when currency is transferred physically to a financial institution, a secure courier is typically used to deliver the money from one place to another, an appropriate response to the value of the object being delivered.

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<sup>59</sup> Dan S. Wallach, Testimony to the National Institute of Standards and Technology and the Election Assistance Commission Technical Guidelines Development Committee, September 20, 2004 (available at <http://www.cs.rice.edu/~dwallach/pub/eac-tgdc-20sep2004.pdf>).

142. It goes without saying that the SBOE should treat the software, which is now solely responsible for ensuring that votes are counted, with the same level of respect and security as the mere transfer of physical currency to a bank or other institution.

143. In the absence of such secure delivery, local boards of election cannot with any certainty insure that the software received is identical to that sent by the SBOE, as upon information and belief, the software received could contain viruses or other modifications which would effectively masquerade itself as the correct software, defeating even software validation procedures.

AS AND FOR A FIRST CAUSE OF ACTION  
(Violation of N.Y. Const. Art. I Sec. 1)

144. Plaintiffs repeat and reallege pars. 1 through 143 as if fully set forth herein.

145. ERMA is unconstitutional because it requires plaintiffs and other local boards of elections to use unsecure voting machine technology that threatens to disenfranchise voters in violation of Article I, Section 1 of the New York State Constitution.

146. Article I, Section 1 of the New York State Constitution mandates that “[n]o member of this state shall be disenfranchised, or deprived of any of the rights and privileges secured to any citizen thereof....”

147. Under Article I, Section 1, governmental entities have a duty to refrain from interfering with rights possessed by the citizenry. The section “has been construed not as a grant or source of rights [to the individual], but as a shield against unwarranted interference with existing rights by any department of the government.” Van Allen v. McCleary, 27 Misc 2d 81, 83-84 211 N.Y.S.2d 501505 (Sup. Ct. Nassau Co. 1961).

148. At the forefront of the rights protected from governmental interference under Article I, Section 1 is the fundamental right to vote. See Rosenstock v. Scaringe, 54 A.D.2d 779, 387 N.Y.S.2d 716, 717 (3<sup>rd</sup> Dept.), aff'd 40 N.Y.2d 563, 388 N.Y.S.2d 876 (1976). See also N.Y. Const. Article 2, Section 1: “Every citizen shall be entitled to vote at every election for all officers selected by the people and upon all questions submitted to the vote of the people...”

149. ERMA jeopardizes and interferes with the right to vote because it requires the use of electronic voting machine technology that is inordinately vulnerable to systemic tampering that can manipulate, alter, falsify and nullify votes cast by the electorate, resulting in widespread disenfranchisement.

150. By compelling the Nassau County Board of Elections to comply with ERMA, plaintiffs are being forced to violate the constitutional proscription against government disenfranchisement of New York State citizens. See County of Oswego v. Travis, 16 AD3d 733, 791 N.Y.S.2d 189 (3d Dept. 2005). Plaintiffs therefore have capacity and standing to sue to challenge ERMA’s implementation.

AS AND FOR A SECOND CAUSE OF ACTION  
(Violation of N.Y. Const. Article II, Sec.8)

151. Plaintiff realleges pars. 1 through 150 as if fully set forth herein.

152. In requiring NCBOE to replace its mechanical lever-based voting machines with software-based electronic voting machines, ERMA violates the constitutional imperative under Article II, § 8 of the N.Y.S. Constitution to ensure bi-partisan representation in the setting of the ballot and the counting or recording of votes.

153. Article II, § 8 of the N.Y.S. Constitution requires that “All laws creating, regulating or affecting boards or officers charged with the duty of... recording or

counting votes at elections, shall secure equal representation of the two political parties which, at the general election next preceding that for which such boards or officers are to serve, cast the highest and next highest number of votes.”

154. Under this section, a board of election must afford bi-partisan representation where personnel are setting ballots or counting or recording votes cast in an election. See Clark v. Cuomo, 66 N.Y.2d 185, 191 (1985).

155. The local election personnel who will be required to implement ERMA, the SBOE Resolutions, and to administer and oversee the operation of the electronic voting systems, are charged with the responsibility to record or count votes at elections. Therefore, the constitutional requirement of bipartisanship is fully applicable to these activities.

156. As the courts have long-recognized, bipartisanship is an essential safeguard to the integrity of the election process, as vividly described in the following passage:

The Election Law throws every possible safeguard about the canvass of the vote, and the proclamation of the result. The election is conducted by a *bi-partisan board*. Watchers representing *both parties* are present at the count. After the voting machine is closed and locked, the counter compartment is examined in the presence of the watchers and all other persons lawfully in the polling place. The chairman of the board, under the scrutiny of an inspector of a *different political faith*, announces the result of the vote of each candidate as shown by the counter numbers. If he should inadvertently make a mistake there is a man of the *opposing party* at his elbow to correct the error. Watchers of *both parties* also examine the figures in the counter compartment. The proclamation of the result of the votes cast is deliberately announced by the chairman of the board. He reads the name of each candidate with the designating number, and the letter of his counter, and the vote registered on such counter. During such proclamation ample opportunity is given to any person lawfully present to compare the result so announced with the counter tallies of the machine, and any necessary corrections can then and there be made by the board. The counter compartment is kept open until the official returns have been fully completed and verified. During all this time any candidate or watcher who may desire is at liberty to examine the counter numbers. The vote is

taken down by two inspectors of *opposite political faith* from each other, and the returns are filled out and certified by all the inspectors. After all this is done the machine is closed and locked....With all these precautions the rights of the various candidates are well protected.... “ In Re Barrett ,12 Misc 735, 202 N.Y.S. 20, 23 (Sup. Ct Onondaga Cty 1923) rev'd on other grnds 209 A.D. 217, 204 N.Y.S. 705 (4th Dept. 1924) (emphasis added).

See also Metz v. Maddox, 189 N.Y. 460, 468 (1907) (“Now it was the count, in which at all times there has been the greatest danger of fraud, that the Constitution intended to safeguard, and the people by the Constitution determined that the best way to safeguard the count was to require it to be made by a bi-partisan board.”

157. ERMA has made it impossible for NCBOE to comply with the constitutional mandate of bipartisanship. Instead, ERMA has effectively removed the responsibility to record and count votes at elections from the local boards and placed it into the hands of third-party software engineers and the manufacturers of the Electronic Voting Machines.

158. With mechanical lever machines, the operation of the vote recording mechanism is plainly visible to non-expert poll workers. The optical scanning computer equipment forced upon election officials prevents them from knowing whether the software-based machines are accurately counting and tabulating votes. It is not physically possible for election officials to observe the manner in which the electronic machines are operating and the testing available is inadequate to the task of preventing fraud.

159. The checks and balances of bipartisan administration are replaced with a system in which the power to determine electoral results is vested in vendors and their computer technicians. The election officials are reduced to parroting what the software has invisibly counted and recorded the vote to be. Instead of election officials reporting the results by directly reading them from mechanical voting machines, the officlas cannot

read the machines at all -- he or she merely reports what the software tells him to do. The final tabulations are the result of processing of bits and bytes, through a patchwork of programming that is wholly out of control of the election officials. Under ERMA, it is now the third-party software engineers who actually are responsible for both counting and recording the votes.

160. ERMA therefore violates the protections afforded by Article II, § 8 of the N.Y.S. Constitution, which ensures the electorate that no one interest, and no one party, has exclusive control of or responsibility for determining election results. ERMA effectively shuts out both the electorate, and the bi-partisan Boards of Election, from the recording and vote counting process.

AS AND FOR A THIRD CAUSE OF ACTION  
(Unconstitutional delegation)

161. Plaintiff realleges pars. 1 through 160 as if fully set forth herein.

162. ERMA is unconstitutional because it mandates the use of voting machine technology that requires local boards to delegate their official responsibilities to private vendors.

163. The right to vote is expressly guaranteed by the New York State Constitution Article II, Section 1. Voting rights are the cornerstone of the democracy. As the United States Supreme Court has observed: "The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." Reynolds v. Sims, 377 U.S. 533, 555, n. 29 (1964).

164. The constitutionally guaranteed right of suffrage is meaningless unless votes are counted accurately and honestly. "Obviously included within the right to choose, secured

by the Constitution, is the right of qualified voters within a state to cast their ballots and have them counted...There is more to the right to vote than the right to mark a piece of paper and drop it in a box or the right to pull a lever in a voting booth. The right to vote includes the right to have the ballot counted..." Id. (citations omitted).

165. Article II, Section 8 of the New York State Constitution makes clear that the duty of "receiving, recording and counting of votes at elections" shall be carried out by lawfully constituted "boards or officers."

166. In light of Article II, Section 8 of the New York State Constitution and given the overriding importance of the right to vote in a free society, the duty to ensure the integrity of the vote count cannot be legitimately delegated to private vendors. Nevertheless, the electronic voting machines mandated by ERMA do precisely that. ERMA therefore effectively divests local boards of their responsibility to supervise and verify the accuracy of the tabulation of election results, and unlawfully delegates that duty to private vendors and their technicians. This constitutes an unconstitutional delegation of an essential sovereign function of government to a private party. General Elec. Co. v New York State Dept. of Labor, 936 F.2d 1448 (2d Cir. 1991); Szold v Outlet Embroidery Supply Co., 274 N.Y. 271, 8 N.E.2d 858 (1937); Washington ex rel. Seattle Tit. Trust Co. v Roberge, 278 U.S. 116, 49 S. Ct. 50, 73 L. Ed. 210 (1928); Eubank v. Richmond, 226 U.S. 137 (1912); Geo-Tech Reclamation Indus., Inc. v Hamrick, 886 F.2d 662 (4<sup>th</sup> Cir. 1989); Matter of Fink v Cole, 302 N.Y. 216, 97 N.E.2d 873 (1951); Murtha v Monaghan, 7 Misc. 2d 568, 169 N.Y.S.2d 137 (N.Y. Sup. Ct. 1957); aff'd 5 A.D.2d 695, 169 N.Y.S.2d 1010 (2d Dept 1957); 4 N.Y.2d 897, 174 N.Y.S.2d 648, 151

N.E.2d 83 (1958); Matter of Medical Socy. of State of N.Y. v Serio, 100 N.Y.2d 854, 768 N.Y.S.2d 423, 800 N.E.2d 728 (2003).

AS AND FOR A FOURTH CAUSE OF ACTION  
(Violation of Article II, § 7 of the New York Constitution)

167. Plaintiff realleges pars. 1 through 167 as if set forth fully herein.

168. ERMA, by requiring the use of optical scan voting machines which do not preserve secrecy in voting, violates Article II, § 7 of the New York Constitution.

Similarly, the SBOE's December 15, 2009 resolution certifying the use of the Electronic Voting Machines, is arbitrary, capricious, and contrary to law as it requires the use of voting systems which violate the New York Constitution.

169. Article II, § 7 of the New York Constitution provides that: "All elections by the citizens... shall be by ballot, or by such other method as may be prescribed by law, provided that secrecy in voting be preserved."

170. The policy of the State of New York is "to preserve the secrecy of the ballot." Longo v. D'Apice, 154 A.D.2d 726, 727 (2d Dep't 1989).

171. However, ERMA and the Certification Resolutions, by requiring the use of optical scan voting machines, violate this sacrosanct policy of the conduct of elections in New York.

172. When voters insert a ballot into the Electronic Voting Machines the ballot is scanned and then deposited into a bin below the scanner, in the order in which they are inserted.

173. The Electronic Voting Machines do not scramble the order of the ballots in any way.

174. A voter's identity could therefore be easily linked to their ballot by observation of the order in which ballots are inserted or by reference to the order of signatures in the registration book.

175. Therefore, ERMA violates Article II, § 7 of the New York State Constitution by requiring the use of voting systems which do not preserve "secrecy in voting."

176. Likewise, the Certification Resolutions were arbitrary, capricious, and in violation of law because SBOE certified Electronic Voting Machines that violate Article II, § 7 of the New York State Constitution as the certified Electronic Voting Machines do not provide that "secrecy in voting be preserved."

177. By way of comparison, the lever voting machines completely preserve the secrecy of a voter's vote.

AS AND FOR A FIFTH CAUSE OF ACTION  
(Impermissibly disregards voter intent)

178. Plaintiffs repeat and reallege pars. 1 through 177 as if fully set forth herein.

179. The Electronic Voting Machines certified for use by SBOE impermissibly disregard voter intent by potentially not counting votes where the voter has either voted erroneously for too many candidates in a given race ("overvote") or has not voted for a given candidate in a race at all ("undervote").

180. "Where the intent of the voters is apparent... it should not be frustrated by technical rules." Hosley v. Valder, 160 A.D.2d 1094, 1096 (3d Dep't 1990). This reasoning readily applies to frustration by technical *devices* as well.

181. The Court of Appeals has recently reinforced the well-established policy that where "ballots clearly indicate the voters' selections for candidates [they] should be

counted.” *Stewart v. Chautauqua County Board of Elections, et al.*, 2010 NY Slip Op 01530, at 10 (2010).

182. Furthermore, the SBOE’s regulations, 6 N.Y.C.R.R. § 6210.13(A)(3), provide that:

A [voter’s] mark is considered valid when it is clear that it represents the voter's choice and is the technique consistently used by the voter to indicate his or her selections. Such marks may include, but are not limited to, properly filled in voting position targets, cross mark "X", a checkmark, circles, completed open arrow, or any other clear indication of the voter's choice.

183. The Electronic Voting Machines provide a prompt on its small display screen to the voter that an undervote or overvote has been detected, but if the voter misunderstands, does not see, or otherwise fails to follow the prompt correctly, the machines will accept the ballot but not count the voter’s vote for those candidates. Overvoting or undervoting can be caused by a voter improperly marking a ballot such that the voting machines cannot read it for some reason.

184. The Electronic Voting Machines do not alert election personnel that a ballot may contain an overvote or undervote.

185. The Electronic Voting Machines certified by the SBOE are unable to process ballots that do not fill in the bubbles on the scannable ballot, such as the marks recognized as “valid” by the SBOE.

186. Thus, the Electronic Voting Machines violate 6 N.Y.C.R.R. § 6210.13(A)(3) by retaining ballots which may contain valid indications of voter intent, but which are unable to be counted by the machines and which do not alert election personnel to the potentially valid, but uncounted, ballot.

187. As a result, because the Electronic Voting Machines certified by the SBOE do not honor New York's tradition of recognizing voter intent, votes may be lost, especially in the case of overvoted ballots.

188. In fact, a recent study by the Florida Fair Elections Coalition (FFEC) showed that voters who used the ES&S DS200 (the identical system to the one Nassau County will be using), the only system used in Florida which does not automatically return overvoted ballots, had an overvote rate on Election Day 2008 that was eighteen times higher than that of any other system used in Florida. See FFEC, [Examining Florida's High Invalid Vote Rate in the 2008 General Election](#) (2009) (available at [http://www.ffec.org/documents/Invalid\\_Vote\\_Report\\_Revised\\_23June2009.pdf](http://www.ffec.org/documents/Invalid_Vote_Report_Revised_23June2009.pdf)).

189. The Brennan Center for Justice estimated that if New York had an overvote rate as high as that found in Florida, as many as "40,000 votes would be lost for the top of the ticket contest in a major election year." See Brennan Center for Justice, [Letter to New York State Board of Elections Regarding Overvotes on Optical Scanners](#), February 4, 2010 (available at [http://www.brennancenter.org/content/resource/letter\\_to\\_new\\_york\\_state\\_board\\_of\\_elections\\_regarding\\_overvotes\\_on\\_optical\\_/](http://www.brennancenter.org/content/resource/letter_to_new_york_state_board_of_elections_regarding_overvotes_on_optical_/))

190. The Electronic Voting Machines certified for use in New York by the SBOE are a threat to the integrity of elections and the long-standing view that a voter's intent should be honored.

191. Therefore, the SBOE acted arbitrarily, capriciously, and contrary to law in certifying Electronic Voting Machines that violate New York law.

AS AND FOR A SIXTH CAUSE OF ACTION  
(Arbitrary and Capricious Agency Action)

192. Plaintiff repeats and realleges pars. 1 through 191 as if set forth fully herein.

193. The SBOE's delay in certifying the optical scan machines until December 15, 2009 places an impossible burden of attempting to conduct elections within the terms of the Constitution and the Election Law on local boards of elections, including Nassau's board, threatens to throw the September 2010 primary and the November 2010 general election into disarray and is therefore arbitrary, capricious, an abuse of discretion and contrary to law. See N.Y CPLR Section 7803(3). In addition, in failing to certify machines in time for them to be properly deployed in the September primary, the SBOE has failed to perform a duty enjoined upon it by State law, including ERMA.

194. In order to deploy the new voting machines in time for the Fall 2010 elections, would have to take the following time consuming steps:

- a. Procuring adequate climate controlled and electrified storage – three to six months. Until the SBOE certified the ES&S DS200, 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 suffer irreparable harm by being 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 suffer irreparable harm by incurring 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, HAVA-compliant 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 suffer irreparable harm by not being 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. 6901.1(1)). 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.

195. Given the resources available to the NCBOE, it is estimated that it would take more than ten to fourteen months to carry out these tasks in a reasonably prudent and careful manner. Attempting to rush the implantation of ERMA would create chaos in the Fall elections.

196. Local boards were not legally permitted to select a new machine for deployment prior to SBOE certification. Because the SBOE did not certify the new voting machines until December 15, 2009, the local boards, including NCBOE, have had inadequate time to take the necessary preparatory steps to roll-out the new machines. Forcing the local boards to deploy the machines without sufficient preparation would potentially create chaos, confusion disarray in the Fall 2010 election process, cast doubt upon the legitimacy of the elected candidates and result in large scale disenfranchisement of voters. It is therefore arbitrary, capricious and an abuse of discretion for the SBOE to delay certification of the new machines until December 15, 2009, while requiring deployment in time for the Fall 2010 elections.

197. The delayed certification was also contrary to New York State election law, including ERMA, which must be read to mandate SBOE certification in sufficient time for the local boards to be able to carry out their duty to deploy the new machines in a way that will safeguard the integrity of the election process.

198. Before local boards of elections could use new voting machines and systems, ERMA required the SBOE to subject all proposed voting machines and systems to thorough review and testing and to certify and approve voting machines and systems as

meeting certain specific statutory criteria, including features which “ensure the integrity and security of the voting machine or systems” Elec. Law Secs. 7-201 and 7-202 (r).

199. On December 15, 2009, the SBOE completed its certification and approval process, certifying the Dominion Democracy Suite 3.0. 3 Voting System optical scan voting system and the ES&S Unity Suite 3.0.0.0 and DS-200 v. 2.1.0.0 precinct-based scanner optical scan voting system.

200. Despite the fact that approval and certification by the SBOE was a legal prerequisite to selection of a voting machine by the local boards of elections, on January 4, 2008, the SBOE directed and mandated local boards to select a voting system by February 8, 2008, nearly two years before the December 15, 2009 approval and certification.

201. Directing local boards to select voting machines prior to conducting and concluding the certification and approval process demonstrates that the process was a mere formality and the approval of the Dominion and ES&S machines was a foregone conclusion.

202. In view of the fact that its outcome was a forgone conclusion, the approval and certification was arbitrary and capricious. See Lawrence School Corporation v. Lewis, 174 A.D.2d 42, 46 (2d Dept. 1992); King v. New York State Division of Parole, 190 A.D.2d 423, 432 (2d Dept 1993).

WHEREFORE, plaintiffs/petitioners demand judgment against defendants/respondents:

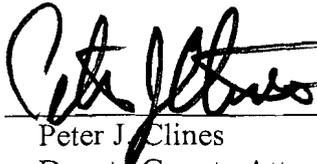
- a. declaring that the ERMA statute violates Article I, Section I of the New York State Constitution and is therefore unenforceable;

- b. declaring that the ERMA statute violates Article II, Section 8 of the New York State Constitution and is therefore unenforceable;
- c. declaring that ERMA violates the New York State Constitution by requiring local boards of elections to use electronic voting machines that delegate the sovereign function of supervising elections to private parties;
- d. declaring that ERMA violates the New York State Constitution by requiring local boards of elections to use electronic voting machines that violate the right to cast a secret ballot;
- e. declaring that respondents-defendants actions are violative voter intent and of the New York State Civil Rights Act;
- f. that respondents-defendants actions in certifying machines on December 15, 2009 are arbitrary, capricious, an abuse of discretion and contrary to law;
- g. that, in the event petitioners-plaintiffs must comply with ERMA that they not be required to deploy the new ERMA optical scan voting machines until the Fall of 2011 at the earliest;
- h. granting such other and further relief as this court deems just and proper.

Dated: March 9, 2010  
Mineola, New York

Yours, etc.,

JOHN CIAMPOLI  
Nassau County Attorney  
Attorney for Petitioners

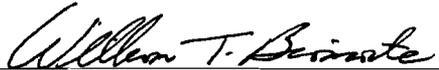
By:   
Peter J. Clines  
Deputy County Attorney  
One West Street  
Mineola, New York 11501  
(516) 571-3015

**VERIFICATION**

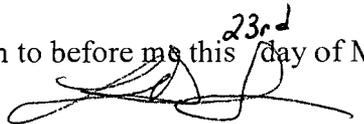
State of New York)  
County of Nassau )

**WILLIAM T. BIAMONTE**, being duly sworn, hereby deposes and says:

I am Democratic Commissioner of Elections for the Nassau County Board of Elections. I am duly authorized to make this verification on behalf of the Nassau County petitioner-plaintiffs. I have read the foregoing Verified Petition/Complaint and it is true to my knowledge and as to matters alleged upon information and belief, I believe it to be true.

  
WILLIAM T. BIAMONTE

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



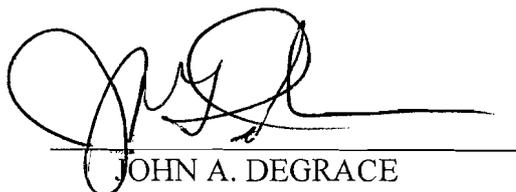
LAUREN ANN DUCATI  
NOTARY PUBLIC-STATE OF NEW YORK  
No. 01DU6205045  
Qualified in Nassau County  
My Commission Expires May 04, 2013

**VERIFICATION**

State of New York)  
County of Nassau )

**JOHN A. DEGRACE**, being duly sworn, hereby deposes and says:

I am Republican Commissioner of Elections for the Nassau County Board of Elections. I am duly authorized to make this verification on behalf of the Nassau County petitioner-plaintiffs. I have read the foregoing Verified Petition/Complaint and it is true to my knowledge and as to matters alleged upon information and belief, I believe it to be true.



JOHN A. DEGRACE

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



3/23/10

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

2010 MAR 23 PM 1 13  
NASSAU COUNTY CLERK