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June 26, 2008

Judge Gary L. Sharpe  
United States District Court Northern District of New York  
James Hanley Federal Building  
P.O. Box 7367  
100 South Clinton Street  
Syracuse, New York 13261-7367

Re: *United States v. New York State Board of Elections et al.*, 06-cv-00263

Dear Judge Sharpe:

We write on behalf of the Nassau County Legislature and the Nassau County Board of Elections (collectively "Nassau"), to bring your attention to a matter that the New York State Board of Elections ("SBOE") has failed to disclose in its status reports—a matter that seriously threatens compliance with the Court's Order in *United States of America v. New York State Board of Elections et al.*, 06-cv-00263 to implement disabled accessible ballot marking devices (BMDs) in time for the fall 2008 elections. The primary elections are less than three months away.

The SBOE's acceptance testing has proven to be completely unreliable. Fully 85% of the 156 BMDs received by Nassau through June 26, 2008—after the SBOE acceptance tested them in Albany—have substantial operational flaws that render them unusable or that require major repairs. 29 were rejected immediately when they were unloaded from the truck because of obvious physical defects or damages, such as a broken side of the printer. 62 failed diagnostic testing because of problems with the USB cord and the printer. And 42 failed Nassau's acceptance testing for a variety of reasons, such as nonresponsive key pads and battery failure. Out of a total of 156 BMDs, only 23 can be used by voters in the condition they were received in. (See Letter from the Nassau County Board of Elections to the SBOE (June 18, 2008) and spreadsheet (attached)). Sequoia has informed Nassau that some of the problems with the BMDs were caused by

improper handling during the SBOE's acceptance testing. The fact that Nassau has only a few BMDs that work makes it extremely challenging to train pollworkers on their use.

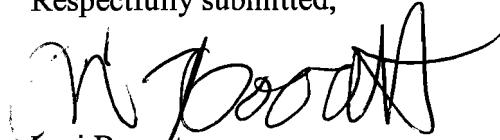
Nassau County is not the only municipality affected by the SBOE's unreliable testing. At a hearing of the New York City Government Services Committee on June 23, 2008, the New York City Board of Elections testified that the state's certification process failed to catch software flaws that resulted in problems when a voter attempted to write in a candidate and that failed to rotate candidates' names in primary elections in compliance with the Election Law. Due in part to these problems, New York City has not received BMDs and cannot begin training pollworkers.

Moreover, the SBOE and Sequoia negotiated a fee of \$250 per BMD for shipment from Albany to Nassau County after the SBOE's acceptance testing at a total cost of \$112,250. The SBOE insisted on imposing this cost on Nassau County even though Sequoia was willing to make minor adjustments in its manufacturing process so that the BMDs could be acceptance tested on Long Island, thereby substantially reducing the shipping costs. (A substantial portion of the BMD parts are manufactured by Sequoia on Long Island.) Nassau County made numerous requests to the SBOE to test the BMDs in Nassau County, and we understand that Suffolk County and New York City made similar requests for local testing. The SBOE, however, has refused or failed to act on these requests and taken no meaningful steps to address the problem. In addition, the SBOE failed to respond to correspondence from the Nassau County Board of Elections dated April 10, 2008, apprising them of problems with the BMDs and failed to inform Nassau that Sequoia discovered a "systematic problem" involving its printers that cause paper jams.

To prevent further problems that could impair Nassau's ability to comply with the order that every polling place be equipped with a BMD, Nassau respectfully requests that the Court direct SBOE personnel to perform acceptance testing of BMDs purchased by Nassau County on Long Island at the facilities of the Nassau Board of Elections, in conjunction with Nassau employees. Nassau County has adequate resources and space for the SBOE to conduct such local acceptance tests. This will guarantee more effective testing, and will greatly enhance the efficiency of the process because it will eliminate the need for double testing. Testing locally will reduce the shipping costs extensively and the personnel hours required for acceptance testing because it will render subsequent testing by Nassau County unnecessary. It will also ensure that the BMDs in polling places *actually work* and that voters with disabilities can vote on a machine in the Presidential Election.

In short it is clear that Nassau's interests with respect to BMD's are not being adequately protected by the State Board of Elections. Although we believe the circumstances justify a renewal of Nassau's intervention motion, we believe the proper course is to seek relief informally through this application, relying on our status as amicus.

Respectfully submitted,



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