

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

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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.  
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**AMICUS CURIAE JOINT  
DECLARATION OF  
ANTHONY COMO AND  
JAMES J. SAMPEL AS  
COMMISSIONERS OF  
THE BOARD OF  
ELECTIONS IN THE  
CITY OF NEW YORK**

06-CV-0263 (GLS)

ANTHONY COMO and JAMES J. SAMPEL individually and jointly declare pursuant to 28 U.S.C. § 1746, and subject to the penalties of perjury, that the following are true statements:

1. We are a Commissioners of the Board of Elections in the City of New York ("City BOE"). Commissioner Como, who was appointed to the City BOE in 2005, is the Republican Commissioner for Queens County and serves as President of the City BOE for calendar year 2007. Commissioner Sampel, who was appointed to the City BOE in 2005, is the Democratic Commissioner for Richmond County and serves as Secretary of the City BOE for the calendar year 2007. We submit this amicus curiae declaration to advise the Court and the parties of the City BOE's significant operational concerns attendant to compliance with this Court's June 2, 2006 order.

2. We 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 City BOE is 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. However, we differ from the Plaintiff in our assessment of the timing of the implementation of the new systems.

4. To the extent there have been delays in implementation of the subject court order to date, those delays cannot fairly be attributed to the City BOE, which, like all other County Boards of Elections in this state, is doing its best to comply with the subject order. As this Court is aware, the City BOE cannot act unilaterally in this matter, but is 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 City BOE would begin the selection/procurement process.

5. As discussed below, in our view, the voters in the City of New York, and indeed, all 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 elections, rather than the more comprehensive implementation sought by the Plaintiff.

#### **The Experience of the 2006/2007 Elections**

6. Pursuant to the June 6, 2006 Order, the City BOE placed and used ballot marking devices (“BMDs”) at five “super poll-sites” within the City of New York (at one location per county). These devices were programmed to mark any ballot for any election district located within the jurisdiction. Accordingly, any disabled voter in the City 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 6<sup>th</sup> 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, including the City BOE, 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 City BOE.

#### **Problems in Placing BMDs at the 1,391 New York City Poll-sites**

9. The problems created by placing ballot marking devices at the 1,391 poll-sites across the five boroughs are exceedingly complex and difficult. As background, in the City of New York, as of November 1, 2005, there were 4,383,276 registered voters. The City has 6,111 election districts, and the voters vote at 1,391 polling places.

10. In order to implement a ballot marking device at *every* City poll site in 2008, as sought by Plaintiff, we would need to take the following steps:

- Select a system 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 (whereas current storage space many only be set-up for level machines);
- 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 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.

11. Upon information and belief, many of these implementations issues will be faced by counties throughout the State, but the City faces unique issues that complicate the process for running elections and introducing new voting devices. These include: the very large number of candidates and races that appear on the City's ballots; the location of the vast majority of poll-sites in public facilities that may not have the necessary electronic or spatial resources; the need to comply with minority language requirements; the difficulty of retaining more than 30,000 poll workers; and the need to educate more than 4.3 million registered voters on any substantial voting change.

12. The poll worker issue alone would be daunting if the City had to increase its number of BMDs. The City estimates that it would have to hire approximately 8,220 new poll workers to manage the use of BMDs throughout the City, who would have to be trained upon

hiring. In addition, some current City poll workers would also have to undergo extensive training so that they could manage use of the BMDs if necessary.

13. In regard to testing, the Court should understand that testing BMDs would be intricate and laborious. First, the City BOE will need to do extensive acceptance testing upon receipt of the machines both as to the election management system and as to each individual device. Such acceptance testing might take at a *minimum* 2-4 months. In addition, preparation for *each* election will include a new round of set-up and testing (of the system and of each device), including proofing of ballots in printed, displayed and audio form and the creation of portable memory devices used to configure each BMD. It is critical for the Court to understand that for each extra BMD in use, the time spent carrying out these set-up and testing procedures, both upon receipt of the machines and in preparation for each election, increases proportionately.

14. The use of BMDs at each poll-site raises unique concerns in regard to security, one of the most vital components of any election system. The security protocols for lever machines and BMDs are different from each other. Because of that, for any new system introduced, including BMDs, possible security breaches must be identified, protocols to mitigate against those breaches must be determined, and procedures to implement the security protocols must be developed, documented, taught to staff, implemented and tracked. Additionally, BMDs are computers that have a higher theft value, and their size (lighter and smaller than levers) makes them easier to lose, misplace or steal.

15. Putting BMDs at each poll site would also divert valuable resources and staff from preparations for the ultimate solution to HAVA. Work to prepare the final systems the SBOE chooses to replace lever machines will include analysis of vendor responses to requests for information; obtaining public input from interested parties during the selection process;

contracting and procurement; poll worker training and recruitment; evaluation of poll-sites and voting machine facilities; and voter education. These processes are in some ways identical to those that would take place in order to put BMDs at each poll-site. It is simply not feasible to ask our staff to prepare for BMDs at each poll-site while simultaneously preparing for the ultimate HAVA solution, all while administering three elections.

16. Using two different systems at each poll-site also raises serious concerns, not just in terms of managing those poll-sites, but in configuring and setting-up those locations and combining the election results from the canvass for each system after the election. As such, having two systems not only implicates voter training and education, but issues regarding establishing procedures for managing the flow of people and paper at the sites.

17. As this Court may also be aware, the City BOE 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 personnel of the City BOE who are responsible for managing the entire election process (utilizing our existing voting machines and systems).

18. In addition, to implement such a change, the City BOE is 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 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 City BOE submits 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.

19. While the City BOE has done its best to prepare for the implementation of a new voting system, the fact remains that it will take at least a year to undertake and roll out such a significant project properly. Along with our fellow Commissioners of the City BOE, we 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 our staff must conduct with a new voting system. This is simply not a matter that can be rushed, at least not without dire consequence to the voters.

20. Moreover, it is important to stress that the City BOE’s resources are not unlimited and its staff not infinite. It will be a great strain on those resources and our staff members to try to implement this project while at the same time trying to carry out three separate elections for the approximately 4.3 million voters in New York City.

21. In addition, the potential financial waste in placing BMDs at each poll-site could be immense. For example, the City BOE’s best estimate is that it would cost approximately \$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 City BOE (or other county boards) selected for interim compliance do not merit certification (*i.e.*, we must purchase *other* machines to achieve final compliance with HAVA), the money spent on the purchase of those machines will have been wasted, and there will be less HAVA money available as a result.

22. Finally, a few examples from other jurisdictions demonstrate that the City BOE must be given adequate time to prepare its election system, to train staff and to educate the City's populace, or serious problems might arise on election day. For example, in this year's election in Sarasota County, Florida, optical scanners broke down at three precincts and ballots that were not scanned had to be separated in order to be manually counted later. Similarly, in San Mateo County, California, the 2006 elections were marred by technical problems with optical scanners, with reports that as many as 1 in 8 poll places suffered with major ballot jams on election day. Election administrators there were forced to take paper ballots from voters in order to scan those ballots later at separate machines. Needless to say, the chances of these breakdowns decrease substantially if the City BOE and the State Board have adequate time to test every facet of new voting systems. But perhaps most importantly, the City's poll workers *must* be given adequate time to learn these new systems, or the ability of the City BOE to resolve problems at the polls will be compromised. (The Court should know that while current NYC poll workers may have some experience in handling problems with lever machines, it is almost a certainty that none of them could handle the breakdown of BMDs without additional training.)

23. The experience in California also supports the proposition that extensive, “top-to-bottom” reviews and testing of election systems should occur *before* systems are selected. There, after some localities had already selected and purchased systems, the Secretary of State de-certified three systems based on serious security concerns. The City BOE doesn’t want to wait until *after* it purchases systems to find out that those systems have security flaws.

24. Finally, all of the implementation issues that arise from placing BMDs at every poll-site would only be hugely magnified by any attempt to actually overhaul the City’s entire voting systems by September 2008. Issues raised by procuring, testing, storing, and securing new machines are enormously complex. Likewise, training poll workers and hiring new workers to run these new machines will be an immense task. Perhaps most daunting of all, however, will be the need for the City BOE to carry out one of the most extensive and important public relations campaign in its history – the key to a successful transition to new voting systems will lie in fully informing and educating the City’s populace about new voting systems.

**Amicus Curiae ECA’s Proposed Plan**

25. Along those lines, the City BOE 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.

26. 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

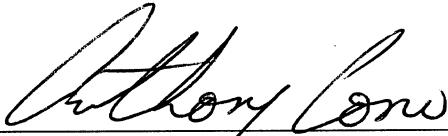
the members of the disability community, as well as enhance the transportation alternatives to enable them to get to these poll sites in a reasonable and reliable manner. Also, both the State and County Boards of Elections should continue to work with local government agencies, as well as community based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

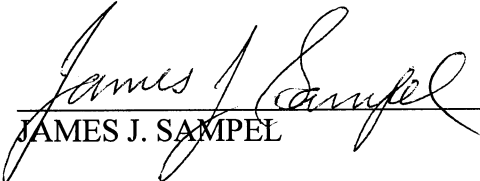
27. Our colleagues and we acknowledge that this proposal is not a ‘quick fix’ and would add another year to full implementation. However, we believe it is a reasonable and practical proposal, one that is in the best interests of the voters, and we respectfully urge the Court to adopt it.

**Conclusion**

28. For the above reasons, we respectfully request that the Court accept this *amicus curiae* declaration, and consider the concerns expressed by the City BOE attendant to implementation of the June 2, 2006 Order.

Dated: New York, New York  
December 17, 2007

  
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ANTHONY COMO

  
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JAMES J. SAMPEL