

STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

LIBERTY ELECTION SYSTEMS, LLC,

Petitioner,

— against —

NEW YORK STATE BOARD OF ELECTIONS,
and DOUGLAS A. KELLNER, EVELYN J.
AQUILA, NEIL W. KELLEHER and HELENA
MOSES DONOHUE, SAID COMMISSIONERS
TOGETHER CONSTITUTING THE NEW YORK
STATE BOARD OF ELECTIONS, and THE NEW
YORK STATE OFFICE OF GENERAL
SERVICES,

Respondents.

AFFIDAVIT IN OPPOSITION

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

DOUGLAS A. KELLNER, being duly sworn, says as follows:

1. I am one of the four commissioners who constitute the New York State Board of Elections and I serve as Co-Chair of the Board. I submit this affidavit in opposition to the petition of Liberty Election Systems, LLC which seeks to circumvent the requirements of Election Law § 7-201(1) that any voting machine or system be approved for use by at least three commissioners of the State Board of Elections before it may be purchased and used in New York State.

2. Liberty's allegations concerning the January 24, 2008 decision of the State Board that determined those ballot marking devices that are authorized to be ordered by county boards of elections could hardly be further from the truth. I voted against approving the LibertyMark Voting Device (BMD) after many dozens of hours of study

and examination. At the State Board's meetings on January 23 and January 24, 2008, I stated my legal conclusions publicly on the record. Yet the petitioner has declined to address the specifics of those objections but asserts only in broad, generic conclusions that its product complied with the legal requirements. Petitioner also overlooks the many reports and comments submitted by non-partisan public interest groups that also identified the legal shortcomings of its product.

3. Article II, section 8 of the New York State Constitution requires bi-partisan administration of elections. When the Legislature enacted the Election Reform and Modernization Act of 2005 (Chapter 181 of the Laws of 2005), it amended the procedures on certification of voting equipment to specifically require a determination by a *majority of the commissioners* "whether the kind of machine or system so examined can safely and properly be used by voters and local boards of elections at elections, under the conditions prescribed in [the Election Law] and the requirements of the federal Help America Vote Act." I concluded after thorough study that the LibertyMark Voting Device (BMD) does not satisfy that standard. Because the LibertyMark Voting Device (BMD) did not receive the required determination by a majority of the commissioners of the State Board, it would be wrong for this Court to substitute its judgment, particularly on the Spartan record submitted by petitioner.

Qualifications

4. I was appointed as the Democratic Co-Chair of the New York State Board of Elections by Governor George Pataki on December 9, 2005. Governor Pataki acted on the formal recommendation of the Speaker of the Assembly, Sheldon Silver, and the Minority Leader of the Senate, David Paterson. Governor Spitzer reappointed me on August 17, 2007. I believe that I am the only commissioner who is not holding over after the expiration of the term in office.

5. Before my appointment to the State Board of Elections, I served twelve years on the New York City Board of Elections. During that service, I spent considerable time studying the technical details of voting machines and voting systems. I became an outspoken advocate for mandating detailed operational procedures in advance of elections in order to avoid partisan disputes over election outcomes. I prepared the initial draft of regulations to introduce due process for determining those candidates who could be on the ballot.

6. In December 1992, several months prior to my appointment as commissioner of the New York City Board of Elections, New York City entered into a contract for the development and acquisition of an electronic voting system to replace the lever voting machines used by New York City. In the course of implementing that contract, I spent literally thousands of hours reviewing tens of thousands of pages of technical documentation and reports and consulted with dozens of technical experts regarding the many facets of implementation of the development of that system. Because of numerous issues, that contract was eventually canceled because the vendor, Sequoia Voting Systems, was unable to comply with New York City's requirements. Beginning in 1997, I also led the effort at the New York City Board of Elections for the use of central scanning equipment for counting absentee, affidavit and emergency ballots. That contract was successfully implemented in 2000.

7. I have been nationally recognized as an expert on voting machines and voting systems. I have been appointed to the Board of Advisors of the Accurate Voting Foundation, based at Johns Hopkins University, which administers the grant of the National Science Foundation on voting system technology. I also serve on the Board of Advisors of the Verified Voting Foundation, based in San Francisco, dedicated to research and advocacy of reliable and publicly verifiable elections. I am often asked to lecture on the subject of voting technology throughout the country. I

have also been called to testify as an expert witness in numerous litigations and I have provided testimony to Congress on the testing and certification of voting systems.

8. Before entering public service in 1993, I represented hundreds, if not thousands of candidates litigating issues concerning access to the ballot. I have been a member of the Special Committee on Election Law of the Association of the Bar of the City of New York since 1983. I am also a member of the Election Law Committee of the New York County Lawyers Association and I have served as its chairman.

Background

9. The issue now before the Court has its genesis in the adoption of the Help America Vote by Congress in 2002. While the federal law, which applies only to federal elections, does not explicitly prohibit the use of lever voting machines, section 301(a)(3) (A) of the law provides that:

The voting system shall—

be accessible for individuals with disabilities, including nonvisual 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.

(42 U.S.C. § 15481). There has never been any serious dispute that the lever voting machines used throughout New York State cannot comply with this standard.

10. The New York State Legislature enacted the Election Reform and Modernization Act of 2005, L. 2005, ch. 181, to address this issue. The statute contains a comprehensive revision of New York's legal standards for voting machines, systems and equipment and incorporates by reference the requirements of the federal Help America Vote Act.

11. I was appointed commissioner and co-chair of the New York State Board of Elections shortly after the statute became law.

12. I spent considerable time in drafting the regulations on Voting Systems Standards eventually adopted by the State Board of Elections as 9 NYCRR Part 6209.

This included consulting with dozens of experts and advocates as well as reviewing the several thousand comments on the regulations received by the State Board.

13. It became quickly apparent that New York could not immediately acquire new voting equipment to replace its lever voting machines in a way that would not jeopardize the constitutional rights of New York citizens to cast their vote and have their vote counted accurately. Many other states that rushed to implement HAVA without proper planning experienced flawed elections, which have been the subject of national attention. Instead, New York has focused on careful preparation so that New York State can implement HAVA without compromising the proper administration of elections, so that “we get it right the first time.”

14. While it was clear that we could not replace our lever voting machines in 2006 without potentially compromising the integrity of the elections, we recognized the need to address compliance with the disability access provisions of HAVA § 301(a)(3), 42 U.S.C. § 15481(a)(3). Therefore, we adopted a temporary “Plan B” that would provide for at least one device in each county that would allow a voter with disabilities to mark a ballot in accordance with the HAVA requirement. Because no vendor at that time could comply with New York’s legal standards, we did not provide for a thorough certification review. In fact, none of the three ballot marking devices temporarily authorized in 2006 comply with all of the federal or state requirements.

15. By December 2006, contrary to Liberty’s claim in the petition¹, we learned that none of the voting systems presented for certification as replacements for

¹ Liberty’s claim in paragraph 13 of the Petition that, “[i]n November of 2004 petitioner obtained federal certification that their voting system fully complied with HAVA,” is untrue. On November 9, 2004, the National Association of State Election Directors, a private membership organization, issued certification N-2-14-22-22-001 for the LibertyVoteESU1 direct recording electronic voting machine. While some parts of the hardware and software are the same, this is not the same machine as the LibertyMark Voting Device (BMD), which is the subject of this lawsuit. Furthermore, NASED’s certification was based on the modest requirements of the 2002 Voting System Standards issued by the Federal Election Commission before the enactment of the federal Help America Vote Act.

the lever voting machines complied with all state and federal requirements. Vendors were constantly submitting revisions to their products in an effort to respond to each issue raised, making it very difficult to assure that the tests already conducted had addressed the most recent model. The State Board also became aware that its testing authority, Ciber, Inc., had been unable to obtain accreditation from the U.S. Election Assistance Commission as an independent testing authority for voting systems. Consequently, the State Board of Elections determined that it had no choice but to suspend further testing until it could engage a properly accredited independent testing authority. That tortuous contracting process was not completed until late in 2007.

The extraordinarily weak, conflict-of-interest ridden procedures used by NASED to grant certification are the subject of nation-wide criticism. New York State as well as many other states has found that NASED erroneously certified many voting systems that did not, in fact, comply with even the weak 2002 Voting System Standards. See Statement of Douglas A. Kellner to the Committee on Oversight and Government Reform, Subcommittee on Information Policy, Census, and National Archives, United States House of Representatives, May 7, 2007. This has led many states to de-certify voting systems certified by NASED. See e.g. "California Top-to-Bottom Review" http://www.sos.ca.gov/elections/elections_vsr.htm; Colorado Suspension Notice, <http://www.elections.colorado.gov/DDefault.aspx?tid=501>; A. Kiayias, L. Michel, A. Russell and A.A. Shvartsman, *Security Assessment of the Diebold Optical Scan Voting Terminal*, (U. Conn. Voting Technology Research Center) October 30, 2006; Harri Hursti, *Critical Security Issues with Diebold Optical Scan Design*, (Black Box Voting Project) July 4, 2005 <http://www.blackboxvoting.org/BBVreport.pdf> Harri Hursti, *Diebold TSx Evaluation* (Black Box Voting Project) May 11, 2006 <http://blackboxvoting.org/BBVtsxstudy.pdf> Susan Pynchon, *The Harri Hursti Hack and its Importance to our Nation* (Florida Fair Elections Codification) January 21, 2006 <http://www.votetrustusa.org> Ariel J. Feldman, J. Alex Halderman, and Edward W. Felten, *Security Analysis of the Diebold AccuVote-TS Voting Machine* (Princeton Univ. Center for Information Technology Policy) September 13, 2006 <http://itpolicy.princeton.edu/voting/> RABA Technologies LLC, *Trusted Agent Report Diebold AccuVote-TS Voting System*, January 20, 2004 http://www.raba.com/press/TA_Report_AccuVote.pdf

One of the principals of Liberty Election Systems, LLC is N.V. Nederlandsche Apparatenfabriek, known as Nedap. In September 2007, the government of the Netherlands de-certified the Nedap voting system, which is similar to the system offered by Nedap in New York through Liberty.

http://www.opednews.com/articles/genera_bev_harr_070930_dutch_voting_compute.htm

The Current HAVA Compliance Plan

16. In the meantime, the State Board of Elections recognized its obligation to do everything possible to bring New York into compliance with HAVA and the Election Reform and Modernization Act of 2005 as quickly as possible. In the fall of 2007, the commissioners split along partisan lines on how to accomplish this. The Democratic commissioners believed that it would be feasible, with a very aggressive timetable, to comply with the federal and state disability access requirements at every poll site in time for the September 2008 primary. The Republican commissioners disagreed that this was feasible and would not agree to commit to a timetable for implementation by September 2008. Ultimately, U.S. District Court Judge Gary Sharpe directed the State Board to submit a detailed timetable that would provide for implementation by placing a ballot marking device at every poll site in the State in time for the September 2008 primary, and for replacement of the lever voting machines by September 2009. That ruling was confirmed by the Supplemental Remedial Order entered by Judge Sharpe on January 16, 2008, attached as an exhibit to the Petition.

17. In order to comply with Judge Sharpe's rulings, the State Board adopted detailed timetables that move simultaneously on many fronts in order to assure compliance. Some of the key benchmarks regarding "Plan B," which provides for compliant ballot marking devices at every poll site in the State by September 2008, follow:

- January 22, 2008 – BOE review and signoff [of contracts for counties to procure ballot marking devices]
- January 23, 2008 – Office of General Services completion of contract process, subject to approval by the State Comptroller
- January 10, 2008 – Vendors submit in scope systems for testing
- January 11, 2008 – Planning for testing to begin

- January 25, 2008 – State Board to approve and provide list of recommended machines to counties to be ordered
- February 8, 2008 – County Boards return ordering information to the Office of General Services
- February 18, 2008 – State Board Commissioners select machine for counties that did not meet February 8th deadline
- February 27, 2008 – State Board Commissioners to approve/reject machines for use in 2008 (Note, this is final certification based on the technical tests of the independent testing authority.)
- February 29, 2008 – Office of General Services issues purchase orders
- March 11, 2008 – Voting system vendor accepts purchase orders
- April 3 – July 31, 2008 – Estimated start time for delivery after purchase order is finalized
- April 3 – July 31, 2008 – Acceptance testing of ballot marking devices (see Election Law §7-206)

18. Consequently, in order to meet the very aggressive timetable for implementation by September 2008, the counties would be compelled to select their preferred vendor before final approval of the contracts from the State Comptroller, and before the independent testing authority would complete its report to the commissioners of the State Board on its certification review. In view of these multiple fronts, one of the key dates was the January 25, 2008 deadline for the commissioners to determine which ballot marking devices would be offered to the counties for review and selection. The purpose of making this determination before completion of formal testing was to avoid having counties select a particular vendor's ballot marking device that, on its face would not be approved because of issues already known to the commissioners of the State Board.

19. The vendors were required to submit the documentation and equipment for the ballot marking devices that were being proposed by January 10, 2008. This allowed the staff of the Elections Operations Department of the State Board an opportunity to become familiar with each of the models submitted. I arranged to be at

the State Board's office on Friday, January 18, 2008 and to spend as much time as necessary in order to study each of the seven submissions. In view of the staff time involved, it was agreed that members of the Citizens Election Modernization Advisory Committee (established by Election Law § 7-201(1-a)) would also meet at that time to study the ballot marking devices. CEMAC members present included county elections commissioners Don Wart and Peter Quinn, Bo Lipari, Executive Director of New Yorkers for Verified Voting and the representative on CEMAC designated by the League of Women Voters, and Greg Jones, who is the senior attorney for the Commission on Quality Care & Advocacy for Persons with Disabilities. Brad Williams, Executive Director of the New York State Independent Living Council and public activist Aimee Allaud (NYSLWV) were also in attendance to observe.

The LibertyMark Voting Device (BMD) Does Not Comply

20. Based on my personal examination of the device and review of the documentation furnished by the vendor, it was apparent to me that the LibertyMark Voting Device (BMD) does not comply with New York and federal law. Most significantly, I knew that I could never make the determination required by Election Law § 7-201(1) that "the kind of machine or system so examined can safely and properly be used by voters and local boards of elections at elections, under the conditions prescribed [by the Election Law] and the requirements of the federal Help America Vote Act."

21. The failure to generate a ballot that complies with Election Law §7-104 and the failure to comply with the HAVA requirement of an independent verification process in a meaningful way is not something that must await the technical analysis of SysTest as it is essentially a field determination which I made when I and representatives of the disabled community attempted to utilize the machine. These are threshold flaws in the device, easily identifiable by one who understands the usage

to which the device is intended to be put, allowing voters with disabilities to vote independently.

22. The very reason why a line was added to the Plan B Timetable for state board approval of the list of machines to be submitted for selection by the counties was to avoid having the counties waste their resources in very substantial effort necessary to choose among the vendors' offerings.

23. When those of us present at the ballot marking device examination on January 18, 2008 turned our attention to the LibertyMark Voting Device (BMD), the room broke out in laughter at the first use of the machine. The so-called "ballot" spits out a small opening in the back of the machine, elevated above the voting surface. It would be virtually impossible for a blind voter to locate the "ballot" after the machine produces it.

24. I use the word "ballot" in quotations intentionally. Although the contract and the law require that the machine produce a ballot, a term which is defined in Election Law § 1-104(8) and (18) and which must meet the requirements of Election Law §§ 7-104 and 7-106, the LibertyMark Voting Device (BMD) produces on a record of the candidates voted for on a thin strip of paper like a cash register receipt. It does not produce a paper ballot as that term is defined in the Election Law.

25. Nearly identical provisions in both the Help America Vote Act § 301(a)(1), 42 U.S.C. § 15481(a)(1), and New York Election Law § 7-202(1)(e) require that the voting system provide the voter with the means "to verify (in a private and independent manner) the votes selected by the voter on the ballot before the ballot is cast and counted." The method of independent verification for visually impaired voters provided for the LibertyMark Voting Device (BMD) is a digital pen reader. Coupled with the small size of the "ballot" (a slip of paper the width of a cash register receipt) it would be virtually impossible to obtain a read-back of the "ballot" by a visually impaired voter using the digital pen reader.

26. My personal views on “whether the kind of machine or system so examined can safely and properly be used by voters and local boards of elections at elections, under the conditions prescribed [by the Election Law] and the requirements of the federal Help America Vote Act” were only further confirmed following that examination when I read the public comments submitted for the commissioners’ January 23, 2008 meeting. Notice had been widely disseminated that the commissioners would be making the initial determination of what machines could be selected by the county boards of elections at the January 23, 2008 meeting.

27. On January 22, 2008, I received a report from the League of Women Voter’s representative on CEMAC, Bo Lipari, on the Liberty ballot marking device and its compliance with HAVA and New York state law. (A copy of the Lipari Report of January 22, 2008 is annexed hereto as Exhibit “A”).

28. The Lipari report confirmed my own experience in the operation of the Liberty machine, that is, that it would be difficult for a person with disabilities to independently verify his/her ballot, an essential requirement of HAVA. Mr. Lipari also observed:

Because the full face ballot display on the front of the machine is printed, it provides no ability to change font sizes or display.

The Liberty DREs mechanism for independently verifying the printed ballot is unusable for voters with disabilities. In particular, voters with visual disabilities and mobility impairments will not be able to use it.

Problem 1-The Liberty VVPAT

The “ballot” is not a ballot but a VVPAT style piece of paper.

Problem 2-VVPAT delivery to voter

... since the slot is located at least three feet higher than table height, a voter using a wheelchair might not be able to reach the paper

...the VVPAT is ejected from the slot towards the front of the machine. Since this is not guided but literally sent flying, it would be nearly impossible for many voters with disabilities to be able to catch the VVPAT as it comes out.

Problem 3-Independent Verification

After the voter has located and retrieved the VVPAT, (possibly from the

floor), they must place the VVPAT on some solid surface (presumably a clipboard), take up a digital pen which must be connected to the voters' earphones (requiring the voter to unplug earphones from the DRE and plug them into the pen), and run the digital pen over each line of the VVPAT, one at a time. The digital pen audio reads the characters on the VVPAT and reads them back via the earphones.

This solution proved unworkable, even for those of us testing the machine who were not disabled. It is nearly impossible to run the pen precisely over each line of the VVPAT—even when it can be seen. Even if it could be done for one or two races, it was nearly impossible to verify the entire VVPAT.

This solution is unusable for almost any voter with visual disabilities, mobility impairments, cognitive disabilities, and many other voters. The Liberty DRE provides no usable mechanism for independent verification.

29. On January 20, 2008 I received and reviewed a report from the New York State Independent Living Council that essentially was a submission of that group's amicus curiae filing with the U.S. District Court. (A copy of the New York State Living Council's submission is annexed as Exhibit "B"). Brad Williams and Sue Cohen, who are both employed by NYSILC subsequently told me that they were extremely troubled by the Liberty device and that they believe that it would neither address adequately the needs of many voters with disabilities nor comply with HAVA.

30. On January 22, 2008, the Brennan Center for Justice submitted a seven-page letter that also recommended against approval of the Liberty and Avante ballot marking devices. (A copy of the Brennan Center's submission is annexed as Exhibit "C") The Brennan Center wrote:

Based on our extensive study of electronic voting systems, it is our judgment that any attempt to satisfy Judge Sharpe's order by purchasing full-face DRE's that have been modified to become "ballot marking devices" is not only misguided, but also a violation of state and federal constitutional provisions. . . .

The Brennan Center also wrote:

We also have serious concerns about whether any of the full-face DREs satisfy state and federal accessibility requirements. It is our understanding that, unlike the three [other] ballot marking devices being

considered by the State Board, none of the full-face DREs produce a paper ballot that can be independently and privately reviewed by voters with visual impairments and other disabilities. At the same time, research sponsored by the Brennan Center suggests that persons with reading disabilities may make many more errors on full-face DREs than other voting systems.

31. Based on my own examination, confirmed by these other reports I have concluded that the LibertyMark Voting Device (BMD) does not meet the standard set by Election Law § 7-201(1) for a commissioner of the State Board of Elections to determine that the device can be used in New York State. Because there is at least one other device, the Sequoia ImageCast that all commissioners agree does meet the standards of New York and federal law, there is no basis for approving any machine that does not comply with HAVA and the New York Election Law.

Conclusion

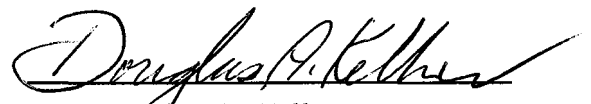
Election Law § 7-201(1) was explicitly amended by the Election Reform and Modernization Act of 2005 to require an affirmative determination by three commissioners before a voting machine or system can be used in New York State. The LibertyMark Voting Device (BMD) has not obtained that approval because, in the determination of myself and others, it is not in compliance with the requirements of the federal Help America Vote Act in that it does not provide a voter with disabilities a meaningful opportunity to independently verify their ballots after they have been marked.

I also respectfully point out to the Court the potential harm of granting Petitioner the relief it seeks—allowing what has been determined to be a noncompliant system to be offered to the county boards of elections. If the Court does so and the U.S. District Court which has retained jurisdiction over the State Board's efforts to comply with the District Court's Supplemental Remedial Order should agree that the LibertyMark is not HAVA-compliant, then the counties will have lost valuable time in

their efforts to have HAVA-compliant machines in place for the September 2008 Primary.

I respectfully urge the Court that I have articulated a rational basis for my decision to vote against including the LibertyMark Voting Device (BMD) on the list of choices for selection by the county elections commissions, because the Liberty device does not meet the standard required by Election Law § 7-201(1). The Court should not substitute its judgment for that of Respondents.

Consequently, the Court should deny the petition.


Douglas A. Kellner

Sworn to before me
January 31, 2008



MONICA SALVATIERRA
Notary Public, State of New York
No. 01SA4971312
Qualified in Nassau County
Commission Expires Aug. 27, 2010



Initial Analysis of Problems with LibertyVote Accessibility Features

NYS Lot 2 (BMD) Submissions to SBOE Machines delivered to SBOE as of 1/17/08

By Bo Lipari

League of Women Voters of New York State Representative
Citizens Election Modernization Advisory Committee
January 22, 2008

Vendor Name: Liberty

System Name: LibertyVote (BMD) with EMS LibertyControl, EPU 1

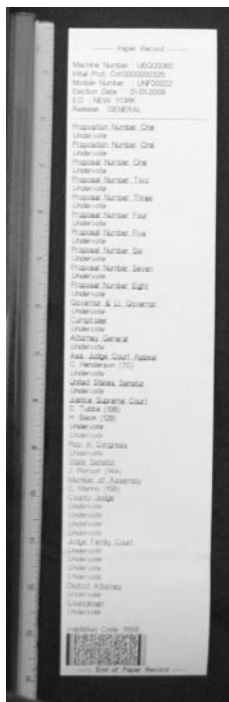
System Description: This submission is essentially the LibertyVote DRE with a modified VVPAT. This model DRE does not have a touch screen, but uses a printed overlay positioned over pressure switches. Because the full face ballot display on the front of the machine is printed, it provides no ability to change font sizes or display contrasts and colors.

Independent Verification of Paper Ballot

The Liberty DREs mechanism for independently verifying the printed ballot is unusable for voters with disabilities. In particular, voters with visual disabilities and mobility impairments will not be able to use it.

Problem 1 - The Liberty VVPAT

The "ballot" is not a ballot, but a 3" wide, VVPAT style piece of paper. Like a VVPAT, it produces the printout from a paper roll which is positioned behind the back screen of the device. The printed output is a line by line text description of race and result, with a bar code on the bottom containing unknown information.



The Liberty VVPAT



The VVPAT slot is located quite far from the voter

Problem 2 – VVPAT delivery to voter

After the voter has completed voting and presses the “Cast Vote” button, the machine pushes the VVPAT out of the slot by only 1 inch. Since the slot is located at least three feet higher than table height, a voter using a wheelchair might not be able to reach the paper.



The VVPAT sticks out only about 1 inch after the voter is finished

In this case, if the voter presses the “Cast Vote” button a second time, the VVPAT is ejected from the slot towards the front of the machine. Since this is not guided but literally sent flying, it would be nearly impossible for many voters with disabilities to be able to catch the VVPAT as it comes out.



After the second press of the “Cast Vote” button, the VVPAT is ejected out the front.



It is difficult if not impossible for many voters with disabilities to find, hold, and orient the VVPAT.

Problem 3 – Independent Verification

After the voter has located and retrieved the VVPAT, (possibly from the floor), they must place the VVPAT on some solid surface (presumably a clipboard), take up a digital pen which must be connected to the voters' earphones (requiring the voter to unplug earphones from the DRE and plug them into the pen), and run the digital pen over each line of the VVPAT, one at a time. The digital pen audio reads the characters on the VVPAT and reads them back via the earphones.

This solution proved unworkable, even for those of us testing the machine who were not disabled. It is nearly impossible to run the pen precisely over each line of the VVPAT, even when it can be seen. Even if it could be done for one or two races, it was nearly impossible to verify the entire VVPAT.

This solution is unusable for almost any voter with visual disabilities, mobility impairments, cognitive disabilities, and many others. The Liberty DRE provides no usable mechanism for independent verification.

The LibertyVote submission is unsuitable for almost any voter with visual disabilities or mobility impairment. In light of the fact that this device provides no usable mechanism for independent verification, it should not be used as a ballot marking device.

The lack of an ability for a voter to independently verify the contents of the ballot violates New York State Election Law Section 7-202(1)(e) and HAVA Section 301.



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STATEMENT ON THE NEED FOR TESTING OF BMD TECHNOLOGY BY PEOPLE WITH DISABILITIES

The New York State Independent Living Council (NYSILC) believes that it is important people with disabilities test the Ballot Marking Device (BMD) or devices selected by the State Board of Elections which will serve as the voting technology designated to meet the State's HAVA implementation requirements per the Supplemental Remedial Order signed by the Federal Judge.

NYSILC will help SBOE to assemble a focus group of people with various disabilities to test the voting technology to educate the vendor(s) about final improvements that they can make to the system(s) to better accommodate voters with disabilities before they go into final production and the counties purchase the devices.

Such a proactive step would be a benefit to all parties involved. Ignoring this step would bypass a significant opportunity to gain valuable feedback to improve the devices and reduce potential problems that could have been avoided.

New Yorkers with Disabilities Getting Equal Voting Access (NYDGEVA)

New Yorkers with Disabilities Getting Equal Voting Access is a coalition of disability organizations working together to gain equal voting access for individuals with disabilities. Coalition members include; New York State Independent Living Council, National Multiple Sclerosis, United Spinal Association, Disabled in Action, New York State Association of Community and Residential Agencies, New York State ARC, New York State Self Advocacy Association, and the New York City Disability Network.

Contact Susan Cohen

Coordinator of NYDGEVA

suec@nysilc.org/518-427-1060 Fax 427-1139

The coalition wants the New York State Board of Election Commissioners and all the County Board of Election Commissioners to understand and act on the following items;

- 1. Individuals with disabilities want to fully and equally participate in the electoral process.**
- 2. NYDGEVA understands the very challenging nature of full HAVA implementation and wants to assist New York State and all the counties in everyway possible.**
- 3. The coordinators of NYDGEVA have expertise in disability voting access and want to be included in the decision making process.**
- 4. Eight large Disability organizations submitted an Amicus Brief with Judge Sharpe and we want every election official to read this document. It is comprehensive and educational. No election official should purchase election equipment without reading this document. It is available in electronic format.**

5. New York State should have a choice on which machines they purchase. The only way individuals with disabilities will be able to vote privately and independently is if there are a combination of ballot marking devices and DRE's available for use for all New Yorkers as the permanent solution. No machine which is currently being considered, meet all the needs of all disabled individuals. The only way for that to happen is for these machines to be customized to meet our specific needs. These machines need to have one set of standards so they work uniformly. These standards exist in the non-accessible machines but do not exist in the accessible machines. This will lead to nothing but problems for New York.

6. The disability community wants to assist in the following ways:

- 1. There has been very limited testing by the disability community on the machines slated to be purchased, that are designed for the disabled individuals. This is very dangerous, and opens New York State for many serious problems if the equipment purchased is faulty or unreliable. Experts from the disability community should be given the opportunity to assist New York State and the vendors in making these machines accessible to as many individuals with disabilities as possible. Some of the major vendors have agreed to listen to and implement recommendations of the disability community and other technology experts provided this was done in a timely matter and takes no more then two weeks to complete. This work group should be comprised of those who are knowledgeable of the needs of disabled voters and of the existing voting technology. This has been done successfully in Cook County, Illinois.**
- 2. To be part of the poll worker training/public education advisory committee.**
- 3. To provide technical assistance of any kind to the County Board of Election commissioners to assist them with their challenging job of implementing HAVA.**
- 4. To be included in any and all testing of voting equipment**

- 7. The disability community demands that accessible voting machines to have the capacity to count the ballots the night of the election like every other ballot will be counted, even if that means a change in New York State law to do so. For every accessible ballot marking device purchased their needs to be an optical scanner purchased.**

Reasons for this:

- 1. The disability community has been disenfranchised for over 200 years by not being able to vote independently and privately in New York State. Treating the ballots of these new machines like absentee ballots is unacceptable. This is not an equal vote and will not be tolerated.**
- 2. Every other state who has purchased BMD's for HAVA compliance, has also purchased scanners. Not purchasing scanners is like buying a chalk board without the chalk.**
- 3. If purchasing scanners is not possible by 2008 then they MUST be purchased by September of 2009 when the lever machines are fully replaced.**
- 4. Read the attached Amicus brief for more information.**

In closing, the disability community up to recently has been left out of discussions and the decision making process when it comes to HAVA implementation. This has had disastrous results and has put New York State in the humiliating position it is in. We believe if New York State and the counties allow the disability community to share its expertise and energy, New York in the long run can be the best state has far as opening the electoral process to thousands of previously disenfranchised individuals.

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

UNITED STATES OF AMERICA,
Plaintiff,

v.

06 Civ. 0263 (GLS)

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.

**BRIEF *AMICUS CURIAE* OF THE NEW YORK STATE INDEPENDENT LIVING
COUNCIL, DISABLED IN ACTION OF METROPOLITAN NEW YORK, THE
DISABILITIES NETWORK OF NYC, THE NATIONAL MULTIPLE SCLEROSIS
SOCIETY UPSTATE NEW YORK CHAPTER, UNITED SPINAL ASSOCIATION,
AMERICAN COUNCIL OF THE BLIND OF NEW YORK, THE NEW YORK STATE
ASSOCIATION OF COMMUNITY AND RESIDENTIAL AGENCIES AND SELF
ADVOCACY ASSOCIATION OF NEW YORK STATE**

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PRELIMINARY STATEMENT

The amici submitting this brief are a diverse consortium of organizations representing people with various types of disabilities and have been involved, among other things, in the effort to ensure that people with disabilities are afforded the right to vote privately and independently. This right was granted to them by the Help America Vote Act of 2002 ("HAVA"), and further guaranteed by HAVA implementing statutes under New York state law – the Election Reform Modernization Act ("ERMA"), as amended, N.Y. Elec. Law § 7-202 (2007) and accompanying regulations, as well as the Election Assistance Commission's Voluntary Voting System Guidelines (the "VVSG"), with which New York has committed to comply. *See* N.Y. Comp. Codes R. & Regs., tit. 9, §6209.02(A) (2007).

The amici have considerable expertise regarding the accessibility issues that voters with disabilities have faced over the years and which must be addressed by New York in order to bring its voting system into compliance with these new legal mandates. Historically, the central issues facing disabled voters in New York have been overlooked, in large measure due to New York's failure to include the disabled community in decisionmaking with regard to voting systems. Unfortunately, that situation continued during the past several years, when New York was required, but failed, to craft and implement a plan for complying with the accessibility requirements of HAVA and the interrelated provisions of state law. Even during the course of this litigation, which was brought to compel the State to do what it should have done long ago, the State, at best, has focused on other concerns regarding implementation. The State has continued to fail to adequately consider the accessibility issues or gain an understanding of the assistive technologies currently available in voting systems and the further technology that must be developed in order to assure HAVA compliance.

On January 16, 2008, the Court entered a Supplemental Remedial Order that requires the State to move forward with great speed on interim and full HAVA compliance plans. We believe that the State will benefit as it proceeds if it gives greater consideration to the disability community's substantial expertise and ability to assist in the process of reforming New York's voting system to meet HAVA's requirements. We believe that the Court, which will be overseeing the State's progress on compliance, will also benefit from hearing from the disability community on the accessibility issues that the State must address. Accordingly, we respectfully submit this amicus brief the purpose of which is to inform the parties and the Court of the particular accessibility issues that are faced by the large and diverse population of more than 3,300,000 people with disabilities of voting age living in New York. *See American Association of People With Disabilities, State Census Disability Numbers and Voting Turnout*, <http://www.aapd-dc.org/dvpmain/elreform/census.html> (last visited January 18, 2008), and the currently available voting systems and extent of their accessibility. In addition, in light of our collective knowledge and expertise, we further offer our recommendations on modifications to the Supplemental Remedial Order with respect to the goal in HAVA of ensuring that all voters with disabilities have the ability to exercise the franchise in a private and independent matter.

As we explain further below:

- We agree with the requirement in the Supplemental Remedial Order that by the Fall 2008 federal elections, Ballot Marking Devices ("BMDs") be available at every polling place, but recommend that the order be amended to require precinct-based optical scanners. Since many more BMDs will be used in these upcoming elections than under the Court's earlier Remedial Order, Plan B, scanners are necessary to ensure that the votes cast on the BMDs are accurately captured and

are counted in the same manner and time as votes cast on other voting systems.

Precinct based scanners will also serve the important function of providing a voter verified paper audit trail ("VVPAT").

- We agree with the requirement in the Supplemental Remedial Order that full HAVA, ERMA and VVSG compliance be achieved by the Fall 2009 primary elections. We further recommend that the State's full HAVA compliance plan require both BMDs with precinct-based optical scanners, and Direct Recording Electronic devices ("DREs"), each with its own form of a VVPAT, in every polling place because that is the only way to reasonably meet the accessibility needs of *all* voters with disabilities.
- We recommend that the Supplemental Remedial Order be amended to expressly require the State to continue to upgrade voting machines, in conjunction with the disability community and appropriate experts, as new assistive technologies become available.
- We recommend that the Supplemental Remedial Order be amended to expressly require the State to provide and fund, with the involvement of the disability community and appropriate experts, poll worker training curriculum and public education programs concerning the issues that disabled people face when voting.

I. STATEMENT OF INTEREST

The amici collectively and individually have considerable experience and expertise regarding the nature of the vast array of disabilities affecting voters in New York and the barriers that those citizens face in order to vote privately and independently.

The New York State Independent Living Council ("NYSILC") is a consumer controlled organization, providing support and technical assistance to 37 independent living centers throughout New York State, which are directed by and for people with disabilities. NYSILC assists in the drafting of disability legislation, promotes research projects on disability issues, and coordinates the collection of polling data concerning voters with disabilities. NYSILC has been a member of the Election Modernization Task Force as mandated by state law, and had a seat on the original HAVA implementation task force in 2003. It also has been a member of the Citizen's Election Modernization Advisory Committee authorized by ERMA.

Disabled in Action of Metropolitan New York ("DIA") is a civil rights organization committed to ending discrimination against people with all disabilities. DIA fights to eliminate the barriers that prevent people with disabilities from enjoying full equality in American society. Founded in 1970, DIA is a democratic, membership organization consisting primarily of and directed by people with disabilities. DIA has been active in the effort to ensure that all voters, including those with disabilities, have the right to a private and independent vote in their community's polling sites.

The Disabilities Network of NYC ("DNNYC") promotes full participation of people with physical disabilities in the life of the city by strengthening appropriate citywide policies, resources, services and legal protections; assuring reasonable accommodations; and building informed and accurate public perception about people with disabilities. DNNYC has been supportive of, and worked toward, the implementation of HAVA in New York City polling places.

The National Multiple Sclerosis Society Upstate New York Chapter ("NMSSNY") provides programs and services to 12,000 clients and families affected by Multiple Sclerosis

("MS") in 50 counties throughout upstate New York. MS is an unpredictable, life-long, neurological disease usually diagnosed in early adulthood. Symptoms often associated with MS include difficulties with vision, numbness or tingling, muscle weakness, loss of balance/coordination, gait disturbances, excessive fatigue, memory loss and paralysis. There are more than 34,000 New Yorkers with MS, many of whom have faced particular difficulties with New York's existing largely inaccessible voting system. NMSSNY has diligently advocated for a voting system that will allow voters with MS the privacy and independence that voters without disabilities are granted.

United Spinal Association ("USA") is a national membership organization formed in 1946 by paralyzed veterans. USA's mission is to improve the quality of life of Americans with spinal cord injuries and disorders, and includes a significant number of members who are quadriplegic, and have limited dexterity and use of their arms, hands and fingers. USA has a comprehensive understanding of the numerous and diverse forms of physical disabilities faced by individuals with spinal cord injuries and disorders, and the corresponding array of problems that physically disabled people face when voting.

American Council of the Blind of New York ("ACBNY") is the state affiliate of The American Council of the Blind, the national organization. Its purpose is to support and promote the educational, vocational and social advancement of blind and visually impaired persons. The state affiliate has 400 members who are blind or visually impaired. ACBNY is intimately familiar with the barriers that blind and visually impaired people face when voting and has been involved in testing and evaluating the accessibility of potential voting systems.

The New York State Association of Community and Residential Agencies ("NYSACRA"), comprised of over 200 voluntary not-for-profit agencies providing services to

persons with mental retardation and developmental disabilities, promotes full participation of persons with developmental disabilities in the communities of New York State. NYSACRA agencies provide a comprehensive and integrated system of services which has as its primary purposes the promotion and attainment of independence, inclusion, individuality and productivity for persons with mental retardation and development disabilities. NYSACRA understands that individuals with developmental disabilities have long been disenfranchised from their right to vote. Some have been denied under the guise of competence, others through inaccessible locations and machines.

Self Advocacy Association of New York State ("SAANYS") is an organization run by and for people with developmental disabilities, which are an array of severe chronic conditions that are due to mental and physical impairments that become manifest before the age of 22. SAANYS is a grass roots organization with local self-advocacy groups, regional leadership teams and an active statewide board of directors elected by a democratic (and accessible) voting process at the regional level. SAANYS is intimately familiar with the barriers that people with developmental disabilities face when voting. SAANYS has thousands of members and supporters throughout New York State who are extremely dissatisfied with New York's efforts to support accessible voting opportunities for all New York State citizens.

II. THE FUNDAMENTAL VOTING RIGHTS OF NEW YORK CITIZENS WITH DISABILITIES

A. HAVA and the Rights Granted to Voters With Disabilities

No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined. Our Constitution leaves no room for classification of people in a way that unnecessarily abridges this right.

Wesberry v. Sanders, 376 U.S. 1, 17-18 (1964).

Following the elections in 2000, in which millions of voters throughout the United States were disenfranchised or had their fundamental right to vote impaired, impinged or unduly burdened due to a myriad of problems in the administration of federal elections on the state level, Congress enacted HAVA to ensure continued protection of the fundamental right to vote. Included among the problems that Congress addressed were those that the physically and developmentally disabled segments of the population have long faced – being disenfranchised historically by virtue of the inaccessible voting systems deployed throughout the country. Accordingly, HAVA, among other things, created individual voter rights in establishing minimum requirements for the States concerning election technology and the administration of federal elections with a particular emphasis on voting system accessibility.

HAVA required compliance by January 1, 2006, but delegated to the states the task of further defining and applying the federal standards to their particular situations in their respective states. HAVA, however, guarantees, at the minimum, that each state provide equal access to and participation in the voting process for all of its citizens, in particular, voters who are blind, visually impaired and have other disabilities.

Without a doubt, HAVA is a watershed piece of legislation for voters with disabilities. It creates a new right for voters with disabilities, the right to vote privately and independently, thereby guaranteeing voters with disabilities the fundamental right to equal treatment under the law with respect to exercising the franchise.

In this regard, HAVA expressly grants rights to individuals with disabilities by requiring that the States' voting systems be accessible for individuals with disabilities, including the physically disabled, developmentally disabled, and blind and visually impaired, in a manner that provides the same opportunity for access and participation, *including privacy and independence*,

as for other voters. 42 U.S.C. § 15481(a)(3). This includes providing voters with disabilities with the opportunity to *privately and independently* verify their votes before they are cast. *Id.* HAVA requires at least one such disabled accessible voting system to be available at each polling place. *Id.* (emphasis added).

While the right is otherwise guaranteed, in the event a State, such as New York, accepts certain funding pursuant to Title II of HAVA, voters with disabilities are specifically afforded the right to have expenditures used to ensure accessibility to polling places, including the path of travel, entrances, exits, and voting areas of such polling facilities. 42 U.S.C. § 15421(b)(1).

B. New York Law Implements HAVA and Its Accompanying Guidelines, Requiring Satisfaction of Specific Accessibility Requirements for Voters with Disabilities

Under HAVA, Congress deferred to the states to develop the particular requirements it deemed necessary to comply with and implement HAVA on the state level. In doing so, Congress provided for enforcement of the State's particular requirements so long as they are not inconsistent with HAVA's federal standards. New York's HAVA implementing legislation is ERMA, as amended, N.Y. Elec. Law § 7-202 (2007), which is parallel to, and consistent with, the federal requirements. Accordingly, any plan to comply with HAVA necessarily requires full compliance with the state's law implementing legislation.

ERMA and the accompanying regulations precisely define the standards by which New York will satisfy HAVA, including the requirement that voters with disabilities be afforded the opportunity to vote privately and independently. New York's specific standards account for and address the various barriers that voters with disabilities must overcome in order to exercise their fundamental right to vote in the manner now required by law.

Reflecting HAVA's mandate of full accessibility throughout the voting process, ERMA requires that the New York voting system provide disabled voters with the opportunity to

privately and independently verify votes selected and the ability to privately and independently change such votes or correct any error before the ballot is cast and counted, N.Y. Elec. Law § 7-202(1)(e) (2007); N.Y. Comp. Codes R. & Regs., tit. 9, § 62090.2(A)(3).

With specific regard to blind and visually impaired voters, in accordance with HAVA, ERMA requires that the voting system have certain features that accommodate this group of voters, including:

- providing sufficient illumination to enable the disabled voter to see the ballot. N.Y. Elec. Law § 7-202(1)(k); N.Y. Comp. Codes R. & Regs., tit. 9, § 62090.2(A)(1);
- having at least one voting machine or system at each polling place equipped with an audio voting feature that communicates the complete content of the ballot in a voice which permits a voter who is blind or visually impaired to cast a secret ballot using voice-only or tactile discernible controls. N.Y. Elec. Law § 7-202(2)(b); N.Y. Comp. Codes R. & Regs., tit. 9, §§ 62090.1(2), 62090.2(B)(2);
- having ballots that are printed in a format and arrangement utilizing types and fonts that are plain and clear and “shall satisfy all requirements and standards set forth pursuant to the federal Help America Vote Act.” N.Y. Elec. Law § 7-104(1); and
- having ballots available or printed in adjustable font sizes. N.Y. Comp. Codes R. & Regs., tit. 9, § 62090.2(F)(1)(c).

ERMA addresses the needs of voters with physical disabilities by requiring that voting systems:

- allow a voter in a wheelchair to cast his or her vote. N.Y. Elec. Law § 7-202(1)(p);

- permit inspectors of elections to easily and safely place the voting machine or system in a wheelchair accessible position. *Id.* at § 7-202(1)(q);
- offer at least one voting machine or system at each polling place equipped with a voting device with tactile discernible controls designed to meet the needs of voters with limited reach and limited hand dexterity. N.Y. Elec. Law § 7-202(2)(a); N.Y. Comp. Codes R. & Regs., tit. 9, §§ 62090.1(32); 62090.2(B)(1); and
- offer at least one voting machine or system at each polling place that is capable of being equipped with a pneumatic switch (also called a “dual-switch”) voting attachment which can be operated orally, by gentle pressure or the creation of a vacuum through the inhalation or exhalation of air by the voter including, but not limited to, a sip-and-puff switch voting attachment. N.Y. Elec. Law § 7-202(2)(c); N.Y. Comp. Codes R. & Regs., tit. 9, §§ 62090.1(24), 62090.2(B)(2).

When ERMA was initially enacted in 2005, it, along with the related regulations, established the precise requirements to be satisfied as New York upgraded its voting systems to meet the standards of HAVA, including full voting system accessibility for voters with disabilities. The law left open the particular voting systems to be used to meet these precise requirements. That issue would be determined through a testing, certification and selection process. As we know, New York, however, was woefully behind in achieving HAVA compliance and nowhere close to approaching satisfaction of its legal obligations, when, in 2007, the state legislature amended ERMA to provide an interim approach, referred to as “Plan B.” Plan B specified a particular “accessible” system – a BMD – and allowed the state to provide only one BMD in each county, rather than having one in each polling place, as required by HAVA. The amendment to ERMA did not require an accompanying optical scanner in each

precinct, which meant that ballots cast on the county-wide accessible ballot marking devices would most likely be centrally scanned and counted later and separately from other ballots. The amendment to ERMA required by Plan B was intended to terminate when New York purchases new voting systems as permanent replacements for the lever machines.

The Supplemental Remedial Order expands upon Plan B by requiring a BMD in every polling place, but it does not require precinct-based optical scanners. We explain below, in Point III.C.1, *infra*, that as the use of BMDs is expanded, precinct-based scanners are essential both to meet the mandates of HAVA and New York law, which require equal, independent and confidential voting in the election process, and to avoid the serious risk that votes cast on the BMDs will be lost if only scanned on a centralized basis. Brennan Center For Justice at NYU Law School; Task Force on Voting System Security, *The Machinery of Democracy: Protecting Elections in an Electronic World* (2006) (hereinafter, Brennan Center Report”).

Under ERMA’s accompanying regulations, New York law further requires the state to comply with the U.S. Election Assistance Commission’s VVSG’s (N.Y. Comp. Codes R. & Regs., tit. 9, § 6209.02(A)), which were promulgated to address increasingly complex voting system technology. These guidelines went into effect nationally on December 13, 2007, and require that any newly tested voting system meet its standards. The guidelines were designed for state and local election officials to help ensure that new voting systems function accurately and reliably. The VVSG’s require the following:

- An audio-tactile interface so that a blind voter can listen to the ballot and navigate/mark the ballot through tactile controls;
- Enlarged and enhanced text for individuals who have vision loss but cannot or prefer not to use an audio ballot;

- Simultaneous audio and enhanced visual display for individuals who have vision loss and those with print perception-related disabilities such as dyslexia;
- A “non-manual” input option (usually dual switch) that allows individuals with very limited motor skills to navigate and mark the ballot; and
- Foot pedal requirement that allows individuals with very limited motor skills to navigate and mark the ballot.

III. AS THE STATE COMPLIES WITH THE SUPPLEMENTAL REMEDIAL ORDER, IT MUST ACCOUNT FOR AND ADDRESS ALL FORMS OF DISABILITY

As is emphasized above, any compliance plan must ensure full access for voters with various – and oftentimes dual – disabilities. As it stands today, however, New York still has a long way to go until such a voting system is in place. The Supplemental Remedial Order will help to bring the State closer to satisfying its legal requirements, but as a practical matter, it appears that, at least in the short term, voters with disabilities will be forced to accept the current best case scenario, albeit a scenario that will continue to exclude many disabled voters from full inclusion in the voting process in the manner required by HAVA and New York’s implementing legislation. We urge the Court to require the State to take all the steps necessary to overcome those shortcomings as soon as possible. We set forth below our recommendations on steps and considerations that we believe the State should take into account as it moves forward with compliance.

A. The State’s Compliance Plan Must Involve the Participation of Individuals With Disabilities and Experts in Assistive Technologies

In this monumental effort to reform the voting system and create an accessible voting system, it is essential that individuals who have disabilities be provided the opportunity to present first hand feedback on the effectiveness of proposed assistive technologies. In

conjunction with this hands-on, practical expertise are the professional experts that can guide the state through the technical aspects of voting system and machine technology. These include experts in disability access (the way people with disabilities interact with technology) and in the sorts of technology that is being developed to ensure improved access to voting systems over time. It is only through the utilization of these two groups that New York will fulfill its promise, and legal obligations, to provide a universally accessible voting system.

That New York is in the boat it is now – delinquent on meeting HAVA requirements – is directly related to the fact that New York needs, but has failed, despite the availability of voters with disabilities and experts in assistive technology, to consult and include these two groups in its HAVA implementation process. This omission is at odds with the very essence of HAVA, as Congress recognized the need for specialized expertise in assistive technology by funding State Assistive Technology Programs in the 56 states and territories.

The issues presented in selecting a voting system that provides privacy and independence for all voters necessarily requires an understanding of the particular accessibility issues faced by a large and diverse population of people with different types of disabilities, and the assistive technologies currently available and in development to accommodate their needs. Simply put, to acquire this understanding, there is no better way to address and solve those issues than to include and rely upon the very people that are unable to access the current voting system and the experts that study these issues.

The amici, therefore, offer their considerable expertise on the issues before this Court. They are highly knowledgeable about the accessibility issues that must be addressed for the population of citizens with disabilities in New York, and have consulted with experts, directly and through their counsel, on the assistive technology and important security and reliability

issues to be considered in new voting technology. These experts include Diane Cordry Golden, Ph.D, director of Missouri Assistive Technology,¹ and David Jefferson, Livermore National Laboratory, a computer scientist in the Center for Applied Scientific Computing.²

Accordingly, for every step along the testing and certification process, including, for example, the "Initial Planning & Test Plan Preparation," the "Testing of Voting Machines," and the "Functional Configuration Audit" – the disability community and related experts should be included in decision-making with respect to voting machines and systems. This should involve routine input from organizations that are concerned with disability issues. The machine testing process should involve people with a variety of disabilities in order to ensure that their needs are met as voting machine technology develops.

**B. Viable Options for Accessible Voting Systems,
Subject to Further Adaptations and Upgrades**

Based on their first-hand experience and professional expertise, the amici believe that there are viable options currently available that will allow for an accessible voting system. Experts find that BMDs and DREs are the most accessible voting systems currently available. Brennan Center Report at 75. Each system, however, has certain accessibility limitations. Neither system can alone adequately accommodate all people with disabilities. The amici, therefore, recommend that in order to come into full compliance with HAVA, the State must

¹ Dr. Golden is a leading expert on assistive technology and accessible voting systems. Dr. Golden serves on the Board of the National Association of Assistive Technology Act Programs, and provides technical support to the National Disability Rights Network on voting equipment access issues. She has also provided invited testimony to the Election Assistance Commission and the Technical Guidelines Development Committee on accessible voting systems.

² Mr. Jefferson has extensive knowledge and experience with voting machines and technology. He spent several years in Silicon Valley doing Internet-related work, specializing in election security. At U.C.L.A., he conducted research in the fields of parallel discrete event simulation, simulated evolution, parallel operating systems, and robotics. Mr. Jefferson also serves on a number of government panels at the state and federal levels, advising on election security issues, especially with regard to electronic and Internet voting. He also sits on the board of directors of the California Voter Foundation.

require that both systems be available to all voters and provide for further adaptations and upgrades to these systems as they become available. Indeed, other states – Texas, Missouri and Iowa, for example – have successfully met the accessibility requirements of HAVA by making both BMDs and DREs available to voters with disabilities.³

A basic understanding of how these voting machines function and the way people with disabilities interact with the machines is necessary to gain an understanding of the voting accessibility issues specific to voters with disabilities.

1. Ballot Marking Devices with a Precinct-Based Optical Scan as the Voter Verified Paper Audit Trail

The BMD system is a paper based ballot system that utilizes a computer/electronic interface to mark the paper ballot. The BMD prints the marked ballot for the voter to verify the ballot, but the ballot must then be fed back into the BMD if any changes are made, or, in the absence of a precinct-based scanner, deposited into a separate sealed receptacle in order to be counted and preserved. In order to count ballots from BMDs in the same manner as other ballots cast by people who manually mark their ballots, the BMD must be accompanied with an optical scanner at each precinct. These optical scanners are computer-based counting machines that can, and we believe, should, be provided at the precincts.

- a. Accessible Features Currently Available

BMDs enhance currently available accessibility for disabled voters – primarily blind and visually impaired voters – in a number of ways. The audio output communicates complete ballot content, provides navigation of the ballot, and access to generate, verify and cast a write-in vote

³ See Texas Secretary of State Website, <http://www.sos.state.tx.us/elections/forms/sysexam/voting-sys-bycounty.pdf> (last visited January 18, 2008); Missouri Secretary of State Website, <http://www.sos.mo.gov/elections/VotersFirst/VotersFirst-FINAL.pdf#i-a> (last visited January 18, 2008); Iowa Secretary of State Website, <http://www.sos.state.ia.us/elections/hava/access/VotingMach.html> (last visited January 18, 2008).

(though it will not confirm the actual contents of write-in votes). Volume and speed of speech of the audio output is voter adjustable. The touchscreen input has a button or other tactilely discernible controls (e.g., in Braille). Therefore, generally speaking, BMDs are accessible for blind, visually impaired, and deaf voters to cast their vote in a private and independent manner; though difficulty exists for blind voters in being able to privately and independently put marked ballots into scanners.

BMDs also allow voters to verify their votes through the process of audiolizing ballot information by input into scanners. This has, to some extent, been considered to meet the requirement that there be a VVPAT. In addition, these systems can allow for enlarging the display of the ballot on the screen, which enhances the accessibility for voters who are visually impaired (but not blind) to use these systems.

In sum, BMDs, absent precinct-based scanners, are largely accessible for blind and visually impaired voters, and are accessible for some voters with physical disabilities, provided the voter has enough manual dexterity to handle the paper ballot once it is printed and can place the ballot in a separate receptacle for casting without assistance. If BMDs are used *without* precinct-based scanners, however, they do not allow for verification, thereby failing to provide some measure of a VVPAT.

b. Aspects Requiring Modification or Upgrades

BMDs, while offering significant benefits to the disabled community, namely blind, visually impaired, and deaf voters, do not provide accessibility for voters who cannot handle and manipulate a paper ballot. Because BMDs do not provide a mechanism so that the paper ballot can be verified and submitted independently, they do not allow most disabled voters – particularly those with motor and other physical disabilities – to cast or verify the paper ballot privately and independently.

In addition, BMDs without a precinct-based optical scanner do not provide any voters with disabilities equal treatment as other voters, in violation of HAVA, because their ballots are not counted in the same manner or at the same time as other ballots cast in person by non-disabled voters.

2. Direct Recording Electronic Machines With a Voter Verified Paper Audit Trail

Inclusion of DRE systems in any final plan will ensure access for many with disabilities who cannot use BMDs privately and independently. With a DRE system, the voter uses an electronic interface to mark the ballot by making selections on a touch-screen. The DRE, in turn, records the vote electronically, and then produces a duplicate paper record of the voter's decisions in an attached VVPAT, which, under New York law, only becomes the official ballot if there is a systems failure in the electronic DRE or, more broadly, in the tallying system of DRE electronic votes. N.Y. Elec. Law § 7-202(1)(j).⁴

a. Accessible Features Currently Available

DREs enable most disabled voters to cast their vote in a private and independent manner. Audio output communicates complete ballot content, provides navigation, and provides full access for people who cannot see to generate and cast their vote. The volume and speed of the audio output is adjustable by the voter. Touchscreen input has a tactilely discernible control in the form of Braille, as well as a toggle switch for manual use. In addition, for voters with

⁴ The amici recognize concerns about the security of DREs, but we believe that if sufficient audit procedures are employed the security risks can be minimized and DREs, which offer an accessible option to many voters with disabilities, can be safely used. In that regard, ERMA requires an audit after every election of three percent of the voter verified audit records (VVPATS) from voting machines or systems, which are to be compared to the voting machine or system. Standards are to be developed by the New York State Board of Elections to determine when any discrepancy should lead to a larger or complete audit of all election records and how such audits should be conducted. N.Y. Elec. Law § 9-211. In addition, in the event of a systems failure, the voter verified audit trails will be used to determine the votes cast. N.Y. Elec. Law § 9-211(5). We believe that this level of automatic, mandatory, scrutiny will help assure that the likelihood of security tampering with such machines will be identified and foiled.

manual dexterity limitations, most DREs have dual switch features, which can be operated by sip and puff and other interface devices, greatly enhancing accessibility for disabled voters. DREs have the ability to enlarge the ballot display for greater visibility, and in some cases, the ability to have audio and visual content run concurrently. This capacity is important for a number of people with disabilities who benefit from relying on both vision and sound in order to adequately orient themselves on the ballot.

b. Aspects Requiring Modification or Upgrades

Like BMDs, a principal accessibility shortcoming of DREs is the incapacity to provide most voters with disabilities with the ability to verify their vote in a private and independent manner. DREs do not allow voters who are visually disabled to review VVPAT in a private and independent manner because the DRE technologies currently available do not provide a mechanism for audio output of the printed audit trail for blind, visually impaired or other voters who are unable to read the printed form. DREs, in their current form, also cannot convert the content of a paper ballot into accessible media, such as in Braille, large print, or audio output format, despite the fact that the paper ballot may be deemed the official ballot if there are systems or machine failures. Accordingly, this falls short of the accessibility requirements of HAVA, New York law and the VVSG, with regard to VVPAT.

C. Recommended Amendments to the Supplemental Remedial Order Regarding New York's Plan for Interim Compliance by Fall 2008

1. BMDs with Optical Scanners in 2008

As provided by the Supplemental Remedial Order as it relates to interim HAVA compliance, the amici support, solely on an interim basis, the requirement of at least one BMD in every polling place for the Fall 2008 federal elections. We, however, advocate an amendment to the interim compliance plan to add the requirement of an optical scanner in each precinct.

Without precinct-based scanners, New York's interim compliance effort is all but undercut. Votes cast on BMDs will not be counted along with the votes cast on other voting machines, but treated akin to absentee ballots. This ignores HAVA's promise of access for voters with disabilities, many of whom have had to vote absentee all of their voting lives because of the inability to access New York's soon-to-be replaced lever machines. It also gives these voters little incentive to vote in person and use the BMDs. Further, as discussed above, there is a heightened risk of loss of properly cast votes when scanning is done on a centralized basis only. Brennan Center Report, *supra*, at 27-28. With BMDs being employed at every polling place and being used, we hope, by voters with and without disabilities, it is likely that many votes will be cast on these systems. Precinct-based optical scanners are a necessity to ensure that such votes are accurately captured and timely tallied on Election Day, rather than transported to a centralized scanner and counted following the election. As we further discuss below, since we believe that BMDs with precinct-based optical scanners should be a part of the State's full HAVA compliance plan, investment in precinct-based scanners is a reasonable expenditure.

The amici recognize and agree, however, that for any voting system to be approved and implemented as part of the State's final compliance plan, appropriate testing must be completed to ensure reliability and security. Therefore, if optical scanners cannot be adequately tested and certified by the Fall 2008 elections, as an alternative, the State's final compliance plan must provide for at least one optical scanner and one BMD per precinct for the elections in the Fall of 2009.

2. Comprehensive Poll Worker Training With Input From the Disability Community

The amici strongly recommend that the Supplemental Remedial Order be amended to require that the State's interim HAVA compliance plan also include provisions and funding for

the development of comprehensive poll worker training that will prepare poll workers adequately on the use of the accessible BMDs, for their roll-out to every polling place for the Fall 2008 federal elections. The BMDs are radically different from the lever machines that have been used in New York for decades and the State should not underestimate the need for comprehensive training. Accordingly, we recommend that the State be directed to develop poll worker training curriculum as it relates to people with disabilities. Adequate training time must be given on all the necessary topics, including ensuring that poll workers are fully instructed on how to use new voting equipment and how to, in turn, instruct voters with disabilities on use of the new equipment. This will also entail sensitivity training of poll workers about working with individuals with various disabilities and about the voting rights of people with disabilities.

We strongly recommend that in connection with the development of such poll worker training curriculum the State be required to consult with and utilize experts from the disability community and experts on disability access, who have extensive experience with voting access issues. Active involvement from those that are most familiar with these accessibility issues is critical to maximize voting system accessibility. Disability experts should direct (or at least provide input on) comprehensive and mandatory disability awareness training to be integrated into customary poll worker training. County Boards of Elections should recruit and hire people with disabilities to work as poll workers.

3. Public Education Campaign With Input From the Disability Community

In conjunction with disability-specific and sensitivity training for poll workers, the State's interim HAVA compliance plan must also include a funded public education program. Accordingly, we recommend incorporation of this requirement into the Supplemental Remedial Order. Public education is critical to inform the disability community about accessible voting

options and how to use particular voting systems, especially as the voting system and assistive technology develops going forward. Someone who cannot vote privately and independently today may be able to do so in 2009 – but that voter cannot and will not vote without the knowledge that an accessible voting system is available and instructions on how to use it.

To that end, the disability community should be included in creating public education materials including public service announcements and in-community outreach efforts. The State should consult the disability community – specifically those with extensive knowledge of and experience with voting access issues – in developing a comprehensive voter education curriculum for people with disabilities. The State should also fund the marketing and distribution of educational and training materials to the disability community (and the community at large). In addition, outreach efforts should focus on the location of accessible voting sites, as well as information concerning transportation and, where possible, transportation itself, to such sites.

Materials produced for educating the public should be done in multiple formats including in audio, large print and Braille so all individuals with visual and audio impairments will have access to it. Disability experts should be consulted before producing public education materials to ensure the language and format of all materials are accessible to individuals with all disabilities.

D. Recommendation for Full HAVA Compliance by General Elections in 2009

Looking beyond the shortcomings of the State's current interim HAVA compliance plan, which we have addressed above, the amici acknowledge that full HAVA compliance with HAVA, ERMA and the VVSG simply is not possible by the 2008 federal elections. As lever machines are replaced in 2009, the amici believe that full compliance can be achieved through a

flexible approach that requires *both* BMDs with precinct-based optical scanners, and DREs with VVPATs, be available for all voters throughout New York State.

In addition, the State's full HAVA compliance plan *must* include compulsory obligations on the State to continue to upgrade machines as new assistive technology becomes available. For example, currently there is no system available that allows VVPATs to display in large print or to be audiolized so that voters who are blind can hear their ballot in order to confirm the data going onto the paper trail. The development and acquisition of that technology should be mandated in order to satisfy the accessibility mandates of HAVA and ensure that voters with visual impairments and voters with dexterity-related disabilities are able to vote with privacy and independence, which includes privately and independently verifying their ballot before it is cast. Accordingly, selection of accessible BMDs and DREs should include consultation with the disability community and experts on assistive technologies. This will ensure the selection and certification of voting machines capable of upgrades as further assistive technologies become available. In addition, the selection and certification process should include testing by individuals with disabilities. This way, as the technology develops, its application for people with disabilities can be refined before systems are purchased.

At the same time, the amici strongly believe that any voting system must pass rigorous testing that involves the disability community to ensure accessibility, reliability and security. Accordingly, to keep pace with advancing technologies, funds must be reserved or allocated by the State for the testing and purchase of new voting and assistive technology as it becomes available in order to ensure that every voter in New York with a disability is able to mark, verify and cast their ballot privately and independently as required by HAVA and New York's implementing law, regulations and guidelines.

Finally, as discussed above, disability-specific poll worker training and public education of voting access issues go hand in hand with implementation of new voting systems and technologies. Therefore, as the technology develops and New York moves towards full HAVA compliance, disability-specific training and education measures should be included with the steps New York takes in achieving full HAVA compliance.

CONCLUSION

For the reasons discussed above, we respectfully request that the Court consider and incorporate the recommendations of the amici into New York State's revised interim and full HAVA compliance plans.

Dated: January 18, 2007

Respectfully submitted,

/s/ Emily Stern
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VIA FACSIMILE AND ELECTRONIC MAIL

January 22, 2008

Neil Kelleher, Commissioner
Douglas Kellner, Commissioner
Evelyn Aquila, Commissioner
Helena Moses Donohue, Commissioner
Peter Kosinski, Co-Executive Director
Stanley Zalen, Co-Executive Director

New York State Board of Elections
40 Steuben Street
Albany, NY 12207

Dear Commissioners and Co-Executive Directors,

We write to oppose any effort by the State Board of Elections to permit the authorization or purchase of full-face DREs as ballot marking devices. Scientific studies show that full-face DREs produce more residual votes than other voting systems compliant with the Help America Vote Act ("HAVA") and that the lost votes disproportionately affect low-income voters and voters of color. The Brennan Center filed suit against the New York City Board of Elections because of discriminatory residual votes in 2000 and secured modifications to the City's lever machines. We hope that further litigation will not be necessary to preclude New York counties from purchasing machines that potentially will disenfranchise hundreds of thousands of New Yorkers in violation of state and federal law.

It is our understanding that on the morning of January 23, 2008, the State Board will meet to vote on which voting systems counties may purchase to comply with Judge Gary L. Sharpe's January 16, 2008 Order that counties must deploy ballot marking devices in every polling place this fall. We further understand that at least one of the systems the State Board will consider is a full-face DRE, or "touchscreen machine," which presents every candidate, every race, and every ballot measure on a single, large computer screen. These full-face DREs will produce printed paper trails of voter choices that will presumably be the "ballots" to be counted by hand after the

polls have closed. This procedure stands in contrast with traditional ballot marking devices (also being considered by the State Board), which present voters with a “scrolling” computer interface that allows voters to consider a single race at a time, and uses that computer interface to mark a paper ballot that can later be read by an optical scan machine.

Based upon our extensive study of electronic voting systems, it is our judgment that any attempt to satisfy Judge Sharpe’s order by purchasing full-face DREs that have been modified to become “ballot marking devices” is not only misguided, but also a violation of state and federal constitutional provisions. Full-face DREs have repeatedly been shown to produce substantially higher lost vote rates than other voting systems, whether they are “scrolling” computer interfaces found on traditional ballot marking devices or hand-marked optical scan ballots. These differences are particularly pronounced among low-income voters and voters of color. There is no state interest sufficient to justify this discriminatory burden on the fundamental right to vote.

We also have serious concerns about whether any of the full-face DREs satisfy state and federal accessibility requirements. It is our understanding that, unlike the three ballot marking devices being considered by the State Board, none of the full-face DREs produce a paper ballot that can be independently and privately reviewed by voters with visual impairments and other disabilities. At the same time, research sponsored by the Brennan Center suggests that persons with reading disabilities may make many more errors on full-face DREs than other voting systems.¹

As you are aware, the New York State Board of Elections has broadly defined duties and responsibilities to ensure that federal and state election laws are enforced and that voters’ rights to cast their votes and have them counted are protected. The State Board must act to ensure that local boards of elections across the state comply with and implement the election laws of the State of New York and the Federal Government, including those laws governing the purchase and use of voting machines.

¹ Lawrence Norden *et al.*, THE MACHINERY OF DEMOCRACY: VOTING SYSTEM SECURITY, ACCESSIBILITY, USABILITY, AND COST (Brennan Center for Justice ed., 2006), *available at* http://www.brennancenter.org/content/resource/the_machinery_of_democracy_voting_system_security_accessibility_usability_a/.

I. Full Face DREs Produce Higher Lost Vote Rates, Particularly Among Low-Income and Minority Voters

Usability experts have long argued that, by presenting so much information on a single computer screen, full-face DREs are inherently confusing and thus are likely to cause more lost votes than other voting systems. An analysis of lost vote rates for the last several federal elections, conducted by Professor David Kimball of the University of Missouri, confirms this theory. In fact, full-face DREs have consistently produced higher residual vote rates than any other HAVA-compliant technology.

Table 1:
Lost Vote Rates by Voting Technology
“Top of the Ticket” Races

Year	Full-Face DRE	Scrolling DRE ²	Optical Scan
2000	1.6%	—	0.9%
2002	2.2%	1.2%	1.3%
2004	1.2%	1.0%	0.7%

Based on studies of 1755 counties in 2000, 1270 counties in 2002, and 2215 counties in 2004. Source: Norden *et al.*, *supra* note 1, at 99.

A “lost vote” rate of 1.0% is generally expected in “top of the ticket” races. Some voters consciously choose not to vote for President, Senator or Governor. In 2000, 2002 and 2004, the lost vote rate for full-face DREs exceeded 1.0%. It also consistently exceeded the lost vote rate of precinct-based optical scan machines – by 0.5% to 1.0%. In New York State, this would represent between 35,000 and 70,000 extra lost votes.

² The State Board is not considering authorization of any scrolling DREs. We are providing residual vote rates for scrolling DREs for informational purposes. Traditional ballot marking devices use the same interface as scrolling DREs.

Table 2:
Ethnic and Economic Disparity in Lost Vote Rates by Voting Technology
2004 Presidential Election

Composition of County	Full-Face DRE	Scrolling DRE	Optical Scan
<i>Ethnic Composition</i>			
Hispanic Voters			
< 10% Hispanic	1.1%	1.0%	0.6%
10 – 30% Hispanic	1.1%	0.7%	0.9%
>30% Hispanic	2.0%	1.4%	1.2%
<i>Median Income</i>			
< \$25,000	2.8%	1.3%	1.4%
\$25,000 – 32,499	1.4%	1.1%	0.8%
\$32,500 – 40,000	1.3%	1.0%	0.7%
> \$40,000	0.9%	0.8%	0.7%

Based on a 2004 study of more than 2500 counties. Source: Norden *et al.*, *supra* note 1, at 101.

Usability experts have also long argued that voters who use computers less frequently than the general population, or who have adopted English as a second language – specifically, low-income and voters of color – would be disproportionately and negatively affected by having to vote on a full-face DRE because it presents a confusing computer interface. Again, the statistics bear out these concerns. In particular, the data show that if New York buys full-face DREs instead of Ballot Marking Devices and Optical Scans, the votes of close to an extra 1% of Hispanics and 1.5% of low-income voters as a whole may be lost in top of the ticket races.

Table 3:
Lost Vote Rate for State Ballot Initiatives by Voting Technology
2004 General Election

Full-Face DRE	Nationwide Average	Scrolling DRE	Optical Scan
15.4%	9.3%	6.3%	8.8%

Based on a study that reviewed results of 2042 counties in 2004.

Moreover, the lost vote rate increases as we move “down ballot.” On average, the votes of 15.4% of voters using full-face DREs were not counted for state ballot measures in 2004; by contrast, only 8.8% of voters using precinct count optical scan machines did not have votes counted for state ballot measures. Again, this difference in residual vote rates was significant *regardless of vendor*. This means, for instance, if New York City buys full-face DREs instead of Ballot Marking Devices and Optical Scans, it is likely to record 175,000 fewer votes on state ballot measures than it would if it chose the latter technologies.

II. Full-Face DREs Do Not Produce An Accessible Paper Ballot

The *only* record of votes cast on full-face DREs used as ballot marking devices will be the paper trail. This is because the DREs’ counters will be turned off; there will be no electronic record of such votes. Given this fact, DREs used as ballot marking devices must provide a way for visually impaired and other disabled voters to review the paper trail privately and independently.

Section 301 of HAVA provides, in relevant part, that the accessible system must “be accessible for individuals with disabilities, *including nonvisual 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.” (Emphasis added.)

Similarly, Section 7-202(1)(e) of New York election law states that a voting system approved by the State Board must “provide the voter an opportunity to privately and independently verify votes selected and the ability to privately and independently change such votes or correct any error before the ballot is cast and counted.”

We are aware of only one DRE being considered by the State Board that even purports to allow blind and visually impaired voters to privately and independently review the paper ballot. Unfortunately, it is our judgment that this full-face system, the LibertyVote (BMD) with EMS Liberty Control, will be inaccessible to an unacceptably large number of disabled voters.

In particular, it is difficult to imagine how voters with visual disabilities and any sort of mobility impairment will be able to use the system’s digital pen, which is meant to “read back” a voter’s choices through an audio interface. Based upon interviews with persons who have used the LibertyVote during public demonstrations, it is our understanding that to use this digital pen, a voter must place the paper record on some solid surface, connect the digital pen to her ear phones (requiring her to unplug her earphones from the DRE), and run the digital pen precisely over each line of the paper trail. Given the size of the type-font and the narrow width of the paper trail, it is our view that this would be an extremely challenging task even for voters without any visual or mobility impairments, let alone someone who was visually impaired and/or lacked fine motor skills. A voting system that makes it impossible for a large

percentage of voters with visual and mobility impairments to review their votes violates federal and state laws and should not be certified in New York.

Compelling the use of confusing voting systems that predictably disenfranchise hundreds of thousands of voters, who are disproportionately voters of color and disabled voters, unnecessarily burdens the fundamental right to vote, in violation of federal law. U.S. CONST. amends. I, XIV; Voting Rights Act of 1965, Section 2, 42 U.S.C. § 1973; Americans with Disabilities Act of 1990, Title II, 42 U.S.C. §§ 12131-12165. In addition, Sections 1 and 11 of Article 1 of the New York Constitution preclude the use of discriminatory voting systems. N.Y. CONST. art. 1, §§ 1 (“No member of this state shall be disfranchised, or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land, or the judgment of his or her peers,”); 11 (“No person shall, because of race, color, creed or religion, be subjected to any discrimination in his civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state.”). Because voting systems that comply with federal and state law are readily available, there can be no justification for permitting New York counties to purchase full-face DRE voting systems for use as ballot marking devices.

For the reasons detailed in this letter, we strongly urge you to permit the purchase of only real ballot marking devices that were *designed as* ballot marking devices, and not the use of full-face DREs that are likely to disenfranchise hundreds of thousands of voters, particularly low-income voters, voters of color and disabled voters. New York’s accessible voting systems should allow all voters, including the visually impaired and other disabled voters, to verify their ballots independently and privately, and should not employ a confusing full-face computer screen.

Sincerely,



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