

systems. As such, I am fully familiar with the electronic voting machines currently being used throughout the State of New York and which will be used in the upcoming election scheduled for November 2, 2010.

2. I submit this affidavit on behalf of defendants in opposition to plaintiffs' motion for a preliminary injunction for an order enjoining the Board's practice, in accordance with Election Law §9-112(4), of crediting a "double vote"¹ for a single candidate to the candidate's party line which appears first on the ballot. For the reasons set forth herein, the motion should be denied in its entirety.

3. Preparing for a statewide election is a monumental task, both with respect to the logistics involved and in assuring that the voting equipment properly performs. There are 62 county boards of elections throughout the State and approximately 6000 separate polling places. Each polling site is made up of one or more Election Districts of which there are approximately 16,300. In addition, there are approximately 17,000 electronic voting machines which will be used in the upcoming election.

4. Currently there are two voting systems certified by the Board for use in polling places. The first is the Dominion Voting Systems Corp.'s Image Cast Voting Machine which has two presentations - - an optical scanner voting system with an integrated ballot marking device and an optical scanner voting system without an integrated ballot marking device. The Dominion Image Cast machine is used by all county boards of elections throughout the State except for New York City, Nassau County, Albany County, Erie County, Rockland County and Schenectady County. The boards of elections in those areas use the DS 200 optical scanner

¹ A "double vote" occurs when a candidate's name appears on more than one ballot line for a particular office and the voter casts his vote for the candidate by checking off the candidate's name on two or more ballot lines.

voting system from Election Systems and Software (“ES&S”). The DS 200 voting system comes with a separate but companion Auto Mark ballot marking device.

5. The Board has also certified a third voting system - - the Sequoia Pacific Voting Systems Optical Scan Central Optical Scanner. This system, however, is only used at a county board of elections central location to record absentee and provisional ballots.

6. All of the voting systems used in the State have been programmed to count a “double vote” for a candidate by recording the vote on the first ballot line that the voter casts his vote for that candidate. Pushing the double vote to the first voted ballot line has been the practice in paper ballot counting in New York since at least 1976, when Election Law §9-112(4) was adopted in its present form. Upon information and belief, the practice is well known to all of the political parties throughout the State.

7. I am advised that plaintiffs are asking the Court to have each of the 17,000 voting machine systems reprogrammed before the upcoming election so that the machine issues the same warning to a voter who submits a ballot with a double vote that a voter receives who submits a ballot which contains an “overvote”.² Plaintiffs would have this Court believe that it is as simple as “flipping a switch” on the voting machine to make this happen. They are wrong because turning on the warning and treating a double vote in the same way that an overvote is treated would negate the voter’s clear intent to vote for a particular candidate.

8. Currently, when a voter inserts a ballot into one of the voting machines and the optical scanner detects an overvote, a warning appears on the machine’s video screen. A screen shot of the warning which appears on the ES&S machine is annexed as Exhibit A. The voter is

² An “overvote” occurs when a voter votes for more names than there are persons to be elected. For example, voting for two different candidates for governor when only one candidate is to be elected, or voting for six candidates for Supreme Court when only five candidates are to be selected would be an over vote.

told if he wishes to correct the ballot he can press the “button” marked “Don’t Cast – Return Ballot” and the ballot will be returned to him so that it can be redone. The voter is also given the option, however, to cast the ballot “as is” by pressing the “Cast Ballot” button. If the voter chooses that option, the voting system machines are programmed to disregard the vote for that position in accordance with Election Law §9-112(6). In other words, if the voter casts votes for two different candidates for governor, the machine disregards the votes and neither candidate is credited with a vote.

9. A double vote presents a different situation because with a double vote the voter has clearly identified the particular candidate that he wants to receive his vote and has expressed that preference by voting for the same candidate more than once on different ballot lines. If the voter is given the warning that plaintiffs request and the voter selects the “Cast Ballot” button, the voting machine as currently programmed will disregard the vote for the candidate even though there is no doubt for whom the voter wanted to cast his vote.

10. It is, therefore, not enough to simply have the voting machine treat a double vote in the same way as it treats an overvote. To achieve what plaintiffs want would require all of the voting machines to be reprogrammed to either reject the ballot totally and require the voter to select a specific ballot line, thereby forcing a voter to express a preference for a particular political party or independent nominating body before his vote will be counted, or to count a single vote for the candidate despite the double vote when he presses the “Cast Ballot” button on the screen. To change the way in which the voting machine handles double votes after the voter receives the overvote warning would require changing the double vote functionality of the voting machines including changes in the ballot configuration settings of each system, the complexity of which is different between the two systems.

11. While poll site systems could be configured to automatically reject all double voted ballots, an additional problem exists with respect to the Sequoia optical scanning system used by some county boards of elections to conduct a central count of absentee and affidavit ballots. At a polling place the voter is at least present when the ballot would be rejected for a double vote and would have the opportunity to “correct” the ballot. The voter is not present when the absentee and affidavit ballots are optically scanned. The voter would not have the same opportunity to “correct” his ballot to eliminate the double vote, and the vote for the candidate would, therefore, not be counted, thereby depriving the candidate of a vote despite the voter’s clear intention to vote for that particular candidate.

12. To change the overvote functionality of the voting machine systems to automatically reject a ballot when either an overvote or a double vote is detected would require, with respect to the Dominion system, the change to be configured by the Board, tested by the Board, and then distributed to each county using the Dominion system. With respect to the ES&S system, the change would be in the control of the county boards of election, within the existing software/firmware. Each of the 17,000 voting machines would then have to be programmed with the new functionality. The changes are not trivial changes as plaintiffs contend.

13. Any changes to either system which will treat the votes cast on a double vote ballot different from votes cast on an overvote ballot, along with corresponding voter alerts or messages, would require software/firmware changes. Because it is critically important to maintain the integrity of the voting system, a number of steps and procedures consistent with statute and regulation must be followed to assure that the systems will operate properly. Whenever there are changes to a program’s source code there is the possibility that the change

will cause unanticipated problems and possibly contain malicious code. Any change must, therefore, be thoroughly tested before it can be placed into operation. The following is a brief explanation of the steps that would need to be followed before a change could be implemented.

- a. The issue would first need to be clearly defined by the Board and understood by the voting system vendors who then would make the changes to their respective systems;
 - b. Once the new source code is written the voting system vendor would conduct in-house quality assurance testing;
 - c. After the program change passed the vendors' in-house testing, the software/firmware and source code would then be submitted to the Board's independent lab for testing;
 - d. The independent lab would review the newly-submitted software/firmware;
 - e. Existing test plans would then need to be reviewed, revised and implemented to ensure that the test reflected all of the necessary steps to thoroughly test any changes;
 - f. Source code review would then be required to be performed by the lab;
 - g. Independent source code review is required to be performed by a separate consultant/lab;
 - h. The lab would then perform a "trusted build" which is a process whereby an independent entity turns the vendor's source code into machine code and does so without vendor intervention;
 - i. Functional testing of the voting system would then begin to ensure that the change would not have a detrimental impact on other aspects of the existing system's operation functions, such as logic or accuracy, and that they were not affected by any changes made to the system;
 - j. Lab and other consultant reports would then be prepared, and analyzed by appropriate Board staff;
 - k. The new software/firmware would then be delivered to the Board for final review and certification;
 - l. Once certified the Board would distribute the revised software/firmware to the various county boards of election;
 - m. County boards would then upgrade to the new software/firmware.
14. Depending upon the extent of the change, and the impact to the software and/or

firmware, all ballot configuration tasks and ballots generated with the existing software/firmware would potentially have to be reconfigured and regenerated, requiring the re-generation of poll site removable media. All pre-election logic and accuracy testing performed to date would not be able to be relied upon, prompting creation of new test decks and the re-running of all pre-election testing.

15. The testing to assure the accuracy to the voting systems is an extensive and time consuming process. New test ballots in each ballot style and configuration must be printed and each of the 17,000 optical scanner voting machines must be tested with each style of ballot. Some counties have more than one hundred ballot styles because of the number of Election Districts in the county. In some areas such as New York City, ballots are required to be available in multiple languages to comply with Voting Rights Act. Each language is a different ballot style. Each ballot style must be hand marked before they are put through the optical scanning machines to test the accuracy of the equipment. This testing procedure, assuming everything goes smoothly, takes approximately three weeks to complete.

16. In addition, the operating procedures for poll workers and voting system technicians would have to be reviewed and revised to implement the changed system on election day. Statewide training for voting system technicians would have to be re-conducted in preparing the system for election day and over 60,000 election day poll workers would have to be trained to operate the revised system so that they would be able to properly address any issues that might arise regarding double votes.

17. Finally, all changes in procedures including changes in the software/firmware would need to be pre-cleared by the Justice Department. It typically takes approximately six weeks to obtain such clearance.

18. In light of the above, it is clear that it would be impossible to implement the changes that plaintiffs are seeking with respect to the handling of double vote ballots in the short time remaining before the election is to occur.

WHEREFORE, it is respectfully requested that plaintiffs' motion for a preliminary injunction be denied in its entirety.

/s/ Robert Warren
ROBERT WARREN

Sworn to before me this
8th day of October, 2010.

/s/ ANNA E. SVIZZERO
Notary Public, State of New York
Qualified in Rensselaer County
No. 01SV4894387
Commission Expires June 1, 2011

2008 BMD CERT BALLOT
2008 BMD CERTIFICATION BALLOT
01/08/2009



Language



Help

POLLING PLACE # 1

Public Count: 3
Protected Count: 4218

2:06 PM



Over Voted Ballot

The following contests on the ballot are over voted.

Contest Title	Status
COUNTY LEGISLATOR	Over voted
BALLOT PROPOSAL NUMBER 11, ONE	Over voted



Fix

If you wish to correct your ballot press "Don't Cast - Return Ballot" and see the election official for a new ballot.

Don't Cast -
Return Ballot

Cast Ballot