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**Testimony of
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Before the
Committee on Governmental Operations
Council of the City of New York
Oversight Hearing: Improving Democracy and the Ability of Citizens to Participate
in the Electoral Process
February 14, 2008**

On behalf of the Brennan Center for Justice at NYU School of Law, I thank the Committee on Governmental Operations for holding this hearing and for providing me the opportunity to discuss our work on election administration, voter registration and party affiliation and voting systems.

The Brennan Center for Justice is a nonpartisan think tank and advocacy organization that focuses on issues of democracy and justice. We are deeply involved in the effort to ensure fair and accurate voting and voter registration systems and to promote policies that maximize participation in elections in New York and throughout the nation. My colleagues Wendy Weiser and Lawrence Norden, among others, have done extensive work on voter registration and the maintenance of such lists, including conducting studies, publishing reports, preparing policy proposals, 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 state and federal law and the Constitution.

My testimony today will focus on primary day voting issues, including the deadline and delay of changing party affiliation and New York's selection of new voting machine technology as mandated by the Help America Vote Act ("HAVA").

Last Tuesday, several Brennan Center attorneys took part in a program known as Election Protection, the nation's most ambitious non-partisan program for preventing Election Day disenfranchisement. Election Protection is committed to protecting the rights of all eligible voters and targets constituencies that are historically disenfranchised including Hispanic, African-American and low-income communities. Administered by the Lawyer's Committee for Civil Rights Under Law and representing a coalition of national, state and local non-partisan not for profit organizations, Election Protection's centerpiece is a toll-free hotline, 1-866-OUR-VOTE, which provides voters with immediate expert

¹ I am not an attorney, nor am I admitted to the bar. My testimony has been approved by attorneys at the Brennan Center.

legal assistance and information when problems arise. On Tuesday, 500 legal volunteers answered more than 70 phone lines in five call centers from coast to coast, including one located in New York.

A sample of calls from across the country includes many properly registered voters who were left off of registration rolls thus forcing them to vote by provisional ballots, uncertain if theirs will count. In every state targeted by Election Protection partners, voters called to complain of poll workers who were misinformed or under trained causing myriad problems at the polling place, leading to eligible voters being disenfranchised. Poor ballot design and problems with voting machines resulted in voters turned away without casting a ballot, and polling place breakdowns. Finally, poor planning continued to cause long lines forcing voters to choose between exercising the most fundamental right under democracy and other essential daily responsibilities.

The Election Protection hotline received over 350 calls from voters in New York. Problems reported and addressed include:

- As already noted, longtime voters showed up at the polls to find that their names were not on the registration rolls. In one location in Brooklyn, for example, many voters who had been living and voting in the same location for over 20 years were told they could not vote by regular ballot because their names did not appear on the rolls. We discovered that many names of registered voters missing from the voting lists at the polling site were on lists maintained by the City Board of Elections, but not on lists at the State Board of Elections. While we're unsure why this occurred, we hope it wasn't due to a purge.
- There were voting machine failures in a number of districts across the city, including Bushwick in Brooklyn, the Upper East Side, Upper West Side, Midtown, West Harlem, and the Lower East Side in Manhattan, and areas of the Bronx. (As we know, the sun is finally setting on the era of the lever machine; I'll address new voting machines later in this testimony.)
- Poll workers were apparently confused about proper procedures concerning inoperable voting machines, and distributed affidavit ballots to voters instead of emergency paper ballots. In some cases, emergency paper ballots were put into affidavit envelopes, increasing the chances that eligible voters' votes will not be counted. In one location, poll workers entered the voting booths to attempt to fix machines while the voters were still inside voting. At another location, poll workers handed out paper ballots that were already filled in. Clearly, poll worker training should be increased.
- Many who tried to change their party affiliation before the voter registration deadline found themselves unable to vote. The switch, whether from one party to another or from blank (no party) to a party, had not taken effect, and voters were prevented from casting ballots for their desired party's primary.

This last point, party enrollment changes, merits further discussion. According to New York State election law, voters who wish to change their party must do so 30 days prior to the general election preceding the primary they wish to vote in. The deadline to register to vote, however, is 25 days before an election, including a primary election. This meant that for the presidential primary on February 5, 2008, the deadline to switch parties was October 26, 2007, while the deadline for new voter registration was January 11, 2008. This unusual party enrollment change deadline is not well known or well administered. Many voters were not informed of this early deadline, and still others were *misinformed* by election officials that they would be able to vote in this past primary so long as they changed their party affiliation before the voter registration deadline.

Those who switched party affiliation between October 26 and January 11, believing it would take effect for the primary, were unable to vote in the primary. Nor will they be able to vote as members of their chosen parties until *after* the next general election. This "party affiliation limbo" will continue through another primary, the state primary on September 9, which may feature several competitive races for the state legislature.

New York's rules for party affiliation changes are among the most restrictive and onerous in the nation, and they especially harm independents. Some states, like California, allow independents to vote for the Democratic ticket, but not for the Republicans. New Hampshire, which has a similar change of party deadline as New York, allows voters without a party affiliation to vote in the primary of either party and allows new voters to register at the polls, which is known as Election Day registration. In New Jersey, parties must vote for their own candidates, however, independents can vote for any party and first-time voters can declare a party affiliation at the polls.

The separate and far apart deadlines for new voters and party affiliation, especially in years of federal elections, causes obvious confusion. We urge the State Board of Elections and state legislature to act to follow the example of many other states and reconcile these two deadlines to coincide. Moreover, we hope both bodies will investigate possible remedies for those who remain in "party affiliation limbo." At the very least, until changes are instituted, the Boards of Elections should educate the public about the different deadlines.

In an saga fitting of a Tolstoy novel, the state is inching toward full HAVA compliance, which it should be noted required updated elections systems to be in place 25 months ago. According to an order from Judge Gary L. Sharpe, of the Northern District of New York, New York must select new voting technology must to replace the nostalgic lever machines by October 23, 2008, to be in place for the fall elections in 2009.

However, Judge Sharpe wisely required that New York speed up the process for voters who need assistance to vote. In time for this fall's primary, every polling place across the state will have one accessible voting unit allowing the disabled community to cast ballots independently and privately.

Without going into the details of the process of choosing new voting machines at the State Board of Elections, which included meetings without a quorum, approvals, denials and lawsuits, several ballot marking devices—all of which were based on optical scan technology—were approved. We applaud the New York City Board of Elections for choosing such a system, the AutoMARK from Election Systems & Software.

Considering the state's tardy track record, the late October deadline for HAVA compliance, looms large. While, the choice of accessible units doesn't guarantee that the next step in selecting new voting machines will also involve optical scan technology, it's a giant step in the right direction.

We'd like to use this opportunity to sound a note of caution about the alternative to optical scan systems: the full-face DRE, or "touchscreen machine," which presents every candidate, every race, and every ballot measure on a single, large computer screen.

As my colleague Lawrence Norden wrote to the State Board of elections a few weeks ago, (text of full letter follows testimony), scientific studies show that full-face DREs produce more residual votes than other voting systems compliant with HAVA and that the lost votes disproportionately affect low-income voters and voters of color.

Quoting from his letter to the State Board of Elections Commissioners and Co-Executive Directors dated, January 22: "Usability experts have long argued that, by presenting so much information on a single computer screen, full-face DREs are inherently confusing and thus are likely to cause more lost votes than other voting systems. An analysis of lost vote rates for the last several federal elections, conducted by Professor David Kimball of the University of Missouri, confirms this theory. In fact, full-face DREs have consistently produced higher residual vote rates than any other HAVA-compliant technology.

"A 'lost vote' rate of 1.0% is generally expected in "top of the ticket" races. Some voters consciously choose not to vote for President, Senator or Governor. In 2000, 2002 and 2004, the lost vote rate for full-face DREs exceeded 1.0%. It also consistently exceeded the lost vote rate of precinct-based optical scan machines – by 0.5% to 1.0%. In New York State, this would represent between 35,000 and 70,000 extra lost votes.

"Usability experts have also long argued that voters who use computers less frequently than the general population, or who have adopted English as a second language – specifically, low-income and voters of color – would be disproportionately and negatively affected by having to vote on a full-face DRE because it presents a confusing computer interface. Again, the statistics bear out these concerns. In particular, the data show that if New York buys full-face DREs instead of Ballot Marking Devices and Optical Scans, the votes of close to an extra 1% of Hispanics and 1.5% of low-income voters as a whole may be lost in top of the ticket races.

"Moreover, the lost vote rate increases as we move 'down ballot.' On average, the votes of 15.4% of voters using full-face DREs were not counted for state ballot measures in 2004; by contrast, only 8.8% of voters using precinct count optical scan machines did not

have votes counted for state ballot measures. Again, this difference in residual vote rates was significant regardless of vendor. This means, for instance, if New York City buys full-face DREs instead of Ballot Marking Devices and Optical Scans, it is likely to record 175,000 fewer votes on state ballot measures than it would if it chose the latter technologies.”

In sum, my colleagues and I thank you for this opportunity to testify and for your continued oversight of and concern for the electoral process. The Brennan Center is eager to work with the State and City Boards of Elections on the many issues discussed today. Thank you.