

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

-----X
UNITED STATES OF AMERICA,

Plaintiff,

-against-

NEW YORK STATE BOARD OF ELECTIONS;
PETER S. 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.
-----X

**AMICUS CURIAE
DECLARATION OF
NORMAN P. GREEN AS
PRESIDENT OF THE
ELECTION
COMMISSIONERS
ASSOCIATION OF THE
STATE OF NEW YORK**

06 CV-0263 (GLS)

Norman P. Green declares pursuant to 28 U.S.C. § 1746, and subject to the penalties of perjury, that the following are true statements:

1. I am the President of the Election Commissioners' Association of the State of New York for the 2007-2008 year and serve as a Commissioner of Elections for the County of Chautauqua, and have held that position since May 13, 1999. I submit this amicus curiae declaration to advise the Court and the parties of the significant operational concerns attendant to compliance with this Court's June 2, 2006 order. These concerns are held by all the local Boards of Elections in the fifty-seven counties outside the City of New York and the Board of Elections in the City of New York, whose commissioners are represented by the Election Commissioners' Association of the State of New York ("ECA or "the Association"). As President of the Association and as Commissioner of Elections for Chautauqua County, I regularly communicate with my colleagues in this organization, as well as with County Boards of Elections in the normal course of the performance of my duties. The ECA, upon notice, met in a Special Full Membership Meeting on Friday, December 7, 2007 in Liverpool, New York and authorized and directed me to file this Amicus Declaration.

Introduction

2. I understand that the United States of America, as plaintiff in this action, seeks an order of enforcement of this Court's June 2, 2006 remedial order ("the June 2, 2006 Order"), which required the State of New York to take certain steps to implement voting systems compliant with the Help America Vote Act ("HAVA"), 42 U.S.C. § 15301 *et seq.*, for use in federal elections.

3. As a threshold matter, the Commissioners of Elections who comprise the ECA are fully committed to the complete implementation of HAVA, particularly its provisions concerning the replacement of lever voting machines with a modern and fully accessible voting system. We fully support the implementation of new voting systems that provide unambiguous, reliable results and provide a better, more inclusive voting experience. Indeed, in the recent past, ECA has advocated for the necessary State legislation and regulatory actions by the New York State Board of Elections, such as the certification of new voting systems that will allow each County Board to implement the HAVA provisions and purchase new systems.

4. To the extent there have been delays in implementation of the subject court order, those delays cannot in any way be attributed to the County Boards, who are doing their best to comply with the subject order. As this Court is aware, the County Boards cannot act unilaterally in this matter, but are constrained by mandates of the State Election Law. Most significantly, we will not be able to replace our lever machines with a full implementation of a new HAVA-compliant voting system, until the State Board of Elections ("SBOE") certifies such a system, at which time the County Boards would begin the selection/procurement process.

5. It is clear that the breakdown of the Federal and State certification process has caused the current problem. The Court must adopt the plan proposed by the Commissioners of Elections comprising the ECA (as set forth herein). Our plan is based on considerable hands-

on experience in the administration of elections. As discussed below, in our view, the people of the State of New York would be far better served by having only a *limited* implementation of ballot marking devices for the 2008 election, rather than the more comprehensive implementation sought by the Plaintiff.

The Experience of the 2006 Elections

6. Pursuant to the June 6, 2006 Order, each County in New York State placed and/or used ballot marking devices (“BMDs”) at a limited number of locations within each jurisdiction. The devices placed and/or used at each of these sites were programmed to mark any ballot for any election district located within the jurisdiction. Accordingly, any disabled voter in the State had the opportunity to cast a ballot utilizing a BMD at the appropriate site. That plan supplemented the current voting options for disabled voters in that a disabled voter would continue to vote at his or her current poll site and use a lever voting machine, with assistance if necessary. In addition, disabled voters could continue to vote by absentee ballot if they choose.

7. As the Court may be aware, following the 2006 election, the Legislature of the State of New York enacted Chapter 506 of the Laws of 2007 on August 6th of this year. That legislation mandates that each County “shall provide at least one location with one or more ballot marking devices which are equipped for individuals with disabilities and provide individuals with disabilities the same opportunity for access and participation as other voters.”

8. This legislation reflected the reality that County Boards of Elections cannot effectively operate dual voting systems in every poll site without the serious risk of disenfranchising vast numbers of voters until permanent replacements for lever voting machines are certified by the State Board of Elections and purchased by the County Boards of Elections.

9. The problems created by expanding the number of ballot marking devices deployed for a given election are complex and difficult. Each County's Board of Election needs to procure additional devices and perform acceptance testing as mandated by the State Board of Elections under their supervision and oversight. For each election using these BMDs, each County Board must "set-up" that election in the BMD's election management system, enter the contents of each ballot and format each as well.

10. Where applicable, the County Board must also comply with the minority language requirements of Section 203 of the Voting Rights Act and enter the ballot in the appropriate language. After loading each BMD with the specific election data for the jurisdictions using the BMD, extensive testing must be performed that included a review of each displayed ballot, audio ballot and where applicable, printed ballot and testing of each BMD's functionality, including each of the features for use by voters with disabilities. Under the New York State Election Law, this work must be managed and performed by the same knowledgeable and experienced staff members of each County Board who are responsible for managing the entire election process (utilizing the County's existing voting machines and systems).

11. Moreover, the Court and the parties should understand that thousands of additional poll workers must be recruited and trained to staff the BMD's. This task, daunting in its own right, is further exacerbated by the fact that each County will have its own technical requirements attendant to hiring and training. Thus, the personnel component of the implementation is significant and demanding, and should not lightly be considered.

The Problems Identified To Date

12. The Court and the parties should also understand that the statewide introduction of any voting system—even if only a ballot marking device for voters with disabilities within the State of New York—is an incredibly complicated project. As of April 1,

2007, there were 11,222,042 registered voters in the State. In the November 2006 election, throughout the State 16,359 lever voting machines were used in 16,359 election districts located at 6,508 poll sites. These poll sites were staffed by more than 124,000 poll workers. In both the 2006 primary and general elections, thousands of candidates appeared on the ballot in contests across the State. Moreover, Boards of Elections throughout this State serve a diverse voting population and several administer elections that must comply with the minority language requirements of Section 203 of the Voting Rights Act, 42 U.S.C. § 1973aaa-1a.

13. In order to implement a ballot marking device at *every* poll site in 2008, each County Board of Elections would need to do, among other things, the following:

- Select a system or systems to be used in 2008 for the limited implementation; note that it may or may not be the same as the one used in 2006 or 2007 and may not be part of the new permanent voting system;
- Execute the necessary procurement documents;
- Conduct a thorough preliminary analysis of the system after receiving at least one voting system, which includes the ballot marking devices, its supporting software, and any other required components;
- Test each aspect of the voting system separately;
- Develop a software interface to extract ballots and other related data from each Board's central computer systems and import it into the new voting system. This process alone may take at least six to eight weeks;
- Test this integrated voting system;
- Receive the complete shipment of the voting system, and conduct acceptance testing (in accordance with the SBOE requirements) of each BMD and the attendant computer systems to ensure that each component functions correctly;
- For each election, "set-up" that election in the BMD's election management system, enter the contents of each ballot used and format each ballot style;
- Where applicable, enter data for other language ballots;

- Configure/load each BMD with the ballot data (both displayed and audio) for every election district at the site the device serves;
- Prior to each election, perform extensive testing of each BMD, including a review of each displayed ballot, audio ballot and where applicable printed ballot as well as testing of each BMD's functionality, including each of the features for use by voters with disabilities;
- Find available storage space for the devices and attendant computer systems;
- Develop staff procedures for the setup, testing, deployment, operation, take down, and storage of the ballot marking devices;
- Build protocols for the configuration and use of the devices to ensure full security of the vote;
- Determine the shipping and trucking needs of the ballot marking devices to ensure they are safely deployed;
- Develop a back-up plan in case of failure of the devices or their computer systems;
- Develop policies and procedures for the production and translations for the audio interface into each of the required minority languages;
- Program the audio interface of each device, including potentially making a recording of the names of every candidate;
- Develop policies and procedures for ensuring the devices comply with the minority language assistance requirements of Section 203 of the Voting Rights Act;
- Survey every site and ensure that each may be configured to accommodate the electrical, and spatial necessities of the devices;
- Develop procedures to determine how to organize the sites;
- Recruit and train a new set of poll workers to manage the devices;
- Design the procedures for canvass of the ballots produced by the ballot marking devices;
- Modify the procedures for coordinating the reporting of unofficial results and closing the sites; and

- Conduct a public education campaign on the availability of the new devices and how they will be integrated into the voting experience.

14. In addition, to implement such a change, both the SBOE and the Board of Elections in the City of New York (“BOE in NYC”) are required to obtain preclearance under Section 5 of the Voting Right Act, 42 U.S.C. § 1973c, for the changes to voting procedures as provided for in any plan. Section 5 provides, in relevant part, that when any covered jurisdiction (which, in New York State, are the counties of New York, Bronx, and Kings) seeks to make a change in voting practices or procedures, it must submit this change to the Attorney General of the United States or institute a proceeding in the U.S. District Court for the District of Columbia for preclearance . When the SBOE or the BOE in NYC submit the proposed changes for preclearance either to the U.S. Department of Justice (“DOJ”) or the District Court, DOJ or the Court will have to review the proposed change to determine whether it has the purpose or effect “of denying or abridging the right to vote on account of race or color” or membership in a minority language group. Implementation of the Plaintiff’s proposal can result in just such actions occurring. Needless to say, this approval process will necessitate additional time to render a decision.

15. While the various County Boards have undertaken preparations for the implementation of new voting systems, the fact remains that it will take at least a year to undertake and roll out such a significant project properly. The Commissioners of Election believe that important actions by the SBOE—such as testing and certifying voting systems and completing the State procurement process—must occur far before an election in order to have the hardware and software delivered in time to complete all of the extensive preparations each Board must conduct. In accordance with this principle, the Association, at its Summer Meeting this past June, recommended that the State of New York enact legislation providing that the

implementation of new voting systems take place the year *following* the year of certification of new voting systems. This is simply not a matter that can be rushed, at least not without particularly dire consequence to the voters.

16. Following the September 11, 2007 meeting at the SBOE, each County Board reviewed its own ability to conduct an expanded deployment of ballot marking devices for the September 2008 Primary Election and the November 2008 General Election. Upon careful consideration, each Board, cognizant of the unique issues that complicate the process for administering elections and introducing new voting devices, believes that it *cannot* expand the number of sites to which BMDs are deployed.

17. These issues that impact on the administration of elections include:

- the very large number of candidates and races that will appear on the 2008 ballot;
- the location of the vast majority of poll sites in public facilities that may not have necessary electronic or spatial resources;
- the need to comply with minority language requirements;
- the difficulty of identifying and training more than 124,000 poll workers who would be needed to staff a ballot marking device in each and every one of this State's 6,508 polling sites; and
- the need to educate more than 11 million voters on this substantial voting change.

18. In view of these issues, the introduction of any new voting devices—while continuing to utilize the existing voting systems—raises an extraordinary level of concern that County Boards of Elections will not have both the necessary control and flexibility to run orderly elections. Under these circumstances, the County Boards of Election should *not* be required to

place a BMD in every poll site, as there is an enormous possibility of an electoral debacle far beyond that which occurred in the 2000 presidential election in Florida.

19. Moreover, the potential financial waste in placing BMDs at each poll-site could be immense. For example, the NYC BOE estimates that it would cost over \$40 million to carry out a plan to put BMDs at every poll-site, to inform the public of the existence of such machines, to test those machines and to train all the new poll workers necessary to assure that voters are able to use the new machines without any hindrances. Some of that money will be used to pay the costs of new BMDs, which will not yet have been officially certified for use by the State. If the State later decides that the BMDs that the NYC BOE or other county boards selected for interim compliance do not merit certification (*i.e.*, that those county boards must purchase *other* machines to achieve final compliance with HAVA), the money spent on the purchase of those machines will have been wasted, and the State and all of its localities will have less HAVA money to spend on compliance as a result.

The ECA's Proposed Plan

20. Along those lines, the ECA believes that for the 2008 election cycle, the State Board of Elections, along with other State agencies, should develop a comprehensive public education campaign to notify disabled voters of the temporary, alternative option for the 2008 primary and general elections. This was not done on a coordinated, integrated statewide basis in 2006. In this instance, we recommend that the State fund this intensive outreach and communications program.

21. Under this proposal, the State of New York, using many of its agencies—including the Commission for the Quality of Care of the Disabled, the Office of Temporary and Disability Assistance, the State Department of Transportation and the various regional transportation authorities—would expand both the informational opportunities made available to

the members of the disability community, as well as enhance the transportation alternatives to enable them to get to these poll sites in a reasonable and reliable manner. Also, both the State and County Boards of Elections would continue to work with local government agencies, as well as community based organizations (“CBOs”), to promote increased participation in the electoral process by persons with disabilities.


22. My colleagues and I acknowledge that this proposal is not a ‘quick fix’ and would add another year to full implementation. Moreover, we believe it is a reasonable and practical proposal, one that is in the best interests of the voters, and we respectfully urge the Court to adopt it.

23. While I understand the frustration of the Plaintiff that the implementation process has not proceeded quicker than it has, I must express the disapprobation of myself and my fellow Commissioners to the Plaintiff’s assertion that the implementation process to date constitutes “an overly complicated picture of compliance mired for the most part in State law and procedure, apparently aimed at excusing in some manner the SBOE’s inability to carry out its federal law obligations ...” See Pl. Mem. at p. 1. The concerns that we raise now and that we have previously brought to the attention of the SBOE, are serious and responsible ones, and do not in any way reflect an intent to evade our federal law obligation. Moreover, it behooves the federal government to acknowledge that the State of New York is a partner in this important endeavor, and we submit that it is unseemly and unwarranted to demean the laws and procedures of a sovereign State. The United States is not the only government entity in the Republic committed to ensuring safe and reliable elections, and its reference to the Defendants as being “*mired* ... in State law and procedure” (emphasis added) is unworthy of the federal government.

Conclusion

24. For the above reasons, I respectfully request that the Court accept this *amicus curiae* declaration, and consider the concerns expressed by the Commissioners of Elections attendant to implementation of the June 2, 2006 Order.

Dated: Mayville, New York
December 17, 2007



NORMAN P. GREEN

<p>UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF NEW YORK</p>	<p>UNITED STATES OF AMERICA, -against- Plaintiff, NEW YORK STATE BOARD OF ELECTIONS; PETER S. 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.</p>
<p>AMICUS CURIAE DECLARATION OF NORMAN P. GREEN President, Election Commissioners' Association of the State of New York</p>	<p>ELECTION COMMISSIONERS' ASSOCIATION OF THE STATE OF NEW YORK Office of the President 7 North Erie Street Mayville, NY 14757 Telephone: (716) 753-4250</p>
<p><i>Due and timely service is hereby admitted.</i></p> <p>New York, N.Y., 200...</p> <p>..... Esq.</p> <p>Attorney for.....</p>	