

Testimony of

Lawrence Norden, Senior Counsel
Brennan Center for Justice at NYU School of Law

Before the
New York State Senate Standing Committee on Elections

Regarding the Introduction of Optical Scan Voting Machines
in the 2010 Primary Elections

September 29, 2010

Good afternoon, Mr. Chairman, and distinguished members of the Senate Standing Committee on Elections. Thank you for the opportunity to speak at this very important hearing. My name is Lawrence Norden, and I am an attorney at the Brennan Center for Justice at NYU School of Law. The Brennan Center is a nonpartisan think tank and advocacy organization that focuses on democracy and justice. For the last several years, in collaboration with the nation's leading technologists, security professionals, usability and accessibility experts and election officials, I have led the Brennan Center's Voting Technology Project and worked to make the country's voting systems as secure, reliable and accurate as possible.

We are very pleased that the Committee is seeking public comment about the introduction of new voting machines in the 2010 primary elections, with an eye toward reviewing and identifying problems that arose, as well as potential solutions that can be implemented prior to the general election to ensure that all votes are cast and counted accurately, giving New Yorkers greater faith in the system.

Some problems on primary day were inevitable. Any change in voting technology on the scale we are seeing in New York this year will necessarily present challenges for both voters and poll workers, most of whom have little familiarity with the new systems. The good news is that the experiences on primary day present us with an opportunity to improve procedures for the general election, when many more voters will turnout, and where the kinds of problems we saw on primary day – if repeated and not addressed – will have far greater impact.

The experiences on primary day also point to action that the State Legislature can take next session to improve the voting experience for all New Yorkers and insure that voters' choices are counted accurately.

This testimony focuses on three areas where the Brennan Center sees room to improve administration of the new optical scan machines, and where both local boards and the State legislature can take concrete steps to improve the use of these machines going forward: (1) ensuring that poll worker training focuses on allowing voters to vote and vote privately, regardless of problems with the machines; (2) improving ballot design so that New Yorkers can easily read and complete their ballots; and (3) adopting policies for using machines to ensure that votes are counted as they were intended to be cast.

1. **Fine Tuning Poll Worker Training**

No doubt, local boards of election did what they could – with limited resources and time – to train poll workers on the new systems. Nevertheless, news reports pointed to several recurring problems that could be addressed with better training in the future. Local boards should work on these issues in the weeks leading up to the general election.

- **Providing Paper Ballots, Regardless of Whether Machines Fail.** One of the more perplexing aspects of primary day were reports that when machines had not been set up in time, or when they failed in the middle of the day, voters were told they had to wait to vote or, worse still, told to come back at some later time in the day.

As with lever machines, sometimes optical scanners will not start, will jam, or will fail while people are voting. We are probably more likely to see such failures the first few times we use these machines, as poll workers and voters must learn to use them. Local boards should do everything they can to minimize these occurrences, of course. However, one of the key benefits of this new system – as opposed to lever machines – is that when the machines do fail, voters can still complete their ballots. Voters should never again be turned away because of problems with voting machinery.

It is critical that local boards stress this point to their poll workers: even when machines aren't working, voters should be allowed to complete their ballots. Ballots can then be placed in the machine's auxiliary bin.

- **Ensuring Privacy for Voters.** It should not be surprising that New Yorkers are extra sensitive to privacy issues when it comes to voting. For decades, New Yorkers have voted on lever machines, surrounded on all sides by a privacy curtain. The act of casting a vote on the optical scan systems is more public – voters cast their ballots on an optical scan machine, which does not have the kind of privacy curtain that existed for lever machines. News reports documented complaints from voters

across New York City, in particular: of voters having to carry exposed, completed ballots past other voters and poll workers to the scanner; of poll workers insisting that ballots must be inserted “face up”; of poll workers standing close behind voters as they placed their ballots in the scanner, or telling voters that only poll workers could place the ballots in the scanner.

There is no reason that the adoption of a new voting system should leave New Yorkers feeling that that the secrecy of their ballot was compromised. Many states have effectively provided voters with privacy using the optical scan system. If New Yorkers are to be provided with adequate privacy, local boards must take the following steps:

- **Ensure that poll workers provide all voters with privacy sleeves, so that their choices can be covered after they are made;**
- **Instruct poll workers that only voters may place their completed ballots in the scanner, and that poll workers should not handle completed ballots absent the explicit request of a voter;**
- **Train poll workers to ensure that there is adequate space for privacy between voters placing their ballots in the scanner and all other persons in the polling place (including other voters and poll workers); and**
- **Instruct poll workers that they should not approach the scanner while a voter is casting her ballot unless the voter has explicitly stated she would like to be helped.**

These steps should go a long way toward making all New Yorkers comfortable that their privacy has been protected during the voting process.

• **Making Sure Ballot Marking Devices are Made Available to All Voters.** There were several complaints from disabled voters throughout New York who were told that the ballot marking devices – computers which assist voters in filling out their paper ballots – were not working or available to them. Unfortunately, this is consistent with reports from voters around the country where ballot marking devices are used. All too often, poll workers discourage voters from using these machines. In fact, many voters cannot independently and privately complete their ballots without the ballot marking devices. This is particularly true in New York, where the typeface for ballots is so small.

If anything, all New Yorkers should be encouraged to use these machines. In addition to allowing voters with limited fine motor skills and/or poor vision to vote privately and independently, ballot marking devices can be programmed in multiple

languages and will not allow “overvotes” or “double votes,” which can disenfranchise voters.

Designing Better Ballots

There were many reports of New Yorkers having trouble reading the new paper ballots, as well as confusion due to the design and layout of the ballot itself. The New York City Board of Elections, in response to complaints of small typeface on the ballots, responded with the solution of offering magnifying sheets to voters. While these magnifying sheets may provide assistance to many voters, they are a far cry from a permanent solution to problems of ballot design which have existed for years.

In Albany, the *Times-Union* reported that nearly 8 percent of all voters in Albany County had selected write-in candidates in at least some races. Unlike many other counties, Albany County chose to place an oval to select a write-in selection below each candidate for office. While the ovals for write-ins appeared in a separate line, they were closer in proximity to the candidate’s name directly above, thus leading much unnecessary confusion, and votes which were cast in error.

- **What Local Boards Can Do**

The Brennan Center and the Usability Professionals’ Association have long advocated for the better ballot design which follows basic usability principles followed by rigorous usability testing. In cooperation with the Usability Professional’s Association, we have conducted usability testing in Florida and Minnesota. Usability testing by real voters allows election officials to discover problems with their ballots before Election Day.

In addition, local boards should review checklists provided by the Brennan Center and Design for Democracy¹ to ensure that their ballots comply with as many best design practices as possible.

Finally, New York should adopt the fairly simple procedure that many other states have adopted of posting sample ballots on-line before the election. This allows for the voter to familiarize themselves with the ballot prior to casting his or her vote.

- **What the State Legislature Can Do**

New York’s legal requirements for ballot design are outdated and prevent local election officials from designing clear, easily understood ballots. Among other things, there are superfluous requirements for party emblems that take up space but provide little information to voters; requirements for capital letters where lower case would be more readable; and mandatory instruction language that relies heavily on

¹ Lawrence Norden, et. al, Brennan Center for Justice at NYU School of Law, Ballot Design Checklist (2008), available at <http://www.brennancenter.org/page/-/Democracy/Ballot%20Design%20Checklist.pdf>

legal and election related jargon, which is difficult for many New Yorkers to understand, and ensures that there is far less room than necessary to ensure that candidate names are large enough for all voters to read.

When you return to session next year, we urge you to review the legal requirements for ballot design and to amend the law to allow for better ballots in the future.

Overvote and Double vote Protection

The introduction of optical scanners meant that the primary election was the first time New Yorker's had to concern themselves with overvotes and the general election will be the first time they must be concerned of double votes.

An overvote results when a voter has selected more than the permitted number of candidates in a race when filling out the bubbles on the paper ballot. Unlike most optical scan machines, the ImageCast and DS-200 scanners were not programmed to automatically reject overvotes, and instead give a voter a confusing message with the option of casting her ballot as-is or requesting her ballot back for correction. On the DS-200 scanners, the "Don't Cast -- Return Ballot" option appears in red with an "X" mark to the side. The "Accept" option is green and displays a check mark, which many are intuitively led to select. Upon selecting the "Accept" option, her vote is cast as-is and the race in which she overvoted will be invalidated.

A recent study revealed that voters in Florida using the DS-200 scanner had an overvote rate of up to *eighteen times higher* than those using other systems.²

A double vote results when a voter fills in more than one oval for the same candidate running on more than one party line. New York's "fusion" voting system allows for the same candidate to run on a major party as well as a minor party line. This allows voters to vote for a major party candidate while supporting a minor party. Instead of programming the machines to automatically reject a double voted ballot or provide voters with a warning message, the state has chosen to allow the machines to accept the ballot as is, and will credit the full vote to the major political party, while the minor party will get no credit.

The issue is of particular importance to minor parties in New York, given that the results of the gubernatorial election are used to determine a party's placement on the ballot for the next four years. Only parties who receive at least 50,000 votes are entitled to a guaranteed place on the ballot, and the order of their appearance is based on the number of votes that they previously received.

Because the Brennan Center is currently counsel for plaintiffs in two separate litigations concerning the previously described issues, we are not at liberty to

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.

comment on data from the primary. We are however pleased to provide our recommendations for how officials can handle both issues.

The best solution to this problem is to program the machines to automatically reject both overvoted and double voted ballots, so that voters are clearly notified their votes will not be counted as intended unless they fill out a new ballot. Short of this, in the near term, election officials can reduce the problem by training poll workers to identify the overvote message on the optical scanners. Poll workers should be instructed to inform voters that their votes in overvoted contests will not count, and provide voters with the opportunity to fill out a new ballot. For both the overvote and double vote issue, there should be an increase in voter education material, including visible signs in polling places.