

February 3, 2010

New York State Board of Elections
40 Steuben Street
Albany, NY 12207-2108

Dear Commissioners:

New York's new optical scan machines will treat overvotes in a way that threatens the voting rights of millions of New Yorkers. As you know, unlike most optical scan systems, the ES&S DS200 and ImageCast machines purchased for New York do not automatically return overvoted or otherwise erroneous ballots to the voter for correction.

Instead, the machines will keep the ballot but give the voter the opportunity to either cast the ballot with the overvote error, thereby invalidating the intended vote cast in that contest, or request the ballot back to make a correction by sending a message on a small screen on the ES&S DS200 and ImageCast machine. Having the machine retain the ballot and provide voters with this confusing and inadequate notice will only ensure that votes are unnecessarily lost, which is the exact problem the Help America Vote Act ("HAVA") was designed to prevent. It is our conclusion that the interface and message provided to New York's voters on the small screen of the ES&S DS200 and ImageCast machines is inadequate to provide the notice of overvote error as contemplated by HAVA.

A recent study out of Florida (www.ffec.org/documents/Invalid_Vote_Report_Revised_23June2009.pdf) leaves us extremely concerned that this system will lead to unnecessarily high overvote rates. The study shows that voters who used the ES&S DS200 (the only system in Florida which did not automatically return overvoted ballots to voters) had an overvote rate on Election Day 2008 that was eighteen times higher than that of the systems used in other Florida counties. If New York has an overvote rate that is as high as those Florida counties that used the DS200, as many as 40,000 votes would be lost for the top of the ticket contest in a major election year.

Unfortunately, there is reason to believe that New York will have an overvote rate that is even higher than the overvote rates in Florida. Specifically, (1) voters in New York have used lever machines which contained interlock systems that prevented overvotes for decades; (2) New York allows fusion voting, which results in the repetition of a candidate's name by all endorsing parties and can result in a confusing ballot prone to overvotes; (3) the statutory requirements for the design of paper ballots makes them far less usable than paper ballots used in other states (such as Florida); and (4) there are frequent contests where voters are entitled to choose multiple candidates in the same contest.

These New York specific circumstances create a voting process more prone to overvotes. Overvotes are almost always mistakes and the letter and spirit of the HAVA requires that the state do everything it can to prevent inadvertent errors when voters cast their ballot on Election Day.

We strongly urge the Board of Elections to correct this problem immediately. The New York Board of Elections must require that the ES&S DS200 and ImageCast machines automatically return overvoted or otherwise erroneous ballots to the voter for correction.

The failure to automatically return overvoted ballots is so significant that the State of Wisconsin recently conditioned its purchase of the ES&S DS200 on a guarantee from the company that the machine be reconfigured to immediately return a ballot to the voter if it detects an overvote. New York must make the same demand for its machines, and refuse the purchase of any machine that cannot meet this demand.

We also urge the board to conduct usability testing to minimize overvotes. We understand from Commissioner Kellner that the Board may not conduct such testing, even though we believe it could be conducted at little or no cost.¹

We look forward to working with the Board of Elections on this issue.

Sincerely,

Asian American Legal Defense and Education Fund
Brennan Center for Justice at NYU School of Law
Center for Independence of the Disabled NY
Citizen's Union of the City of New York
Common Cause/NY
League of Women Voters of New York State
NAACP Legal Defense and Education Fund
New York Public Interest Research Group
New Yorkers for Verified Voting
Women's City Club of New York

Cc: Assemblyman Brian Kavanagh, Chair, Subcommittee on Election Day Operations
Assemblywoman Joan Millman, Chair, Election Law Committee
Senator Joseph Addabbo, Chair, Elections Committee
Andrew Stengel, Senior Adviser for Government Reform
New York City Board of Elections
New York City Councilwoman Gale Brewer, Chair, Committee on Governmental Operations

¹ We also understand that the Board has already spent approximately \$750,000 usability testing; if any of this usability testing related to overvoting, we would very much like to see the results.