

BRENNAN
CENTER
FOR JUSTICE

**Testimony of Laura A. Seago
Brennan Center for Justice at NYU School of Law**

**Before the New York City Council
Committee on Governmental Operations**

**Regarding Board of Elections Oversight
February 9, 2010**

On behalf of the Brennan Center for Justice at the New York University School of Law, I would like to thank the Committee on Governmental Operations for holding this hearing. The Brennan Center for Justice is a nonpartisan public policy and law institute that focuses on issues of democracy and justice. Among other things, we work to ensure fair and accurate voting and voter registration systems and to promote policies that maximize participation in elections. The Brennan Center does extensive work on the voter registration, the maintenance of voter registration lists, and the integrity of voting systems, including conducting studies and publishing reports, providing assistance to federal and state administrative and legislative bodies with responsibility over elections, and, when necessary, litigating to compel states to comply with their obligations under federal law and the Constitution.

I would like to use this opportunity to discuss two issues relevant to the Governmental Operations Committee's election oversight responsibilities. We believe that both of these issues, if unaddressed, may lead to the disenfranchisement of voters in New York City. The first relates to the new voting systems to be used at polling places across the state this year, which, unless mitigating steps are taken, may cause the disenfranchisement of thousands of voters, particularly in minority communities. The second relates to the City Board of Elections voter registration and list maintenance practices, which have already caused the unwarranted disenfranchisement of New York City voters, most likely in violation of state and federal law.

I. The City Board of Elections Should Take Corrective Action to Prevent Unnecessary Disenfranchisement Caused by New Voting Machines

New York's New Voting Systems' Treatment of Overvotes Has the Potential to Disenfranchise Voters

In December of 2009, the New York State Board of Elections certified Dominion Voting Systems' ImageCast optical scanners and the DS-200 optical scanners manufactured by Election Systems and Software (ES&S) to replace New York's antiquated lever voting machines.¹ Voters use these new systems by filling out bubbles on a paper ballot in a manner similar to a standardized test and feeding their ballots into the optical scanners that tally their votes at the polling place.

Unlike most optical scan machines, the ImageCast and DS-200 do not automatically return "overvoted" ballots, on which a voter has selected more than the permitted number of candidates in a race. Although overvotes are almost always errors, the ImageCast and DS-200 scanners both keep the ballot and give a voter the option of either casting her ballot as-is or requesting her ballot back for correction. If a voter casts her ballot as-is, her vote for the race(s) in which she overvoted will be invalidated.

Florida's experience shows that the use of machines that do not automatically return overvoted ballots results in a much higher overvote rate. A recent study of Florida counties shows that voters using the DS-200 (the only optical scan system in the state that does not automatically return overvoted ballots) had an overvote rate *eighteen times higher* than those who used other voting systems.² If New York had a comparably high overvote rate, as many as 40,000 votes for the top-of-the ticket race could be lost.

New York's unique circumstances may cause the overvote rate to be even higher in our state. Voters in New York are accustomed to casting their ballots on lever machines that have a mechanism to prevent overvotes. Voter confusion will likely be exacerbated by New York's system of fusion voting, which allows a candidate to run on multiple ballot lines, and other contests where voters are entitled to choose multiple candidates in the same race. Finally, New York's statutory requirements for the design of paper ballots – which are central to optical scan voting systems – make them far more confusing than paper ballots used in other states (including Florida).³

What is worse, overvoting disproportionately affects minority voters. A report presented to the U.S. Commission on Civil Rights after the 2000 Presidential election found that Blacks in Florida were more likely to cast an invalid ballot than non-minorities. The report found that "[f]or the entire state ... [t]he greatest discrepancy is for over-votes, with an estimated rejection rate of 12.0 percent for votes cast by blacks, compared to an

¹ New York State Board of Elections Election Operations Unit, Recommendation to Certify Precinct-Based Optical Scan Voting Systems (Dec. 15, 2009), *available at* http://www.elections.state.ny.us/NYSBOE/hava/Voting_Machines/Testing/ElectionOpsUnitRecommend12152009.pdf.

² See Mary K. Garber, Florida Fair Elections Center, Examining Florida's High Invalid Vote Rate in the 2008 General Election (2009), *available at* www.ffec.org/documents/Invalid_Vote_Report_Revised_23June2009.pdf.

³ Lawrence Norden, et. al, Brennan Center for Justice at NYU School of Law, Better Ballots 62-63 (2008), *available at* http://www.brennancenter.org/content/resource/better_ballots/.

estimated rate of 0.6% for votes cast by non-blacks.”⁴ Similarly, a study of overvote rates in the 2000 Florida election shows a statistically-significant positive correlation between the Hispanic population of an area and the overvote rate in the Presidential race.⁵

The City Board of Elections Should Demand Reconfiguration of Machines in its Jurisdiction

To prevent unintended overvoting, the Board of Elections should demand that the manufacturers of the optical scanners in use in New York City immediately reconfigure their machines to reject overvoted ballots as most other optical scan systems automatically do. Wisconsin did this with ES&S when it purchased the company’s DS-200 scanners, thereby requiring voters to review overvoted ballots and decreasing the likelihood of mistakes. Our understanding is that this simple step could save tens of thousands of votes in major elections.

The Brennan Center joined with virtually every voting rights and good government group in the city to submit a letter to the State Board of Elections urging the same remedy. So far, the State Board has taken no formal action in response.

II. The Committee on Governmental Operations Should Conduct Oversight Hearings to Ensure the New York City Board of Elections’ Compliance with State and Federal Law Pertaining to the Maintenance of its Voter Registration Database

Over the past several years, the New York City Board of Elections has taken several actions that may violate state and federal law and result in the unnecessary disenfranchisement of voters.

New York City Altered the Registration Status of 34,000 Voters within 90 Days of an Election in 2008 in Likely Violation of the Law

At a hearing before this Committee in September of 2008, officials of the New York City Board of Elections testified on the record that the Board sent 38,000 “Notice of Intent to Cancel” letters to registered voters suspected of being registered in other counties, stating that if voters did not respond in 14 days, they would be removed from the rolls.⁶ The

⁴ See Alan J. Lichtman, Report on the Racial Impact of the Rejection of Ballots Cast in the 2000 Presidential Election in the State of Florida (2001), available at <http://www.usccr.gov/pubs/vote2000/report/appendix/lichtman/ltrpt.htm>.

⁵ See M. C. Herron and J.S. Sekhon, Overvoting and representation: an examination of overvoted presidential ballots in Broward and Miami-Dade Counties, in *Electoral Studies* 22:1 (2003).

⁶ Oral testimony of Steve Ferguson, Director of Management Information Systems, New York City Board of Elections, Before the New York City Council Governmental Operations Committee, Sept. 26, 2008, available at <http://legistar.council.nyc.gov/View.ashx?M=F&ID=676632&GUID=F29BB2E4-C386-4AC0-B4E9-610A6B36A675> [hereinafter *Steve Ferguson testimony*].

letter, which stipulated that all responses must be made in English, was not available in alternative languages as required by the federal Voting Rights Act.⁷

According to New York law detailing the procedure for handling purported duplicate registrations, local boards of elections must send voters a Confirmation Notice of Address and can cancel their registrations only if they do not respond *and* fail to vote in two consecutive general elections.⁸ Instead, the City Board of Elections sent out “Notices of Intent to Cancel.” According to the Executive Director of the City Board of Elections, the Board moved more than 34,000 voters who did not reply to the “intent to cancel” letters within 14 days to inactive status.⁹ At a HAVA compliance hearing, the City Board claimed that it was cancelling the registrations of the voters who failed to respond to the “Notice of Intent to Cancel.”¹⁰ Regardless of whether the registrations were cancelled or moved to inactive status, it appears that the City Board of Elections violated state and federal law by timing its removal program within 90 days of an election. At least some Notice of Intent to Cancel letters were dated after June 1, the legal date after which the Board is prohibited from either sending a voter a Confirmation Notice or implementing a program of cancellation in a general election year.¹¹ This summertime purge made it even more likely that legitimately-registered voters would miss the response deadline due to vacation or other impediments.

Valid Registrations Are Not Processed in a Timely Manner

Many New York City voters appear to have been disenfranchised due to simple oversight. During the 2008 election cycle, third party registration groups sent about 100,000 voter registration forms to the State Board of Elections in Albany. On December 2, 2008, the New York Post reported that the state shipped 3,552 voter registration forms to the City Board of Elections in September, where they sat in a box until November 6, two days after the Election.¹² Similarly, the League of Women Voters reports that they hear “repeated complaints” from voters who registered to vote at Motor Vehicle offices (which are designated voter registration agencies under state and federal law) but who found that their names were not in the poll books on Election Day. In an April 7, 2009

⁷ See Letter from Anna Torres to unnamed voter (Jun. 10, 2008) (on file with the Brennan Center); Steve Ferguson testimony, *supra* note 6; See also 42 U.S.C.1973aa-1a.

⁸ N.Y. ELEC. LAW §§ 5-400(1)(f); 5-614.

⁹ Steve Ferguson testimony, *supra* note 6.

¹⁰ McFeeley v. Board of Elections et al. at 9-10. The city failed to produce any competent evidence that it was either cancelling voter registrations or placing voters on inactive status after sending out these notices. *Id.*

¹¹ See N.Y. ELEC. LAW § 5-712(4).

¹² Lawyer’s Committee for Civil Rights Under the Law, Election Protection 2008: Helping Voters Today, Modernizing the System for Tomorrow 25-26 (2009) [hereinafter *Election Protection*]; Testimony of Jonah Goldman Before Senate Committee on Rules and Administration March 11, 2009; David Seifman, *3,500 Voters ‘Vanished’ in Election Snafu*, N.Y. POST, December 2, 2008, available at http://www.nypost.com/p/news/national/voters_vanished_in_election_snafu_kboMILv8eHxBqHipSulfdL; David Seifman, *Pols Sound Alarm on Voting Snafu*, N.Y. POST, December 3, 2008, available at http://www.nypost.com/p/news/regional/pol_sounds_alarm_on_vote_snafu_WGlezwXMuRxxgvHvARzIgOM

letter to the State Board of Elections, the City Board of Elections acknowledged this problem.¹³ In 2008, many new registrants who were placed on a ‘suspension list’ because of incomplete voter registration applications did not receive notice of suspension in time to correct their applications, and showed up at the polls only to be told that they were not registered.¹⁴

Increased Oversight Is Necessary

There is little doubt that eligible citizens have been disenfranchised due to voter registration problems. The preceding suggests potential violations of state and federal law on the part of the New York City Board of Elections that warrant careful study by your committee. The Brennan Center urges the Committee on Governmental Operations to conduct oversight hearings on the Board of Elections’ compliance with all applicable laws.

The Brennan Center is happy to assist the Committee on Governmental Operations in fulfilling its oversight responsibilities in any way we can.

¹³ Testimony of The League of Women Voters before the New York State Senate Elections Committee, April 24, 2009, *available at* http://www.lwvny.org/advocacy/issues/Test_NYS_SenElectComm042409.pdf.

¹⁴ Election Protection, *supra* note 13, at 25.