

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK**

UNITED STATES OF AMERICA,
Plaintiff

Case No. 06-CV-
0263 (GLS)

v

NEW YORK STATE BOARD OF ELECTIONS;
PETER KOSINSKI and STANLEY L. ZALEN,
Co-Executive Directors of the New York State
Board of Elections, in their official capacities; and,
STATE OF NEW YORK,
Defendants

MEMORANDUM OF LAW OF PROPOSED *AMICI CURIAE*

ARISE (New York); Citizens for Voting Integrity (New York); Connie Hogarth Center for Social Action at Manhattanville College (New York); Del4Change (New York); Dutchess Peace Coalition (New York); New York Citizens for Clean Elections; Northeast Citizens for Responsible Media (New York); Peacemakers Voting Integrity Project (New York); Rhinebeck Democratic Committee (New York); Shandaken Democrat Club (New York); Ulster County Democratic Women (New York); Where's The Paper (New York); Ulster County Legislator Susan Zimet; Ulster County Legislator Gary Bischoff; Dutchess County Legislator Joel Tyner; Ulster County Legislator Peter Liepmann; Professor Mark Crispin Miller, New York University, author, *Foiled Again: The Real Case for Electoral Reform*; Professor Steven Freeman, University of Pennsylvania, author, *Was the 2004 Presidential Election Stolen? Exit Polls, Election Fraud, and the Official Count*; Harvery Wasserman, Free Press Senior Editor, columnist and co-author with Robert Fittrakis of *How the GOP Stole America's 2004 Election and is Rigging 2008*; Robert J. Fittrakis, Executive Director Columbus Institute for Contemporary Journalism; Abbe Waldman DeLozier and Vicke Karp, authors "*Hacked! High Tech Election Theft In America*"; Pokey Anderson, journalist, broadcaster; Election Defense Alliance (national); Nancy Tobi, New Hampshire Fair Elections Committee; AUDITAZ (Americans United for Democracy Integrity and Transparency in Elections, Arizona); Voter Confidence Committee (California); Protect California Ballots; Video the Vote (Florida); Coalition for Voting Integrity (Pennsylvania), Rady Ananda, J30 Coalition (Ohio); Coalition for Visible Ballots (Texas)

Andrea T. Novick, Esq.
Finder Novick Kerrigan LLP
Attorneys for Proposed *Amici Curiae*

TABLE OF CONTENTS

IDENTITY AND INTEREST OF THE PROPOSED <i>AMICI CURIAE</i>	3
SUMMARY OF ARGUMENT.....	3
ARGUMENT.....	11
REQUIREMENTS OF A CONSTITUTIONALLY RUN ELECTORAL SYSTEM: THE RIGHT TO FREELY CAST A BALLOT, THE RIGHT TO OBSERVE THAT IT WAS RECEIVED AND THE RIGHT TO SEE THAT IT WAS ACCURATELY COUNTED	11
A. Computerized Voting Systems Have Caused the Loss of the Essential Requirements for a Democratic Election.....	14
B. Existing Computerized Voting Systems Have Been Found to Be "Inadequate to Ensure Accuracy and Integrity of the Elections "	17
C. Thousands of Documented Failures Of Existing Computerized Voting Systems Destroying Millions of Votes.....	19
D. Irresponsible Voting Vendors Should be Barred from Doing Business in New York.....	21
E. New York State Can Comply with HAVA and with the Requirements of a Constitutionally Run Electoral System For the 2008 Elections.....	24
1) New York can hand-count only the two Federal races.....	26
2) New Yorkers can continue voting on HAVA-compliant lever machines for all races.....	29
CONCLUSION.....	31

TABLE OF AUTHORITIES

Coffey v Democratic General Committee of Kings County, 164 NY 335
(Court of Appeals, 1900).....12

Deister v Wintermute, 194 NY 99 (Court of Appeals, 1909).....13,14

Goring v Wappinger's Falls 144 N.Y. 616, (Court of Appeals, 1895).....12

Hopper v Britt, 203 NY 144, (Court of Appeals, 1911).....14, 21

STATUTES

HAVA, Section 102 (a) (1).....28

IDENTITY AND INTEREST OF THE PROPOSED *AMICI CURIAE*

The proposed *amici curiae* represent a vast body of national and local citizen groups, authors, elected leaders, journalists; most of whom have devoted the past several years since the passage of the Help America Vote Act (HAVA), committed to defending our electoral systems against electronic fraud and to protecting and reclaiming an electoral system that is transparent and secure .

Counsel of record for all parties have no opposition to *amici's* motion. *Amici's* counsel respectfully requests permission For Jonathan D. Simon, to participate in oral argument.

SUMMARY OF ARGUMENT

Amici Curiae herein represent election integrity experts and leaders from New York and from across the nation who have witnessed first hand, with the advent and proliferation of computerized voting systems, the dismantling of the requirements of democratic elections in America. These systems, which the United States is urging New York purchase for our 2008 elections to satisfy the mandates of the Help America Vote Act (HAVA), have repeatedly been revealed to be far too unreliable and insecure to ensure the integrity of the election results. Worse, the machines the United States would have New York buy have been

shown to be capable of rigging by a single person who could alter the outcome of the election, leaving no trace of the manipulation.

While *amici curiae* strongly object to citizens voting on computerized voting systems so faulty, unreliable and secretive, as demonstrated herein, *amici* do agree with the United States that New York State become HAVA-compliant for the 2008 elections. Plaintiff United States has complained that defendants do not even claim to be in compliance with federal mandate, which is correct.

Defendants ("State" and the State Board of Elections, "SBOE") assert there are no existing computerized voting systems that meet the state's certification standards, which is also correct.¹ The position taken by *amici curiae* herein would legally satisfy all parties in that – were New York to "utilize a perhaps less expensive paper ballot system, in conjunction with at least one accessible voting device in each polling place"², as suggested by the United States – the State would not have to lower its standards or disregard state laws or waste millions of dollars purchasing non-complying voting machines.

The evidence of the vulnerabilities of these computerized voting systems –as found by more than two dozen³ independent studies by computer scientists

¹See plaintiff's memorandum in support of this motion at pp 16, 17.

² Quoting from the plaintiff's memorandum at p 21, footnote 32.

³ See *amici's* exhibit "A" entitled, 07TechReportsRAnanda.pdf, also posted at <http://tinyurl.com/2okz67>, which includes citations to all the major independent scientific

from prestigious universities, as well as the Government Accountability Office (GAO) and the National Institute of Science and Technology (NIST) – along with the thousands of documented instances of these machines' breakdowns, failures, mistabulations, etc., have been presented in this *amicus* brief and accompanying declarations, with supporting references.

Amici note that the plaintiff, while claiming these flawed systems are HAVA-compliant, has not brought this evidence to the Court's attention. Much of this evidence had already been submitted to the defendants by a number of the *amici* herein, but to date has been ignored defendants.⁴ It is for these reason that the *amici* felt compelled to seek permission in order to assist the Court by providing it with all the evidence relevant to a determination of whether the citizens of New York should be forced to vote on computerized voting systems.

It is respectfully submitted that the computerized voting systems, which the United States has characterized as HAVA-compliant, would disenfranchise all New Yorkers in that they deprive citizens of their constitutionally protected franchise, recognized in New York courts as encompassing not merely the right to cast a vote, but the right to know that the ballot was received and the right to see

studies fo computerized voting systems.

⁴ See Lukacher Declaration

that it was accurately counted. Computerized voting systems conceal that which is required to be transparent. It is further submitted that the evidence of lost, destroyed, altered and unaccounted-for ballots is so substantial that to implement these systems would be unconstitutional.

Amici agree with the United States' assertion that the State must provide accessible voting devices in all polling places for the 2008 election, but insist that the mandate for these devices cannot be satisfied by the thoroughly discredited DRE technology. *Amici* have argued that the existing lever voting systems are HAVA-compliant, but that in the event the Court disagrees with this interpretation of the statute, New York would still be able to be HAVA-compliant for the 2008 election by hand counting the two Federal races⁵, thus rendering the United States' motion moot.

As the United States' memorandum has made clear, HAVA recognizes the State's right to hand count paper ballots, as long as Ballot Marking Devices (BMDs) are provided in every polling place, producing a paper ballot identical to the paper ballots marked by able voters. Thus, were the Court to direct a hand count of the two Federal races, the defendants would not have to choose between

⁵ In 2008 each New York ballot will contain, at the federal level, two contests: presidential electors and U.S. House of Representatives.

purchasing failed computerized systems or remaining in violation of a federal statute, thereby subjecting the State to this Court's directing an outside party to decide how New York's elections will be held in 2008.

Amici have outlined how simple and feasible it would be for New York to return to a hand count for two races. *Amici* anticipate that the county election commissioners will express grave concern that an insufficient number of people would be available to count. With all due respect for the difficult job of our election commissioners, we submit that, with our democracy hanging in the balance, a will can find a way. A transparent, secure voting process observable by the people is the bedrock protocol of democracy. At some point 'we the people' must underwrite a process so fundamental to our own democracy, and we have seen clear signs that, as they become aware of the need, individuals are willing and eager to step up in more than adequate battalions. *Amici*, both local and national groups, have attested in their declarations to their willingness to assist the recruiting and training of volunteers for New York's 2008 election.

Amici Berman, Ananda and Tobi all have experience with hand-count elections, which they have shared with New York. The declarations of Berman and Ananda, having exhaustively analyzed New York's data, concluded New York

could hand-count the two federal races in less than four hours, requiring four counters at every polling place . See also Summary for NY, exhibit "G".

In democratic societies like ours, the trial of citizens is by fellow citizens who comprise the Jury. Jury selection takes time and energy; jurors and even potential jurors must give up work time, family time, and planned activities. Certainly there are quicker and more efficient ways of reaching verdicts. We retain the jury system because it remains a cornerstone of democracy; generations have recognized the risk posed by the temptations of expediency. We do not abandon our system because we can't find enough jurors. We find a way to make our system work because we believe in it.

We likewise believe in, we *sponsor*, representational democracy. Within our most cherished democracy, voting has often been said to be the right which protects all other rights. The results of elections, particularly federal elections, have the broadest effect on us as individuals and as a nation. The grave illness of our vote counting system, the glaring symptoms of which *amici* have documented herein, demands and justifies a carefully prescribed and effective remedy-- antibiotics, if you please, though cough drops would be tastier and easier to come by.

Clearly, in considering such a remedy, a great deal turns on the diagnosis of the disease. To the extent none of the parties to this litigation seem sufficiently concerned with the specific evidence demonstrating how computerized voting systems deprive the citizenry of their most precious and fundamental right to secure the accuracy of their vote, the *amici curiae* wish the Court to consider the documentation provided herein⁶ as well as the rich precedence provided by the numerous decisions of our Court of Appeals repeatedly recognizing the essential need for citizens to be able to *see* that their ballots are being accurately received and counted. Computerized voting systems, with their secret and oblique processing of our votes, rob citizens of the essential check and balance required for accountability and the preservation of our most treasured right as a sovereign people⁷. These particular voting systems add insult to injury for their abysmal performance record and their vulnerability to wholesale manipulation of our

⁶ <http://www.votersunite.org/electionproblems.asp>

⁷ We are not speaking of some *potential* threat to our sovereignty, although that should be sufficient cause to ban computerized voting. See Freeman declaration: *Exit polls have a 40 year track record of accuracy..... According to **official, machine tabulated results**, Bush defeated Kerry by 3,000,000 votes nationally (2.5%)... **Exit poll data**... across the nation indicated that Kerry defeated Bush by 7,000,000 votes nationally (4.6%). The disparity between the official count and exit poll survey data is far, far, far beyond any possible random error. All explanations for the disparity between the official count and exit poll survey data other than election fraud have been systematically refuted by independent data analysis. See **Freeman and Bleifuss, Was the 2004 Presidential Election Stolen? Exit Polls, Election Fraud, and the Official Count.***

elections on a scale and with an imperviousness to detection never before possible.

Amici Curia respectfully urge the Court to act as the judiciary has and must when governments' potential conflict of interest, in having the authority to determine the means by which it may be re-elected, would so regulate the people's elections as to thwart the full exercise of the franchise as secured by the Constitution. The right to choose our representatives means nothing if the people cannot know – not merely trust – that their will has been accurately reflected by the results of our elections. That right was not granted to the people, but rather was deemed "unalienable," by nothing less than our Declaration of Independence. Governments' role is to secure that right. There is nothing secure about voting on computerized systems which have shown themselves time and again to be readily corruptible while defying detection. We implore the Court to protect the citizens' means to observe and secure our elections so that we may see, not trust, that our consent to the outcome was respected.

ARGUMENT

REQUIREMENTS OF A CONSTITUTIONALLY RUN ELECTORAL SYSTEM: THE RIGHT TO FREELY CAST A BALLOT, THE RIGHT TO OBSERVE THAT IT WAS RECEIVED AND THE RIGHT TO SEE THAT IT WAS ACCURATELY COUNTED

Our constitutionally protected right to vote includes not merely the right to cast a ballot, but the right to witness that all ballots cast are given their full force and effect. Citizens must be able to observe that properly cast ballots are in fact received and fairly counted.

*The Constitution confers upon every citizen ... **the right to vote ... securing to all citizens ... the right freely to cast their ballots ... and the right to have those ballots ... received and fairly counted.** Legislation which fails in such respects and prevents the full exercise of the right as secured by the Constitution is invalid.*

Goring v Wappinger's Falls 144 N.Y. 616, 620, 621, emphasis supplied
(Court of Appeals, 1895)

The turn of the twentieth century saw a great deal of legislative and judicial attention paid to preserving citizens' right to vote by minimizing opportunities for fraud by insiders. As a result we have inherited a rich body of wisdom and precedent from these earlier Court of Appeals' decisions.

The State owes a duty to its citizens to safeguard our constitutionally protected franchise by regulating our elections in the most secure manner. Historically this has meant the Legislature has needed to respond diligently to control the propensity for fraud by insiders who have been relentless in their varied attempts to manipulate the vote and substitute their will for the will of the people.

*The settled conviction that **safeguarding of our institutions requires the untrammelled exercise of the franchise by the citizens and that the result be protected from fraud, has led to no inconsiderable amount of legislation .. legislation aimed largely ... at the frauds of majorities who, at times,***

have manifested a disposition to retain their power, let the cost be what it might.

Coffey v Democratic General Committee of Kings County, 164 NY 335, 338, emphasis supplied, (Court of Appeals, 1900)

Because of this inherent conflict of interest when elected officials are responsible for regulating elections, courts have restrained the legislature from acting in a manner that would render the legislature's actions unaccountable to the people. Our system of government is not built on trust, but on checks and balances. The ultimate check and balance on government-run elections is that the people must be able to do more than vote -- we must be able to observe and understand the procedures with all our votes, sufficient to know that those procedures have resulted in giving the votes their full force and effect:

The right of an elector to vote is conferred by the Constitution.....[the elector] is entitled to see that his vote has been given full force and effect.any method of holding an election which would deprive the electors..... of the right of casting their ballots and having effect given to the votes so cast would plainly be unconstitutional.

Deister v Wintermute, 194 NY 99, 108, emphasis supplied
(Court of Appeals, 1909)

The right to vote has been expressly described as the: 1) the right to freely cast one's ballot; 2) the right to have the ballot received; and 3) the right to have the ballot fairly counted:

The legislature ... In prescribing regulations ... in respect to voting by ballot, ... are to be construed in the broadest spirit of securing to all

citizens ... the right freely to cast their ballots ... and the right to have those ballots ... received and fairly counted.

Hopper v Britt, 203 NY 144, 151, (Court of Appeals, 1911)

A. Computerized Voting Systems Have Caused the Loss of the Essential Requirements for a Democratic Election

Electronic voting machines have caused citizens to lose their ability to observe and oversee the voting process. For this reason the use of these computers destroys the basis for legitimacy of elections and the elected government. The loss of these integral aspects of the right to vote is in direct violation of the repeated pronouncements of the highest court in New York that the constitutional right to vote includes the right to "*see*" that one's vote was "given full force and effect." *Deister v Wintermute, supra* at 108.

Citizens can no longer see or otherwise monitor their elections when the process is made invisible by the use of computers that now perform in cyberspace the functions previously undertaken by trained poll workers in public view. Not only do computers deprive citizens of meaningfully engaging in oversight and scrutiny of their elections, but the private vendors selling voting systems, assert an unestablished extension of intellectual property rights to include trade secret protection over the source code: the very information which directs the computer how to run the election and how to count the ballots! Not even election officials

can observe or know that ballots are properly received and counted.⁸ This creates an irreconcilable conflict between state officials' duties in service to the people and private voting vendors' claimed entitlement to secretly program the computers. Across the nation the problem is exacerbated by poll workers' and election officials' dependence on private vendors to run these complicated computerized voting systems, with the result that no election official (nor citizens)⁹ can vouch for or otherwise ensure the legitimacy of election outcomes.

⁸ See Tobi Declaration: *for profit corporations counting 80% of the nation's ballots, use secret and proprietary vote counting technology. In other words, instead of publicly observable vote counting, as recommended in New York's original Constitution... and as required by Section 8 of the federal Voting Rights Act, most of the nation's votes are being counted in secret, outside of the public's oversight. With DRE technology, this situation is exacerbated because both the casting and the tabulation of the vote are transformed into proprietary Ethernet data, owned by the corporation that manufactures and programs the DREs.*

But even with optical scan technology, which uses voter marked paper ballots, the count itself is secret and proprietary, in direct violation of the Voting Rights Act... and the very tenets of democracy itself... Citizens and even candidates are denied access to inspect and verify the public votes now transformed into privatized election data.

This lack of citizen oversight would be egregious in any voting system, including in a hand count voting system. It is particularly egregious in a computerized system, where the risks for tampering are magnified by the very nature of computer programming.

See also <http://wheresthepaper.org/Memo2NYSvendorsAndOpenSource.pdf>, regarding a publicly owned and transparent electoral system.

⁹ Under New York Law some source coding presumably will be known by a few government officials sworn to conceal the information from all others, including the public, pursuant to non-disclosure agreements with the vendor. It should be observed that even the source coding will not enable election officials to observe or protect the accuracy of the election, see Anderson Declaration and findings of the Secretary of State of California. And the public is of course left to trust what they are told is the outcome of the election.

We are facing a national crisis in our elections consisting of loss of transparency and voter confidence¹⁰ along with decreasing participation. Our crisis is exemplified by exhortations to “trust” our election officials, and the electronic machines they provide for voters to use, paired with barriers to observation which would provide the basis for trust. Both exhortations and barriers have increased proportionally to the flood of uninvestigated electronic voting machine irregularities.

Not only have the essential democratic safeguards been obliterated by oblique computerized processes, but all of the voting systems sold by these voting vendors have been revealed to be seriously vulnerable to attacks that can change the outcome of entire elections. As demonstrated below and in the declarations of Lukacher, Anderson, Simon and Freeman, computerized voting enables the greatest propensity for theft this nation has ever seen. After 200 years of legislative efforts to protect the integrity of our elections by minimizing the opportunities for tampering, we are witnessing a complete reversal wherein the opportunities for tampering are massively multiplied, enabled solely by the introduction of computers into our electoral process. Such action is in direct conflict with our Constitution.

¹⁰ See Anderson Declaration, par 13 and citation therein to California's Secretary of State's Field Poll About Voter Confidence in Elections, August 31, 2007, http://www.votetrustusa.org/index.php?option=com_content&task=view&id=2573&Itemid=113

We ask the court to review the overwhelming evidence, as documented below and more extensively in the annexed declarations, demonstrating that computerized voting systems in use today are far too insecure and unreliable to be used in democratic elections.

B. Existing Computerized Voting Systems Have Been Found to Be "Inadequate to Ensure Accuracy and Integrity of the Elections" ¹¹

More than two dozen independent studies from prestigious universities, the GAO and NIST, to name a few,¹² have repeatedly revealed that the computerized voting systems being used across the nation are all vulnerable to an array of easily accomplished hacks which can alter the results of an entire election.

In July 2007, California's Secretary of State released the findings of the most extensive top-to-bottom independent testing of **DREs and optical scanners** used throughout the nation, confirming that these machines were **"inadequate to ensure accuracy and integrity of election results" and that an outcome-determinative hack could "be accomplished by a single skilled individual with temporary access to a single voting machine"**.¹³

¹¹Quoting from the California's Secretary of State Report, see footnote 13.

¹² Annotated in exhibit "A".

¹³ http://www.sos.ca.gov/elections/voting_systems/ttbr/red_overview.pdf

The California study corroborates the findings of the myriad of independent studies highlighted in the Lukacher declaration and annotated in exhibit "A", exposing the utter lack of security and the ease with which both touch-screen DREs, with or without a paper trail, and paper ballot optical scanners (PBOSSs) can be manipulated to change the outcome of an election without detection. As Computer Security Expert Bruce O'Dell, testified before the New Hampshire Legislature on September 5, 2007:

*Undetected widespread covert manipulation of computerized voting systems is the **functional equivalent of invasion and occupation by a foreign power. In either case the people lose control of their own destinies, perhaps permanently. [W]orse, ... the “electoral coup” would appear to occur with the illusion of the manufactured consent of the governed, and there would be no “tanks in the street” to galvanize resistance.***¹⁴ (emphasis supplied)

Avi Rubin, professor of computer science and technical director of the Information Security Institute at John Hopkins University stated with regard to the findings of the California's Secretary of State's Report:

*I had expected them to find problems – but to be able to replace firmware in all their systems is **nothing short of an utter takeover of machines, and that shouldn't be possible.***

¹⁴http://www.opednews.com/articles/opedne_nancy_to_070909_computer_security_ex.htm

*I was shocked by how severe the problems were. What's even scarier is that the researchers were looking at certified systems that have been already used in an election.*¹⁵ (emphasis supplied)

Professor Mark Crispin Miller, author of *Foiled Again: The Real Case for*

Electoral Reform, stating the obvious threat this technology poses to democracy:

*No computerized machine, whether it is paperless or not, is any more trustworthy than the programmers who work with it, or who may secretly gain momentary access to it. Thus is such technology completely inappropriate for civic use. Although often hailed as more reliable than DRE machines, op-scans have been used in several ... elections, whose outcomes were statistically impossible unless they had been rigged on purpose.*¹⁶

C. Thousands of Documented Failures Of Existing Computerized Voting Systems Destroying Millions of Votes

In the five years since HAVA was passed there have been thousands of reports of equipment failures which have included the failures of tens of thousands of machines.¹⁷ The incidents reported just in the mainstream media alone included malfunctioning machines, election day breakdowns, vote-switching on DREs, tabulation errors, paper jams, data transfer failures, excessively high undervotes,

¹⁵<http://www.technewsworld.com/story/58572.html>

¹⁶ See Miller declaration par 8.

¹⁷ <http://votersunite.org/>. This site contains a record of the thousands of documented instances of machine breakdowns as reported in the mainstream media.

phantom votes (in the 2004 election, for instance, Gahanna Ohio recorded 4,258 votes for George Bush when only 638 people cast votes at the polling site).¹⁸

These machine failures have caused the apparent loss or alteration of millions of legitimate votes: ballots that Americans had the constitutional right to expect would be protected and cast as counted.¹⁹ Whether by nefarious means, shoddily manufactured machines or simple machine failures, the loss or alteration

¹⁸ This is but one poignant example representing many more just as extreme. It is only the extreme failures, if any, which are so obvious they are caught. Untold perhaps millions of votes are lost or altered, undetected, due to these faulty systems and the ability of malicious code that is designed to never be discovered.

¹⁹ See Simon Declaration at pars 10, 11:
There was a disparity, favoring the Republican candidates in the official vote counts, of 3.9% between the Exit Poll and vote counts. This equates to a 3 million vote disparity nationwide, or a net aggregate shift of 3 million votes to Republican candidates for the House. Given the poll's sample size, methodology, and margin of error, there was less than a one in ten thousand likelihood that a disparity of such magnitude could occur by chance.

There is no indication whether these votes were deleted, added, shifted, or a combination of these. Mere "glitches," however must be ruled out as a cause, since the very large number of such glitches required to produce a shift of millions of votes would shift those votes in both directions, precluding a unidirectional net shift of any significant magnitude.

of so many votes cannot be acceptable nor accepted in our democracy.²⁰

D. Irresponsible Voting Vendors Should be Barred from Doing Business in New York

The voting vendors have a long record of failed past performance which includes: repeated instances of failure to timely deliver machines or ballots—thereby jeopardizing elections and creating a nightmare for officials; forcing election officials to compromise their ethics and integrity in running elections²¹; and holding election officials hostage to contract re-negotiation.²²

²⁰ See *Hopper v Britt*, *supra* at 151, wherein the Court, in recognizing the legislature's regulatory function over the people's elections must respect citizens' right to elections that securely protect their ability to see that their ballots weren't merely cast, but were in fact received and fairly counted, observed: *Legislation which fails in such respects and prevents the full exercise of the right as secured by the Constitution is invalid. Indeed, there has been serious criticism on the constitutionality of the system because so many votes have been declared void by reason of the irregularity in the form of the marks made by the voters.*_____ (emphasis supplied)

²¹ "What I was expected to do in order to 'pull off' an election," an election programmer in Texas complained, "was far beyond the kind of practices that I believe should be standard and accepted in the election industry". These quotations with corresponding media reports are all contained within *amici's* exhibits "B" and "C".

²² Oregon's SOS sued when ES&S refused to deliver machines pursuant to the contract unless the terms of the contract were changed, saying: "We will not leave our elections in the hands of companies that do not follow through on their obligations, and we will not be coerced into altering our contract". See *amici's* exhibits "B" and "C".

In a lawsuit filed last month by the Secretary of State of California seeking \$15 million dollars in penalties against ES&S, the Secretary said:²³

ES&S ignored the law over and over and over again and it got caught. I am not going to stand on the sidelines and watch a voting system vendor come into this state, ignore the laws and make millions of dollars from California's taxpayers in the process.

In addition to deceptively covering up or failing to tell other states about known software problems that caused the mistabulation of votes or other computer problems in another state, the vendors have engaged in a wide range of deceitful practices across the nation, including documented cases of lying to election officials, secret installation of unapproved software, and a long list of ethical violations²⁴. Just this past month the city of San Francisco filed suit against ES&S for fraud, breach of contract and negligent misrepresentation, the City's Attorney stating,

*San Francisco's experience with ES&S raises extremely troubling questions, not simply about the integrity of this company's technology, but about the integrity of this company itself... **There can be no more important duty in a representative democracy than to conduct elections, and it is a travesty to see that duty so flagrantly undermined by the fraudulent conduct of an election systems vendor.***²⁵ (emphasis supplied)

²³ <http://www.cbsnews.com/stories/2007/11/20/politics/main3525181.shtml>

²⁴ See *amici's* exhibits "B" and "C".

²⁵ http://www.fogcityjournal.com/news_in_brief/pr_herrera_ess_071120.shtml

New York's Procurement Laws prohibit the State from entering into contracts with "non-responsible" vendors²⁶. The voting vendors who sell America's computerized voting systems share a history of multiple infractions of "non-responsible" conduct as defined in New York's laws -- including, in addition to failed performance and unethical conduct, criminal indictments and convictions, bid rigging, computer-aided embezzlement, money laundering, tax evasion, bribery and kick-back scandals to name a few -- any one of which would render them ineligible to do business in New York.

Two memorandums (*amici's* exhibits "B" and "C") containing 80 pages of documented reports of vendors disqualifying "not-responsible" conduct were submitted to the SBOE and various agencies within the Governor's office. The defendants ignored the evidence, avoiding their affirmative obligation to investigate these vendors.

The evidence of the disaster of computerized voting presented herein is only the tip of the proverbial iceberg. In urging New York become HAVA-compliant by purchasing this equipment, the United States' motion fails to mention that none

²⁶ <http://www.wheresthepaper.org/Memo1NYSvendorsProhibited.pdf>,
<http://www.wheresthepaper.org/UpdatedProcurementVendorIrresponsibility070822.pdf>,
<http://www.votersunite.org/info/IrresponsibleVendors.pdf> and see Lukacher Declaration.

of this equipment can provide a secure, reliable or accurate election result. The United States cannot justifiably compel the purchase of equipment that would disenfranchise millions by virtue of these machines' unacceptably high security vulnerabilities and documented failures.

New York should be free to abide by its rich democratic history in which the rights of citizens to oversee and monitor their elections has historically and progressively been recognized, respected and upheld as constitutionally required. This would be impossible if New York State were forced to purchase these machines as the United States is urging this Court to direct.

E. New York State Can Comply with HAVA and with the Requirements of a Constitutionally Run Electoral System For the 2008 Elections

HAVA-compliance can be realized for New York's 2008 elections in a variety of ways that do not require the State to purchase flawed, theft-enabling computerized systems. As the United States recognizes:

*Of course, HAVA does not require any state to utilize only a mechanical voting system, and **the state would be free to utilize a perhaps less expensive paper ballot system**, in conjunction with at least one accessible voting device in each polling place in the State, as long as they system otherwise met the requirements of Section 301 of HAVA.²⁷ (emphasis*

²⁷ Quoting from plaintiff's memo at p 21, footnote 32.

supplied)

Hand-counted paper ballot elections not only satisfy the requirements of Section 301, but additionally meet the essential requirements of transparent checks and balances not found in computerized systems. Hand counting, when done in a secure manner with chain of custody and citizen oversight, will thus satisfy the constitutional requirement set forth in the beginning of *amici's* memorandum: the right not merely to cast a ballot, but to observe that it was received and see that it was accurately counted.

Hand counting paper ballots was done in this state for more than a century and continues to be the preferred means of voting for the majority of democracies in the world. In addition to being the best means to protect citizens' constitutional franchise²⁸, it is far less costly than testing, purchasing, storing and maintaining computerized machines. Thus defendants' problem, in not being able to comply with HAVA for the 2008 elections, is eliminated in that no extensive testing of machines is required and no new counting technology need be introduced for the 2008 elections. Moreover the chaos and increased disenfranchisement that would no doubt be the result of introducing complex new DREs or Optical Scanners for

²⁸ See Freeman declaration, par 13 and the chart therein showing how votes cast on paper, counted by hand, are the only tallies which corresponded to the exit polls.

the first time in a presidential election year is avoided. Citizens already have familiarity with the low-tech system of marking paper ballots.

Amici appreciate that implementing any entirely new voting system in a presidential election year may cause great stress on election workers unfamiliar with the process and facing a higher volume turnout in a presidential race. There are two options this Court can consider for New York in order to minimize the stress and potential for chaos while satisfying the requirements of HAVA for 2008:

1) New York can hand count only the two Federal races

To satisfy the United States' motion that the State become HAVA-compliant for the federal election (since that is the only election relevant to the federal statute) the State only has to hand count the two Federal races in 2008, providing BMDs in every polling place so that disabled voters could create the same paper ballots as abled voters. *Amici* have gone to great lengths to assist New York by determining what would be required to hand count these two races, demonstrating as well how simple and feasible it would be for New York to return to a manual hand count for 2008's Federal election.

Rady Ananda and Dave Berman have analyzed the official data for each New York county and, using a forecast tool designed by Mr. Berman expressly for

this purpose, have demonstrated that New will require only four citizen-counters in each polling place to be able to count the two races in less than four hours.²⁹

Nearly every appended declaration includes an offer to send volunteers to New York to assist in a hand count should the Court direct. Others have offered continued training and administrative assistance, based on experience conducting secure hand-count elections.³⁰

Amici recognize the resistance of election officials to the task of organizing a hand-count election, as described in the Tobi declaration:

Many local election officials fear they will not have enough help to hand count our elections. ... But our communities are filled with [hepful] people. We just need to reach out to them. In fact, many of our communities have built-in recruitment centers. Church groups, Rotary Clubs, Neighborhood Watch groups, PTAs, High School social action or community service groups, these are just a few that come to mind. With seventeen year olds eligible to be poll workers in most states, and community service often a high school requirement, this is a match made in heaven.

²⁹ The forecast tool is based on the procedures as explained to Mr. Berman by New Hampshire's Assistant Secretary of State, Anthony Stevens. Forty-five percent of New Hampshire's polling places still hand count their ballots and, as explained in greater detail in the Tobi declaration, New Hampshire's ballots are far more complex, and their precincts larger, than New York's.

³⁰ It should be observed that most democracies of the world hand-count their elections. Israel, India, Britain, Germany, Canada all prefer this means of protecting their democracies. It was reported by CBS News on November 28, 2000 that Canada counts 13 million ballots by hand in four hours. Ireland, having spent over \$75 million on computerized voting equipment, has returned to hand-counted paper ballot elections.

There are funds available for administration and training. Were New York to switch from a lever voting system to a hand counting HAVA-compliant voting system for the Federal election, New York would be entitled to use the Title I monies to organize, prepare and administer a proper hand-count election. Section 102 (a) (1) of HAVA provides that where:

a precinct within that State used....a lever voting system to administer the regularly scheduled general election for Federal office...a State shall use the funds... to replace... lever voting systems... with a voting system... that (A) does not use ... levers; (B) is not inconsistent with the requirements of the laws described in section 906; and (C) meets the requirements of section 301.

These funds total approximately \$50 million and are more than ample for the purpose.

To those who reflexively dismiss hand counting as a great leap backwards, we respond that the wisdom of our particular age tells us that not all that is labeled 'progress' is advantageous or, indeed, benign. One need not turn to the obvious examples of weaponry and environmental degradation to see the need for careful judgment where the power of technology beckons: consider instead the more mundane example of our highways. We routinely limit our vehicles to speeds well below their capacity, and even further below the potential velocities they could be

manufactured to travel. We do this because we place a high priority on safety and we know, both from experimentation and intuition, how seriously the implementation of available technology to drive at 140 m.p.h. will put that safety, and indeed our lives, in jeopardy.

Computers purport to offer speed and convenience to our elections and that offer has, by and large, been embraced with an automatic enthusiasm and little or no reflection upon the concomitant dangers. We are now learning how grave those dangers are, how threatening to the life and well-being of our democratic nation. The time is ripe to reconsider the application of this technology to this purpose in light of that knowledge. And in light of that knowledge, we submit that the priority of speed and convenience is no longer obvious. Indeed it is deadly.

2) New Yorkers can continue voting on HAVA-compliant lever machines for all races

Amici have argued herein that mechanical lever voting systems do comply in all respects with the requirements of HAVA, again as long as a means for the disabled voter to vote independently is provided at every polling place. The United States claims the lever voting machines don't

produce a permanent paper record with manual audit capacity, but that is not in fact accurate. Section 310 (a) (2) (A) requires only that:

(i) The voting system shall produce a permanent paper record with a manual audit capacity for such system.

Lever machines do produce a permanent paper record. Some lever machines imprint the total number of votes cast onto a piece of paper. At the close of the election, poll workers remove the paper from the lever machine and use it to create another paper record of the tallies. Other lever machines don't produce an imprinted piece of paper with the tallies, but the poll workers perform the same function, taking the voting tallies off the lever machines and writing them down on a piece of paper, thus satisfying HAVA's requirement for a permanent paper record.

The United States' argument that the lever machine doesn't produce a permanent paper record with manual audit capacity presumably ignores the human being's role as part of the "voting system". However, just as with a hand count, a human being is very much a part of the voting system, and in

the case of lever machines a human being is producing the permanent paper record required by HAVA.³¹

CONCLUSION

The United States' request for relief – to wit, that New York become HAVA-compliant by purchasing the available computerized voting systems that *amici curiae* have documented are unreliable, unable to produce an accurate election result and dangerous to a free society by virtue of their demonstrated vulnerability to hacking on a level that can alter the outcome of the election without detection – must be denied.

To purchase these vulnerable and flawed machines that deprive citizens and election officials alike of the necessary oversight to ensure that votes were received and counted as cast, is not only unconstitutional but an infringement of our most precious and inalienable right.

³¹ It is worth observing that there are voting systems which the United States considers HAVA-compliant that clearly do not "produce a permanent paper record with a manual audit capacity" as required by the statute. Certainly no paperless DRE can be said to produce a permanent record, but the United States is not suing those states with paperless DREs to compel their compliance with HAVA. Moreover the paper produced by DREs with printers attached to them, creating so-called voter verified paper audit trails (VVPATs), have been shown unreliable for auditing purposes in that they have been known to have as high as 20% unreadability, and as corroborated in the recent reports from California, can be rigged to correspond to the electronic tally, neither equating with the machine's official tally.

The right of voting for representatives is the primary right by which other rights are protected To take away this right is to reduce a man to slavery, for slavery consists in being subject to the will of another, and he that has not a vote in the election of representatives is in this case.

– Thomas Paine

It is with the greatest respect for the institution of our judicial system that I respectfully ask this Court to recognize that which both plaintiffs and defendants to date have declined to take into account: that permitting computers to count our votes removes citizens from the very system over which they must maintain the ultimate control – the means by which we choose our representatives. *Amici's* plea is to permit the citizens to hand count the Federal races and demonstrate that, working together with our election officials, citizens – not computers – can be counted on to preserve and protect democracy.

Dated: December 13, 2007

/s/

FINDER NOVICK KERRIGAN LLP
By: Andrea T. Novick, Esq.
Attorneys for *Amici Curiae*
315 Park Avenue South
New York, N.Y. 10010
(212) 989-9100

On the brief:
Jonathan D. Simon, Esq.
(Motion pending for admission *pro hac vice*)
1815 Massachusetts Ave.
Cambridge, MA 02140
617-538-6012

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. 32 (a)(7)(B), I certify that the attached amicus brief is proportionately spaced, has a typeface of 14 points and contains 7,000 words or less

/s/ _____
Andrea T. Novick