

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

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UNITED STATES OF AMERICA,

Plaintiff,

06 Civ. 0263 (GLS)

v.

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

Defendants.
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DECLARATION OF ELEANOR SCIGLIBAGLIO AND JOHN A. DEGRACE

ELEANOR SCIGLIBAGLIO and JOHN A. DEGRACE declare under penalty of perjury, pursuant to 28 U.S.C. § 1746, that the following is true and correct to the best of their knowledge:

1. We are, respectively, the Democratic Deputy Commissioner and Republican Commissioner of the Nassau County Board of Elections (the "NCBOE"). We submit this declaration to advise the Court and the parties of the NCBOE's grave concerns relating to the United States' demand that new electronic voting systems and accessible ballot marking devices (BMDs) be implemented in all polling places in time for the September and November 2008 elections. Nassau's goal is to prevent the 2008 Presidential Election from being thrown into chaos by a possible judicial order forcing Nassau to adopt a new voting system without adequate preparation time.

2. The government of Nassau County, through the NCBOE, is legally responsible for ensuring the integrity of the elections for the County's 853,826 voters and

for the deployment of voting systems in Nassau County, New York that meet the requirements of the Help America Vote Act (“HAVA”), 42 U.S.C. § 15481. The NCBOE stands ready to fully comply with the HAVA voting machine requirements, yet it is being prevented from doing so by defendant New York State’s inability to certify an approved list of new voting systems for use by local boards of elections. Consequently, through no fault of its own, Nassau County is in danger of having its electoral process thrown into chaos; being forced to spend millions of dollars in taxpayer money on ballot marking devices that may not be usable after 2008; forfeiting many millions of dollars in federal funding; and losing the right to select its own voting machines.

A. Background

3. The Court is respectfully referred to the Joint Declaration of William T. Biamonte and John A. DeGrace in support of Nassau County’s motion to intervene dated December 18, 2006 (hereinafter the “2006 Joint Declaration,” attached hereto as Ex. A) for background on the legal duties of local boards of elections, HAVA, and the effect of New York State’s failure to certify HAVA-compliant voting machines.

4. As the Court is aware, the New York State local boards of elections are powerless to adopt new voting systems until the New York State Board of Elections (“SBOE”) certifies its approval. (See N.Y. Election Law § 7-200). In 2006, the United States sued defendants largely because they had not certified machines in time for local boards to implement them by HAVA’s January 1, 2006 deadline. Since Nassau County moved to intervene roughly a year ago, the New York State Board of Elections (“SBOE”) has been unable to make substantial progress towards fulfilling its legal duty to certify

electronic voting systems. The cause for the SBOE's delay is no fault of the local boards of elections and instead rests with the United States, the SBOE, and New York State.

5. In its memorandum, the United States paints a dramatic picture of New York State's chronic failure to expeditiously carry out the steps necessary to certify HAVA-compliant voting machines. Nassau does not dispute that the State is largely at fault for the delay. The United States, however, fails to fully disclose its own contribution to New York's delay with respect to certifying the voting systems and is, once again, taking action that could throw the elections into chaos. In order to fully appreciate the United States' contribution to the delay, it is necessary to explain the independent examination component of the certification process.

6. New York Election Law section 7-201 requires prospective voting system vendors to submit their voting systems to an examiner or examination laboratory (also referred to as an "Independent Testing Authority" or "ITA") for a test. The examination is supposed to (i) determine whether the system meets New York's voting system requirements provided in Election Law section 7-202; (ii) review and test any electronic or computerized features of the machine or system; and (iii) result in an opinion as to whether the kind of machine or system so examined can safely and properly be used by voters and local boards of elections at elections. New York State's Voting Systems Standards, 9 NYCRR § 6209.6(D), requires that the examination be conducted by ITAs "appropriately certified by the National Association of State Election Directors, the EAC or approved by the commissioners of the State Board."

7. On February 1, 2006, the SBOE contracted with Ciber, Inc., an ITA accredited by the National Association of State Election Directors ("NASED"), which is

not a federal governmental entity. (SBOE Plan for Compliance with HAVA and NYS Laws for 2006, attached hereto as Ex. B).

8. Before Ciber began testing voting systems for potential use in New York, from July 17 to 22, 2006, the United States Election Assistance Commission (“EAC”) performed an interim assessment of Ciber, Inc., pending implementation of the full EAC Accreditation Program.

9. The EAC is an agency of the United States established pursuant to HAVA to provide technical assistance in voting technologies. (42 USC §§ 15321-15330). The EAC is required to disseminate information to the public about its activities carried out under HAVA. (42 USC § 15326).

10. The July 2006 EAC interim assessment of Ciber reported that:

CIBER has not shown the resources to provide a reliable product. The current quality management plan requires more time to spend on managing the process than they appear to have available and it was clear during the assessment visit that they had not accepted that they have a responsibility to provide quality reviewed reports that show what was done in testing. The ITA Practice Director indicated during the assessment that their difficulties were that corporate CIBER did not allow for the personnel resource time for quality management functions but there may be other alternatives for allocating the resources.

In addition, during review, ITA Practice Director indicated that the testing for a product tends to either use vendor developed tests or new tests developed specifically for the product—they have no standard test methods defined. This makes their testing dependent on the vendor input and vulnerable to unique vendor interpretations rather than a core validated set of internal reference for training and testing.

(Steven V. Freeman, Assessor, EAC Interim Accreditation, Independent Test Authorities, Assessment Report, Ciber and Wyle, at 3, attached hereto as Ex. C and *available at* http://www.eac.gov/voting%20systems/docs/accreditation-docs-interim-ciberwyleassessmentjuly2006.pdf/attachment_download/file).

11. The report recommended that Ciber, Inc. stop testing voting systems unless it could get “the support of Wyle or a commitment from corporate CIBER to provide management assistance in getting the quality system functioning and fuller reporting of results with a review in 120 days.” (*Id.*). In August 2006, the EAC granted interim accreditation to two ITAs; Ciber did not receive interim accreditation. (Letter from Donetta Davidson, EAC Chair, to the Secretary of State (June 13, 2007), attached hereto as Ex. D and available at http://www.eac.gov/voting%20systems/docs/lettersstakeholdersciber.pdf/attachment_download/file). EAC re-assessed Ciber from December 6 to 8, 2006, and found improvements (Steven V. Freeman, Assessor, EAC Interim Accreditation, Independent Test Authorities, Assessment Report, CIBER, at 3 (Jan. 18, 2007), attached hereto as Ex. E and available at http://www.eac.gov/voting%20systems/docs/accreditation-docs-interim-ciberfollow-upassessmentdec202006.pdf/attachment_download/file); however, it ultimately terminated Ciber’s application for interim accreditation (Press Release, EAC, Commission Votes to Terminate CIBER Interim Accreditation (June 13, 2007), attached hereto as Ex. F and available at http://www.eac.gov/News/press/docs/06-13-07-commission-votes-to-terminate-ciber-interim-accreditation-application/attachment_download/file).

12. According to a *New York Times* article, the United States did not publicly disclose the negative assessment of Ciber during the time Ciber was employed by the SBOE. (Dunn, Citing Problems, U.S. Bars Lab From Testing Electronic Voting, N.Y. Times, Jan. 4, 2007, attached hereto as Ex. G). In a letter dated January 26, 2007, the EAC’s Executive Director offered the following explanation of its failure to carry out its

duty to disseminate information and alert the public about problems with an ITA that could affect the integrity of the vote:

Over the past few weeks, the U.S. Election Assistance Commission (EAC) has received numerous inquiries regarding why information related to CIBER's status in the EAC Interim Accreditation Process was not available on the EAC web site. These inquiries included requests for assessment reports produced as a part of that program. EAC, in consultation with the National Institute of Standards and Technology, believed that it was improper to publish documents related to an accreditation assessment that is not complete.

(Letter from Thomas R. Wilkey, EAC Executive Director, to Wally Birdseye, President CIBER Federal Solutions (Jan. 26, 2006), attached hereto as Ex. H and available at http://www.eac.gov/voting%20systems/docs/accreditation-docs-interim-letterciberjan26200702.pdf/attachment_download/file).

13. The EAC's view of what is "improper" is, in all candor, baffling. Rather than acting in the interest of the voting public and immediately disclosing the fact that a vendor, which was trusted by New York State to ensure the integrity of the voting systems, did not offer a "reliable product," the United States held back critical information. Why the EAC chose to withhold this crucial fact from the New York State and its voters seems inexplicable, especially in light of its statutory duty to disseminate information.

14. Despite its mishandling of the Ciber situation, the United States continues to insist on a completely unrealistic HAVA implementation date—even if it means potentially throwing the 2008 presidential elections in New York into chaos. Careful testing and implementation of the voting systems is essential to protect voters in New York and, as the 2000 Presidential Election debacle made distressingly clear, the rest of

the Country in a Presidential Election year. A mere seven years later, it should hardly be necessary to remind the federal government that electoral chaos in a leading state can throw the nation's political system into turmoil and threaten to provoke a constitutional crisis.

15. The process of testing machines and then implementing them will take well over a year. It is now less than ten months away from the September 2008 elections and testing by a new ITA has not yet begun. There is no way to force a minimum year-long process into eight or nine months without sacrificing the integrity of the vote. The United States' plan has been heavily criticized as being a "disaster in the making." (Allegra Dengler, Editorial, Disaster in the Making, N.Y. Daily News, Nov. 12, 2007 at 28), attached hereto as Ex. I).

16. Permitting the use of New York State's lever voting machines for an additional election cycle is not incompatible with the purpose of HAVA. It is important to bear in mind that HAVA does not ban the use of lever machines—something Congress could have done if the integrity of lever machines was really questionable. (42 USC § 14581). New York State currently has in place lever machines that meet all of HAVA's voting system requirements except the production of a paper trail and accessibility for voters with *certain* disabilities because they:

- (i) permit the voter to verify (in a private and independent manner)
the votes selected by the voter on the ballot before the ballot is cast
and counted;
- (ii) permit the voter to change the ballot and correct any error before
the ballot is cast and counted;

- (iii) do not permit the voter to select more than one candidate for a single office on the ballot;
- (iv) provide alternate language accessibility; and
- (v) comply with federal error rate standards.

17. Lever machines have been in use for decades in New York and there is no evidence that they have been subject to massive security breaches or programming errors or that voters mistrust them.

18. Where electronic voting machines are concerned, a paper trail is essential because such voting machines are computers and are vulnerable to hacking and programming errors that can spoil the election.

19. Far from being obstructionist, NCBOE is eager to implement new electronic voting systems with paper trails—but not without adequate time to take the steps to protect the votes of Nassau County residents and not until new voting systems are compliant with the important security provisions New York State included in its law. In this case, it would be safer to use the same lever machines that have been relied on for decades than to rush—in a *Presidential Election year*—to deploy electronic voting systems that have never before been used in New York and have been responsible for voting catastrophes in other jurisdictions such as Sarasota, Florida where 18,000 votes were lost. (Letter from Senator Dianne Feinstein to U.S. Comptroller David Walker (Feb. 14, 2007), attached hereto as Ex. J and *available at* <http://feinstein.senate.gov/07releases/r-e-voting-fl.pdf>).

20. As explained in the 2006 Joint Declaration, it is impossible for local boards of elections to perform all of the steps necessary to securely implement the new voting

systems in fewer than ten to fourteen months after certification is complete.

Implementation of the new voting systems is not a matter of simply plugging a machine into a wall outlet. (Though even this simple step cannot be taken for granted—some of Nassau’s polling places are school gymnasiums and hallways and they are not adequately electrified at present.) The implementation process necessarily involves a host of time-consuming technical, logistical, and administrative steps. To rush the process is to set the stage for wholesale system failure on Election Day and to leave the new voting systems wide open to tampering—the very type of disenfranchising calamity that HAVA was intended to prevent.

21. The steps involved, which are more fully described in the 2006 Joint Declaration, include:

- public hearings regarding the selection of a new voting system (three months, less time will result in denying the voters substantial input on the kind of voting system that may be in use for decades);
- negotiating a contract with the vendor for items such as warranties and service (one month);
- procuring adequate electrified and climate-controlled storage space and new trucking contractors (three to six months);
- designing and implementing a security system for the voting systems (three to six months);
- programming the voting systems with more than a thousand different ballot combinations (one to two months);
- recruiting and training 6,756 or more poll workers (ten months);

- educating the public about the new voting systems (ten months);
- making modifications to the polling places in order to ensure the necessary power supply and that the polling places are fully accessible (two to six months); and
- “acceptance testing” each system to ensure that each machine functions upon arrival (one month).

22. It is also uncertain whether voting systems manufacturers can make enough machines to accommodate New York’s needs.

23. To the extent possible, the NCBOE has already taken good-faith steps toward implementing new electronic voting systems. For instance, in the spring and early summer of 2005, the NCBOE met with various voting machine vendors to begin the process of research and evaluation. However, because the SBOE must certify non-lever machines before local boards of elections can buy them, the NCBOE can take only limited measures until such certification is accomplished.

24. Certainly, it would have been ideal to implement and test the new voting systems in 2007 as had been planned. Had problems emerged with the new voting systems in 2007, the effect would have been localized to Nassau and other counties because there were no elections for federal office. Implementing new systems on a rush schedule in 2008 could affect the entire country if problems emerge.

25. For this reason, the new voting systems should not be rolled out in 2008.

B. Ballot Marking Devices

26. The United States’ demand that a ballot marking device (BMD) be implemented in every polling place in New York State also has the potential to create

electoral turmoil and waste millions in taxpayer money. To fully appreciate why, it is necessary to understand the purpose of BMDs; how they are supposed to work; and critical accessibility problems.

27. There are two basic types of HAVA-compliant voting systems available on the market; each type is made by various manufacturers. Optical Scan voting systems read and record paper ballots that are marked by voters and cast by feeding the ballot into the Optical Scanner using a privacy envelope. Direct Recording Electronic (DRE) voting systems operate like bank ATMs—voters cast their votes by touching a computer screen.

28. BMDs are designed to be used by people with disabilities who are unable to record their votes on paper ballots that are cast using with Optical Scan voting systems or in jurisdictions that vote on paper. BMDs do not interface with DRE voting systems or lever machines. DRE voting systems themselves are equipped with accessibility equipment.

29. There are no BMDs that are compatible with each and every optical scan voting system. Therefore, if the BMD is chosen before the main voting system is selected, it is impossible to ensure that the BMD would be compatible. Purchasing the BMD before selection of a main system could ultimately force local boards to select less than optimal voting systems simply to avoid having to discard the BMDs. It also gives a significant competitive advantage to the vendor whose BMD is chosen for implementation in 2008.

30. Based on the cost of purchasing BMDs in 2006, Nassau estimates that the cost of BMD equipment alone would be \$3,986,400.00.

31. Vendor services for the BMDs, including the cost of the license fee, software installation, programming, voter education supplies, and community outreach is an additional \$66,000.00, estimated.

32. 1,000 hours of vendor support at \$120 per hour is an additional \$120,000, estimated.

33. Poll workers dedicated to the BMDs will cost roughly \$480,000.00.

34. Wages for technicians who are dedicated to BMDs is estimated to be about \$1,700,000.00

35. Thus, NCBOE estimates that the total cost of implementing BMDs in 2008 would be \$6,352,400.00 and there is a strong likelihood the equipment will not be compatible with the main voting electronic system that is ultimately certified.

36. The United States has argued that the cost of buying the equipment is a non-issue because the federal government has provided millions of dollars in funding for the purpose of buying new voting systems. In other words, the United States believes that New York should not be concerned about wasting taxpayer money on equipment that may be usable for only two days when the funds provided come from federal, instead of state taxes.

37. Because the new electronic voting systems have not yet been certified, it is impossible to know what Nassau's final cost of HAVA-compliance will be. Some have estimated that federal funds will cover less than half of the cost of the new main voting system. Even though federal funds are available to pay for BMDs, there will be less money available for the main voting systems and Nassau taxpayers will have to make up the difference at a cost equal to that of implementing BMDs in 2008.

38. Pursuant to the Court's Order for Remedial Relief dated June 2, 2006, Nassau County completed an ambitious plan to implement 24 ballot marking devices ("BMD") in 12 polling places. Experience has taught us that BMDs are far from perfect and it would be imprudent to implement them in every polling place unless doing so is in conjunction with an Optical Scan system that all voters use. As explained above, implementing the main voting system is not possible in 2008.

39. A BMD requires voters to manually handle the paper ballot which means individuals with motor limitations or impaired dexterity cannot independently verify and cast their vote. In Nassau's experience, users with cerebral palsy had difficulty using the voting systems and needed assistance while voting.

40. Visually impaired voters also have difficulty using BMDs. A visually impaired voter can use a BMD's audio function and a Braille keyboard to complete the ballot without assistance. Actually casting the ballot after completing it, however, requires assistance from a sighted poll worker who puts the ballot into an envelope when the BMD is used in conjunction within a jurisdiction using lever machines. There is no guarantee that the poll worker will not see the ballot. Some advocates for the visually impaired actually prefer DREs to BMDs because DREs afford them greater independence and more privacy. (See Testimony of the American Council for the Blind to the EAC, Re: the Use, Security and Reliability of Computerized Voting Systems (May 5, 2004), attached hereto as Ex. K, and *available at* <http://www.acb.org/washington/testimony-voting-2004.html>).

41. Nassau's BMDs had mechanical problems. Buttons fell off and had to be glued back on and battery packs smoked. The programming software did not work properly and NCBOE spent thousands of dollars to correct software problems.

42. Functionality problems with BMDs have been documented in a news story. The PBS program *Now* shows an AutoMARK BMD jamming after several attempts and the test voter is unable to place a vote. (*Now*, available at <http://www.pbs.org/now/shows/348/index.html>).

43. In addition to the accessibility problems with BMDs, votes cast using BMDs are counted differently than votes cast on a lever machine. When a voter uses a lever machine, the vote is automatically tabulated by a lever. For this reason, it is not possible to challenge an individual voter's vote on a lever machine because an individual's votes cannot be tracked.

44. When a voter uses a BMD in a jurisdiction using lever machines, the vote is necessarily treated differently than that of a voter using a lever machine. A BMD marks a paper ballot, which is put into an envelope and counted in the same way as an affidavit ballot. If a voter or a poll worker makes an error on or fails to complete the ballot envelope, the ballot will not be counted.

45. When BMDs are used in conjunction with an optical scan system, all voters' votes are counted in the same way.

46. When used in a jurisdiction using lever machines, the BMD does not give the disabled community a significant advantage over voting at home or in the polling place by paper ballot.

47. Perhaps this partly explains why BMDs were under-utilized by voters in previous elections despite extensive advertisements in newspapers, mailings to all 6,000 permanent absentee ballot voters, invitations to organizations serving people with disabilities, and information on NCBOE's Web site. In the 2006 primaries in Nassau, only 70 people voted on BMDs. In the 2006 general election, only 300 people voted on BMDs. Not all voters using the BMDs had disabilities. In the 2007 general elections, only 137 voters used BMDs.

48. In addition to the problems with the BMDs themselves, implementing BMDs in each polling place cannot be done without stretching NCBOE's staff and temporary workers to the breaking point. Thousands of additional poll workers must be recruited and trained to staff the BMDs.

49. Permanent staff will have to prepare two separate voting systems instead of one. Each BMD will have to be (1) acceptance tested to ensure that the machines function (in 2006, two of the twenty-six BMDs purchased by Nassau did not work); (2) separately programmed for its election district; and (3) tested extensively to make sure that ballot is displayed properly and prints properly. Testing alone may require the rental of secure space that can accommodate the BMDs. In addition, NCBOE staff will have to visit all of Nassau's 397 polling places to make sure that they can accommodate the BMDs and make necessary adaptations and procure new storage space for the BMDs.

C. The ECA's Proposed Plan

50. Nassau supports the ECA's proposal to develop a comprehensive public education campaign to notify disabled voters of the temporary, alternative option for the 2008 primary and general elections.

51. Nassau is committed to taking out more radio and newspaper ads informing people where they may use the BMDs. NCBOE will include directions to poll sites with BMDs on its Website.

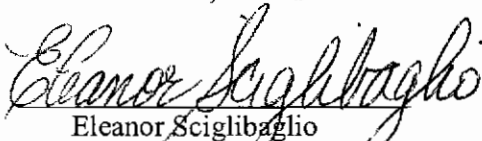
52. For those voters with disabilities who wish to use BMDs, Nassau is committed to expanding transportation options from their homes to the 13 polling places equipped with BMDs.

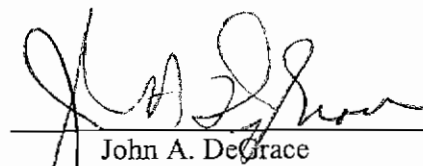
D. Conclusion

53. Nassau is fully committed to implementing new voting systems that are secure and providing voters with disabilities the same opportunity to vote as all other voters. Unfortunately, it is not possible to do so in 2008 without sacrificing the integrity of the vote for all people. The United States is recklessly rushing the voting system implementation process—even though it was partly responsible for recent delays by not disclosing to New York that its original ITA was unreliable.

54. For the above reasons, we respectfully request that the Court consider the concerns expressed by Nassau attendant to implementation of the June 2, 2006 Order.

Dated: December 13, 2007
Mineola, New York


Eleanor Sciglibaglio


John A. DeGrace