November 16, 2005

TO: **Peter Kosinski, Co-Executive Director, New York State Board of Elections**
Stanley Zalen, Co-Executive Director, New York State Board of Elections
Commissioners of the New York State Board of Elections
Citizens Election Modernization Advisory Committee

FR: **Jeremy Creelan and Larry Norden, Brennan Center for Justice at New York University School of Law***

RE: **The Requirements of New York's "Full-Face Ballot" Law**

The purpose of this memorandum is to provide a clear understanding of the actual requirements of that provision of New York State law often referred to as the "full-face ballot" law. It is commonly believed that that law requires any and all voting systems certified and purchased within the State to present the candidates for *all* offices and ballot questions on a single face or display *at one time*. This understanding of the law has led most observers, as well as the State Board of Elections itself, to include a version of such a requirement into the applicable regulations as recently as November 2 of this year.[1]

A careful review of both the (1) original legislative purpose and (2) language of the statute establishes, however, that no such requirement exists in New York law. Rather, a proper reading of the statute indicates that it requires only that the contents of the "ballot" must be presented in such a way as to ensure that any given screen or page does not exceed the boundaries of the "frame." This requirement ensures, for example, that all candidates for a particular office appear together to the voter. The purpose of this requirement is to ensure that the voter has before her at one time all of the candidates for an office and no candidate is disadvantaged by being left off the same display as the other candidates.

---

* The authors gratefully acknowledge the able research assistance and input of David Silva.

[1] The Draft Voting System Standards require that all voting systems "provide a full ballot display on a single surface." *See* Draft Voting System Standards at 4, available at http://www.elections.state.ny.us/hava/machine-cert-6209.pdf. As this memorandum demonstrates, this standard does not reflect the requirements or purpose of New York's Election Law and unnecessarily constrains the universe of voting systems that are to be considered for certification.

In other words, a voting system that presents each *office* separately on consecutive screens or pages would fully comply with existing New York law, as long as it presents all *candidates* for each office on the same surface at the same time.

I. The History and Purposes of the Current N.Y. Elec. L. § 7-104

The current statutory provision that includes what is known as the "full-face ballot" requirement – Section 7-104[2] – was first passed in its original form in 1899.[3] It was preceded by an important ballot reform bill in 1890 that is, in essence, the step-father of the 1899 bill. To fully understand the legislative purpose behind the 1890 and 1899 laws, it is necessary to read them in the context of the ballot reform movement in New York in the late 19th century.

In 1888, several reform-minded good government clubs, principally the City Reform Club and the Commonwealth Club, documented evidence of blatant bribery, corruption and fraud in New York City's elections. The Society for Political Education, *Electoral Reform – With the Massachusetts Ballot Reform Act and New York (Saxton) Bill*, Economic Tracts. No. XXV (1889) [hereinafter Soc'y for Pol. Educ.]. At that time, all ballots were paper and were neither printed nor distributed by the government[4]; instead, the political party machines would print their own ballots, often on paper of a notable color, and distribute them to voters who would then place them in a ballot box. *See* Lewis Abrahams, *New York Election Law* 218 (1950). Needless to say, this "system" allowed party officials to exclude opposing parties' candidates' names from their party's ballots. Indeed, the practice of using separate ballots for different slates of candidates almost ensured that the voter was never apprised of the existence of all of the candidates running for a particular office. Party officials could also easily see which colored ballot a particular voter placed in the box, thereby facilitating vote-buying and voter intimidation.

In 1889, the reform groups established the "New-York Ballot Reform League." They used the evidence they had collected to seek passage of a ballot reform law that would require the essential elements of the "Australian ballot" system to address these problems of fraud. *For Electoral Reform*, N.Y. Times, December 10, 1889, at 8. Among their five recommendations for a reform bill was that "[t]he names of all candidates for the same office shall be printed on the same ballot." *Id.*; Soc'y for Pol. Educ., *supra*.

---

[2] **§ 7-104. Ballots; form of, voting machine**

> 1. All ballots shall be printed and/or displayed in a format and arrangement, of such uniform size and style as will fit the ballot frame, and shall be in as plain and clear a type or display as the space will reasonably permit. Such type or display on the ballot shall satisfy all requirements and standards set forth pursuant to the federal Help America Vote Act.

N.Y. Elec. L. § 7-104 (2005).

[3] 1899 N.Y. Laws, ch. 466 § 167 (1899).

[4] Towns and cities (other than New York and Brooklyn) were authorized to use voting machines as early as 1892. 1892 N.Y. Laws, ch. 127 (1892). Even by 1899, however, very few jurisdictions used voting machines.

According to contemporaneous accounts, the express purposes of that requirement were to "destroy[] dealing and trading between candidates, [to] make[] independent nominations possible, *and [to] make[] it impossible for the name of any candidate to be withheld from the voter.*" *Id*. (emphasis added). Not surprisingly, the reformers wished to make sure that the law would require that ballots present all of the candidates for a single office together in one place to facilitate a meaningful and proper choice by the voter.

In 1890, the New York Ballot Reform Act was passed, and included the Ballot Reform League's recommendation virtually verbatim:

> There shall be a separate ballot for each class of offices to be filled, as now required by law, each with its proper caption and indorsement. *The names of all candidates for the same office shall be printed on the same ballot* and the name of every candidate whose nomination for any office specified in the ballot has been certified to and filed according to the provisions of this act, and no other shall be so printed.

1890 N.Y. Laws, ch. 262 § 16 (1890) (emphasis added). Significantly, even after the Ballot Reform Act of 1890, New York law still required "a separate ballot for each class of offices to be filled," *i.e.*, the reformers were not concerned, and the statute did not require, that the candidates for all *offices* be printed on the same ballot. *Id*.

In the mid-1890s, Australian ballot reform was "eclipsed" in Rochester, New York, "by the invention of a 'voting machine' that, so far as reform and novelty are concerned, is remarkably interesting." *Voting By Machinery*, N.Y. Times, Nov. 24, 1889, at 10. Although little public debate surrounded the regulation of voting machine ballots, there was much support for the machines as a solution to the corruption that continued, despite the 1890 Act. *The Automatic Voting Machine*, N.Y. Times, May 6, 1894, at 4; William M. Ivins, Letter to the Editor, *Election Law Reform*, N.Y. Times, January 20, 1906, at 8. The Myers machine, invented by Jacob H. Myers, was the direct forerunner of the lever voting machines now in use across New York State. As documented by contemporaneous reports, the Myers machine presented all of the offices on the face of a single machine with small levers beside each candidate in essentially the same format as is used today. *See The Automatic Voting Machine, supra*. Significantly, however, unlike the lever machines with which we are familiar (Shoup or AVM), the Myers machine and the other voting machines developed during the same period did not use a single, large paper ballot with all of the offices and candidates printed on it. Instead, those machines required that numerous small paper or cardboard "ballots" of the size of index cards be printed with the name of a single candidate and placed within each of a series of "ballot frames" arranged in linear rows and columns. See illustration from *New York Times* attached as Exhibit A.

Beginning in 1892, the Legislature passed specific statutory provisions allowing towns and cities to use voting machines and setting forth the contents and design of their ballots. 1892 N.Y. Laws, ch. 127 (1892) (Myers machine); 1894 N.Y. Laws, ch. 764-765 (1894) (Myers machine); 1896, N.Y. Laws, ch. 339, § 3 (1896) (Davis machine); 1897

N.Y. Laws, ch. 449 (1897) (Boma machine). The 1896 law, for example, enabling towns and cities to use the Davis automatic ballot machines, provided as follows:

> For each candidate . . . a push key or lever shall be set . . . and adjacent thereto shall be attached a printed ballot of cardboard, or heavy paper, not less than three inches long and not less than two inches wide, upon which shall be printed in plain, clear type, as large as the space will reasonably permit, the name of the office and the name of the candidate. . . .

1896 N.Y. Laws, ch. 339, § 3 (1896). The 1897 law enabling towns and cities to use the Boma automatic ballot machines contained nearly identical language, changing only the dimensions of the ballot. 1897 N.Y. Laws, ch. 449, § 3 (1897).

None of these statutory provisions included any language that required that all offices be presented on a single surface at once. To be sure, all of the designs of the various machines being developed did so, and the relevant statutory provisions were drafted with the obvious knowledge of how the machines worked. *See, e.g.*, 1896 N.Y. Laws, ch. 339, § 3 (1896); 1897 N.Y. Laws, ch. 449, § 3 (1897). But there is no evidence of any legislative activity or public debate that focused on the need to require that all *offices* be so presented; the important reform had already been accomplished in the 1890 legislation for paper ballots, namely ensuring that all *candidates* for a particular office be presented on the same ballot. The drafters of these statutes assumed the equivalent of a "full face" presentation because that is what the existing voting machines provided, but in no way did they require such a presentation.

In 1899, the Legislature amended New York's election law to take full account of the rise of voting machines by adding a new article entitled "Voting Machines." 1899 N.Y. Laws, ch. 466 § 167 (1899). That new article coexisted with the 1890 law that concerned paper ballots at least until voting machines became virtually universal in New York State in the first decades of the 20th century. In relevant part, the 1899 law that formed the direct precursor to our Section 7-104 provided:

> **§ 167. Form of ballots.** – All ballots shall be printed in black ink on clear, white material, of such size as will fit the ballot frame, and in plain, clear type as the space will reasonably permit….

Id. That legislation also defined the "ballot" to mean "that portion of the cardboard or paper or other material within the *ballot frames* containing the name of the candidate for office, or a statement of a proposed constitutional amendment, or other question or proposition with the word 'for' or the word 'against.'" *Id*. at § 183 (emphasis added).

Together, these provisions plainly were intended to address various qualities of the text seen by a voter when voting on a machine, but included no requirement that all offices appear on the same surface; the voting machines available at that time necessarily involved such an inclusive format. Even more significant is the fact that the provision's requirements were addressed to machines that used rows of separate "ballots" placed within separate "ballot frames" and indicating a separate candidate on each "ballot." For

this reason, the requirement that "[a]ll ballots shall be printed . . . on . . . material, of such size as will fit the ballot frame" was simply a statement of the obvious fact that the individual "ballot" cards needed to fit into their designated "frames" in order to function properly, and the text on each "ballot" had to fit within the confines of each ballot to be readable. Far from suggesting any kind of substantive legislative intent to require that all offices be presented at once, this provision focused solely on ensuring that the many index-card-size ballots were of the proper size to fit within the machine's "frames" and that the text was clear and readable on each "ballot." In sum, the historical context establishes that, while those voting machines in use by 1899 inherently presented all offices on a single surface, the 1899 legislation did not include any such requirement – or even a hint of a legislative purpose – beyond ensuring that no words (or candidates) were made invisible to the voter by being unreadable or too large for an individual ballot card or its "frame."

II. A Plain Reading of the Statute Does Not Support a Requirement That All Offices Be Listed on a Single Surface

Consideration of how the statute might have been worded if its drafters had intended to require that all offices appear at once further demonstrates the absence of such a legislative intent. As shown by the 1890 provision requiring that all *candidates* be presented on a single ballot, the Legislature could have made explicit any requirement that all *offices* be presented on a single surface if that had been a point of concern. Instead, the Legislature focused squarely on ensuring that the ballots fit within the metal frames intended for them, and remained silent on whether all offices must be included on a single surface. Reading a "full-face ballot" requirement into this statute thus would require a wholesale fabrication not only of an original legislative intent, but also of statutory language that simply does not exist.

In 1947, the Attorney General confirmed this reading of the statute in an Opinion on a related matter. When asked whether a local jurisdiction could display a lengthy constitutional amendment or local option question across two "ballot frames" instead of one in order to use sufficiently large type, or use separate paper ballots for such questions, the Attorney General replied as follows:

> *The standard voting machine contains fifteen ballot frames* for the submission of amendments, propositions and questions. The space provided in each frame is one and seven-eighths inches in width and one and one-half inches in height. Your inquirer expresses doubt that the "forms of submission" of the propositions can be printed on the cardboard designed to be inserted within the ballot frame, because of their length. . . . Answering your inquirer's specific question, it would seem that all of the six amendments, three propositions and four local option questions described in his inquiry, can, as a practical matter, be printed on the ballot labels of the voting machine; that there is no need to consider submitting any of them by the use of separate paper ballots; *that it is neither necessary nor proper to use two of the ballot frames for any single*

> *submission*; and that it is proper, though not necessary, to separate the local option questions from the amendments and propositions, by placing the former at the extreme right of the ballot. . . .

N.Y. Att'y Gen. Op., Sept. 23, 1947 (emphasis added). The Attorney General read the statute to require that each candidate or, in this case, each ballot question, fit within a single "ballot frame" of 1 ⅞" x 1 ½" rather than be printed on two separate ballot cards placed in adjacent frames. If the "ballot frame" referred instead to the entire surface on the front of the voting machine, the inquiring jurisdiction's proposal plainly would have complied with the statute because the local ballot questions would have all fit on the same surface as the other questions and offices. The Attorney General's reading properly rested on the plain language of the statute as well as an understanding of its origins in the machines in use at that time.[5]

With only insubstantial changes over the years, the 1899 statutory provision is that which became Section 7-104 of the current election law:

> **§ 7-104. Ballots; form of, voting machine**
>
> 1. All ballots shall be printed and/or displayed in a format and arrangement, of such uniform size and style as will fit the ballot frame, and shall be in as plain and clear a type or display as the space will reasonably permit. Such type or display on the ballot shall satisfy all requirements and standards set forth pursuant to the federal Help America Vote Act.

N.Y. Elec. L. § 7-104 (2005).

Despite repeated opportunities over 105 years to require that all *offices* be included on a single surface, the Legislature has never done so. Various insubstantial amendments (and changes to the numerical section heading of this provision) occurred in 1907, 1949, 1976, 1977, and 2004. Even in 2004 when the Legislature was fully aware of the availability of scrolling DRE voting systems and multi-page optical scan ballot systems, its members chose not to include in its amendments to this section language to require that all offices appear at once.[6]

---

[5] In 1916, the Attorney General opined on the distinct question of whether a jurisdiction could place the races for separate offices on two separate machines. N.Y. Att'y Gen. Op., Oct. 4, 1916. Reading both the precursor to Section 7-104 and another provision that required that all voting machines "afford [the voter] an opportunity to vote for as many persons as he is by law entitled to vote for," the Attorney General opined that "only one machine can be used by a voter at any election" and that all general offices (as against presidential elections or ballot questions) must be presented on one machine in any event. *Id*. This opinion is thus of limited relevance in determining whether the statute permits a single machine to present different offices consecutively on different screens or ballot pages.

[6] Nor would the State Board's current interpretation lead a court to find in the statute what does not otherwise exist, *i.e*., a "full-face ballot" requirement. The fact that a statute has been re-enacted in the light of an incorrect administrative construction does not constitute adoption of that erroneous construction**.** ***See, e.g.***, *Del Giorno v. Police Dept. of New York*, 305 N.Y.S.2d 63 (1st Dep't 1969), *aff'd* 26 N.Y.2d 821.

III. Conclusion

As demonstrated above, neither the original intent nor the statutory language of what has come to be known as the "full-face ballot" law support an interpretation that would require that all of the offices be displayed together at once on a single surface or display. Rather, the statute requires simply that the contents of the "ballot" must be presented in such a way as to ensure that any given screen or page does not exceed the boundaries of the "frame." This requirement ensures, for example, that all candidates for a particular office appear together before the voter. It does not preclude the consecutive presentation of each separate office or ballot question. Accordingly, there is no statutory basis to limit the universe of voting system models that can be certified by the State Board to those that present all candidates for all offices at once on a single display or paper ballot.

Exhibit A

1889

Myers Machine

[illegible]

VOTING BY MACHINERY.

AN INGENIOUS REFORM DEVICE INVENTED BY A ROCHESTER MAN.

ROCHESTER, Nov. 23.—Australian ballot reform has been eclipsed in this city within the last few days by the invention of a "voting machine" that, so far as reform and novelty are concerned, is remarkably interesting. The inventor is Jacob H. Myers, a respected and well-to-do resident of this city, who has for years been familiar with and interested in various patents on safes, and whose knowledge of the checks and levers that go to make up the modern bank vault doubtless led to the idea he has just exemplified.

Under Mr. Myers's system each voter would pass before a board of inspectors, as at present, but these gentlemen would not handle his ballots as now. They would merely decide that he was entitled to vote. The voter would then enter a door guarded by one of the inspectors, whose duty it would be merely to see that only one man entered at a time, except in the case of a blind man, when any friend the latter might choose could accompany him. Once inside the door the voter would find before him a curious-looking wall, having the appearance of a telephone switchboard, but with knobs instead of drops.

Mr. Myers proposes to give each party a distinctive color, which it would be expected to retain during its party life. The Republican Party, for instance, might be designated by red, the Democratic by yellow, the Prohibitionist by blue, the Socialist by brown, and so on to the end of the list. The man who could neither read nor write could then vote a straight party ticket without difficulty, provided he was not color blind. The voter would then find before him rows of tickets, each row proceeding down from a large piece of pasteboard of the same color as the tickets under it and bearing the name of the party, thus:

Republican. (Red.)		Democratic. (Yellow.)		Prohibition. (Blue.)	
Presidential Electors.	*	Presidential Electors.	*	Presidential Electors.	*
Governor. Warner Miller.	*	Governor. David B. Hill.	*	Governor. W. Jennings Demorest.	*
Congress. John Smith.	*	Congress. Edw'd Jones.	*	Congress. Frank Frost.	*
Assembly. G. Haynes	*	Assembly. F. Peters.	*	Assembly. J. Smith.	*
Sheriff. Richard Doe.	*	Sheriff. John Hart.	*	Sheriff. Alex. Roe.	*

If the voter is an old-fashioned Republican or Democrat who never splits his ticket, he selects the red or yellow, as the case may be, and presses all the knobs (denoted by asterisks) under that color. A knob once pressed inward cannot be drawn out again while the man is in the voting booth, and by an ingenious but simple contrivance Mr. Myers has made it impossible for two knobs for Governor or Congressman or any other office to be depressed at the same time.

Having pressed the knobs of all the candidates for whom he desires and is permitted to vote, the voter passes out at a second door and finds before him a third door, which he cannot open until he has closed the second. He then finds himself entirely cut off from the little compartment where the voting was done. The act of closing the second door raises a lever that in turn operates other levers, which release the depressed buttons or knobs that the voter has pressed. The voter then finds himself shut in in a tenantless compartment just big enough to contain him if he is a large man, locked out of the voting stall, which is empty and in which the only possible evidence of the candidates he may have favored, the depressed knobs, has been obliterated by his act in entering this second chamber. He cannot reopen the door to the voting apartment, for it is locked behind him, and all there is left for him to do is to walk out at a third door. When he opens that third door, and not until then, the lock that fastens the door by which he gained entrance to the voting stall springs back, and the door can be opened for the admission of a second voter.

No ballot has been cast, but right back of every knob is a little indicator exactly the same in principal as the counter of a printing press that records one every time the knob is pressed. If these recording machines were all visible to outsiders the secrecy sought to be obtained would, of course, be lost, but only one of them is visible. That one is worked by the door by which the voter enters, and simply indicates the number of voters who have passed in. The other indicators, forming as they do an outside wall of the voting room, are covered by a large iron door, which is locked by the election officers, and when it is unlocked, after the closing of the polls, instead of the tedious process of counting now necessary, it is possible to see the vote cast for each and every candidate at a glance.

Mr. Myers has prepared a bill to be presented to the next Legislature, proposing that at the next Spring election in this city the State legalize the use of his machine in his own ward, the Second of this city, that its practicability may be tested. A petition to the Legislature favoring the passage of the measure has already received thousands of signatures. Senator McNaughton has inspected the machine and pronounced it a marvel, and promises to give the bill above referred to his support. Ex-Senator George Raines, William F. Cogswell, Congressman Charles S. Baker, and other gentlemen of note in this city have signed Mr. Myers's petition and speak most enthusiastically of his project.