IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

Plaintiff,

v. 06-CV-0263 (GLS)

NEW YORK STATE BOARD OF ELECTIONS; PETER KOSINSKI and STANLEY L. ZALEN, Co-Executive Directors of the New York State Board of Elections, in their official capacities; and STATE OF NEW YORK,

Defendants.

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PROPOSED AMICI CURIAE BRIEF OF NEW YORKERS FOR VERIFIED VOTING, LEAGUE OF WOMEN VOTERS OF NEW YORK STATE, INC. NEW YORK PUBLIC INTEREST RESEARCH GROUP INC. AND CITIZEN ACTION OF NEW YORK

Geri S. Krauss, Esq.
KRAUSS PLLC
81 Main Street – Suite 500
White Plains, NY 10601
(914) 949-9100
Attorney for Proposed Amici Curiae

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Statement Of Interest

This *amici curiae* brief is being submitted by New Yorkers for Verified Voting ("NYVV"), League of Women Voters of New York State Inc. ("LWVNYS"), New York Public Interest Research Group Inc. ("NYPIRG"), and Citizen Action of New York ("CANY").

NYVV is a non-partisan, not-for-profit corporation of New York State, dedicated to free, fair, accessible and accountable elections which accurately reflect the intentions of voters. The mission of NYVV is to educate the public and local, state and federal officials on issues of voting technology and other issues related to free and fair elections. NYVV's goal is to ensure that all eligible citizens can vote, and that their votes will be accurately counted.

LWVNYS is a non-partisan, not-for-profit corporation, incorporated under the laws of New York State and affiliated with the League of Women Voters of the United States ("LWVUS"). LWVNYS, with 55 local branches throughout the State, is dedicated to the promotion of informed citizen participation in government including protection of the free and equal exercise by all New York citizens of their right to vote. Since 1920, LWVNY has been in the forefront as a grassroots advocate on behalf of all voters. Many areas of the election law have come under League scrutiny and have been the subject of its campaigns for reform, most recently the Help America Vote Act ("HAVA"). To obtain federal funds, HAVA required that each state submit a State Plan documenting how it would fulfill the requirements of the law. In 2003, a HAVA Task Force was appointed and the League's elections specialist was one of two citizen representatives appointed to serve and create a plan which was filed with the United States Election

Assistance Commission in September 2003. The League participated in the NYS Citizens Coalition on HAVA Implementation which produced position papers on all aspects of HAVA implementation in the state, testified at hearings on proposed implementing legislation and regulations on voting systems standards, and educated the public on proposed changes to the voting process through its grassroots network of 55 local leagues in the state. The League monitors the ongoing process by regular attendance at meetings of the New York State Board of Elections. The League of Women Voters of New York has endorsed the following criteria for voting systems: secure, accurate, recountable and accessible. Using these criteria to evaluate the choices available to New York State in complying with HAVA requirements, the League has endorsed precinct based paper ballot optical scan voting with the addition of ballot markers to provide accessibility.

NYPIRG is a non-partisan, not-for-profit, student-directed New York membership organization with 21 member campuses and more than 80,000 supporters within New York State. NYPIRG is a statewide student-directed government reform, environmental preservation and social justice organization that maintains an ongoing presence in New York City, Albany and across the state. NYPIRG is dedicated to enhancing civic participation by educating voters on all aspects of the electoral process and encouraging young people to regularly participate in that process. NYPIRG promotes this mission through electoral reform efforts, including involvement with implementing HAVA, non-partisan voter registration and participation efforts, and its Democracy Project which, among other efforts, includes an Election Day help line that assists voters on Election

Day. NYPIRG also surveys voters and poll workers regarding polling place conditions and compliance with election laws.

CANY is a not-for-profit membership organization with chapters across the state from Long Island to Buffalo. As an organization devoted to economic, racial, social and environmental justice, Citizen Action has a long history of promoting voting rights and participation through voter registration drives and get out the vote activities. Its Clean Elections campaign works to democratize elections by increasing the power of all voters, by restoring the principle of "one person, one vote." Through its efforts thousands of voters and citizens are focused on New York State's electoral process.

These organizations seek leave to file this brief *amicus curiae* because of the profound implications of this case for the voters of New York State. HAVA seeks to improve the ease, reliability and accessibility of the technologies used to record and count the votes of New York State voters. Indeed, nothing is more fundamental to democracy than the guarantee that votes are accurately recorded and counted, and the trust and confidence of the public that this is so.

The Department of Justice is seeking remedial relief as a result of New York State's failure to become HAVA compliant in accordance with the time frame set forth in this Court's prior order. The interim experience of other states that have already attempted to become HAVA compliant demonstrates that not all voting technologies are equally capable of meeting HAVA's goals; and, indeed, some have proven *not* to be capable of accurately recording and counting ballots. Rigorous standards for quality, field performance, sufficient time for comprehensive testing and training, and phased in

implementation are essential if the goals of HAVA are to be achieved not just nominally, but in practice.

In this brief, *amici* seek to present their views, gained from their extensive study and investigation of the implementation of HAVA nationwide, relating to several important issues *amici* believe should be considered in connection with any remedial action. It is of utmost importance that in the haste to achieve compliance, the very protections HAVA seeks to ensure not be sacrificed or impaired.

Preliminary Statement

Proposed *amici curiae* New Yorkers for Verified Voting, League of Women Voters of New York State, Inc., New York Public Interest Research Group, Inc. and Citizen Action New York respectfully submit this memorandum of law regarding the remedial relief requested by the Department of Justice ("DOJ") in its motion seeking enforcement of this Court's June 2, 2006 Order.

The key goals of the Help America Vote Act ("HAVA"), 42 U.S.C. §§ 15301, *et seq.*, passed in the wake of the voting turmoil that surrounded the 2000 Presidential Election, are to ensure the right of each voter to vote easily and accessibly and to have that vote counted. 42 U.S.C. §§ 15381 (a) (1) (3). These objectives were emphasized by President Bush at the signing ceremony for HAVA, October 29, 2002:

> When problems arise in the administration of elections we have a responsibility to fix them. Every registered voter deserves to have confidence that the system is fair and elections are honest, that every vote is recorded, and that the rules are consistently applied.

We, as the voting constituency which this statute was passed to protect, share the enormous frustration with the delays that have transpired with achieving HAVA compliance here in New York. However, it would be a far greater travesty if HAVA's goals are sacrificed in the haste to expedite even what has been a long delay in compliance. We believe that the DOJ's demand that New York State come into full compliance with HAVA by the November 2008 election will have that effect.

If there is any silver lining to New York's delays in complying with the statute, it is that New York now has the opportunity to avoid the very serious technological problems that have emerged and plagued other states which adopted new voting systems

in an effort to comply with HAVA. Indeed, part of the delay here was caused by the federal government, which concluded that the Independent Testing Authority it had approved – and the New York State Board of Elections had engaged based on the belief that it was qualified under federal standards – was unfit to do the job and revoked its certification. The most important criteria for any plan of compliance is that the technology approved will be able to be properly rolled out and reliably achieve the overriding goal of the statute - that each person's vote count and be counted effectively. This is not only a statutory requirement, but a constitutional one.

In its June 2, 2006 Order, this Court carefully balanced the requirements of HAVA with the practical realities of implementation and the ultimate goal of ensuring "that the right of every voter to vote is not impaired and that the orderly conduct of the election process itself is not in any manner jeopardized." (p. 2). Once again, this balance is critical in evaluating the remedial action ordered or endorsed in response to the DOJ's motion.

To assure that voters' rights will not be impaired and that the election process for the heavy expected turnout for the 2008 presidential election will run smoothly, there are two considerations that we urge the Court to take into account. **First**, to meet the statutory and constitutional requirements, the technology adopted must be able to be certified as reliable and secure. The experience of other states has proven that the use of Direct Electronic Recording ("DRE") systems (also known as "touchscreen machines") without a rigorous certification process (which the Department of Justice would disregard in its rush to implementation), will not meet those criteria. This technology has presented a host of documented problems which have severely impaired the rights HAVA seeks to

ensure. Given that there are presently viable alternatives, such as paper ballots with optical scanners devices and ballot marking devices, any remedial order that would circumvent or truncate the certification process should preclude the use of DRE touchscreen devices. **Second**, to require that new technology (whatever system is selected) be fully operational by the November 2008 general election would be a recipe for disaster. Taking into account the extensive certification and security investigations that must be completed to ensure reliability under any standards, the verification of software and ballot programming for all of the many different races in the thousands of election districts throughout this extremely large state, the reconfiguration and/or selection of new polling sites to accommodate new voting systems, the training of election workers, and the education of the voters with respect to the new technology, it is simply not realistic to believe that this can all be done properly in time to run the November 2008 election orderly and effectively. Even if that were the case, however, election experts warn that the worst way to roll-out an unfamiliar and untried new technology is all at once and during a presidential election which draws the highest turnout.

Argument

Point I

DRE Touchscreen Machines Do Not Meet Statutory Or Constitutional Requirements Ensuring That Each Vote Will Be Properly Counted And Should Not Be Part Of Any Remedial Plan

The Supreme Court has repeatedly emphasized that "all qualified voters have a constitutionally protected right to vote... *and to have their votes counted.*" *Reynolds v. Sims*, 377 U.S. 533, 554 (1964) (emphasis added), *See*, *United States v. Classic*, 313 U.S. 299, 315 (1941) ("Obviously included within the right to choose, secured by the Constitution, is the right of qualified voters within a state to cast their ballots and *have them counted*) (Emphasis added); *Williams v. Rhodes*, 393 U.S. 23, 30 (1968) ("the right of qualified voters...*to cast their votes effectively* ... rank[s] among our most precious freedoms). (Emphasis added).

HAVA's entire purpose is to further this constitutional mandate. Its provisions require that each voter have the opportunity to easily and accessibly cast their vote, confirm that they cast their vote properly and do so using a system that reliably and properly counts the ballots. 42 U.S.C. §§ 15381, 15481.

In the five years since HAVA was passed, state after state which attempted to comply with HAVA by purchasing DREs has found that those machines are riddled with such substantial performance and security problems that they cannot possibly meet the Constitutional and statutory mandates. Indeed, some states that rushed to acquire and implement DRE machines have had to decertify them, or exchange them, at great cost. Other states that have rushed to implement new DRE-based voting systems without adequate testing have had more disastrous results.

Thus, in August 2007, the Secretary of State of California decertified and withdrew approval of DRE systems on the grounds that a team of experts had determined that they had proven to be "defective or unacceptable." (Ex. A,[1] p. 5; Determination of the California Secretary of State, "*Withdrawal of Approval of Diebold Election Systems, Inc., et. al.*"[2]). Among other things, the experts concluded that the machines contained "serious design flaws" and that "physical and technological security mechanisms" were "inadequate to ensure accuracy and integrity of the election results." (*Id.* at p. 2).

In *Banfield v. Cortes*, 922 A.2d 36 (Pa. 2007), the Supreme Court of Pennsylvania overruled all the preliminary objections the State raised against a complaint filed by electors seeking an order directing that the various DREs be decertified and requiring the establishment of uniform testing criteria that complied with the state's election code. (Ex. B). The basis for the claim was:

> The various certified DREs have failed during elections conducted in Pennsylvania and other states [from November 2002 to May 2006]: (1) losing almost 13,000 votes; (2) repeatedly registering votes for one candidate when the voter was attempting to vote for another candidate; (3) causing very high "undervote" rates; (4) failing to register votes when the ballot contained only one question; (5) counting more than 1,500 votes twice; (6) failing to print "zero tapes" to demonstrate that no lawful votes were stored on the machine prior to the election; (7) printing "zero tapes" after votes had been cast, i.e., at a time when the machines should not have reported zero votes; (8) printing "zero tapes" that did not contain all necessary information; (9) reporting 100,000 "phantom" votes, i.e., votes that were not cast by any voter; (10) failing to record any votes in four precincts due to programming errors, forcing officials to certify election results without votes from those precincts; (11) failing to activate for use; or (12) failing to record write-in votes. In certifying the DREs, the Secretary did not confirm that malfunctions that occurred previously in other states had been fixed.

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[1] "Ex. __" refers to the exhibits annexed to the Lipari Declaration.

[2] http://www.sos.ca.gov/elections/elections_vsr.htm.

> In addition to these operational failures, in 2006, a computer security investigator found that anyone with brief access to the AccuVote TSX could corrupt the software in a way that would be difficult to detect and that would render the DRE vulnerable to tampering. Moreover, the AccuVote TSX operating systems have a history of security problems. A person with access to the AVC Edge II for a short time could modify unencrypted voting results or replace the "chip" with one that would re-program the machine to give all votes to a particular candidate. The eSlate voting machine transmits unencrypted data along a cable to a central terminal, allowing an unauthorized person to access, monitor and alter data transmitted over the cable. The iVotronic system uses a personal electronic ballot (PEB) to activate and de-activate individual machines, allowing any corruption, malfunction or contamination in one machine to be transmitted to other machines.

Id. at 40-41; citations and footnote omitted. The Court held that the deficiencies alleged were sufficient to permit the Electors to proceed with their challenge to the certification of the DREs under the state's constitution on the basis of their claims that (i) it would be "likely that a significant number of votes will not be counted accurately, or at all," (ii) an elector would have "no way of knowing" whether a DRE has recognized their votes so that they will be counted, and (iii) "the defects and security flaws create the risk that Electors' votes will be rendered meaningless or, worse yet, deemed cast for a candidate for whom they did not vote." *Id.* at 49.

Litigation was also commenced in New Mexico after that State experienced a high undervote[3] in the 2004 election in counties which had purchased DRE machines. A group of voters brought an action in state court seeking to halt the continued use of the existing DRE machines and to preclude the state from purchasing new ones. After the State's motion to dismiss was denied in January 2006, a discovery process ensued which revealed the enormous problems with the DRE technology. Faced with this evidence, the

[3] An "undervote" is a ballot that has been cast but shows no legally valid selection in a given race or referendum.

Governor of New Mexico introduced legislation in February 2006 to make New Mexico an all optically-scanned paper ballot state, thereby effectively banning the use of DRE voting systems. That legislation was adopted and the election results from November 2006 showed that New Mexico's undervote rate had dramatically decreased.[4]

Other states have also passed legislation requiring abandoning the use of DRE voting machines. In Florida, after the loss of 18,000 electronic votes in Sarasota's 2006 election left a congressional seat in dispute, legislation was enacted in May, 2007 requiring the replacement of touch-screen voting machines with optical scanners by 2012.

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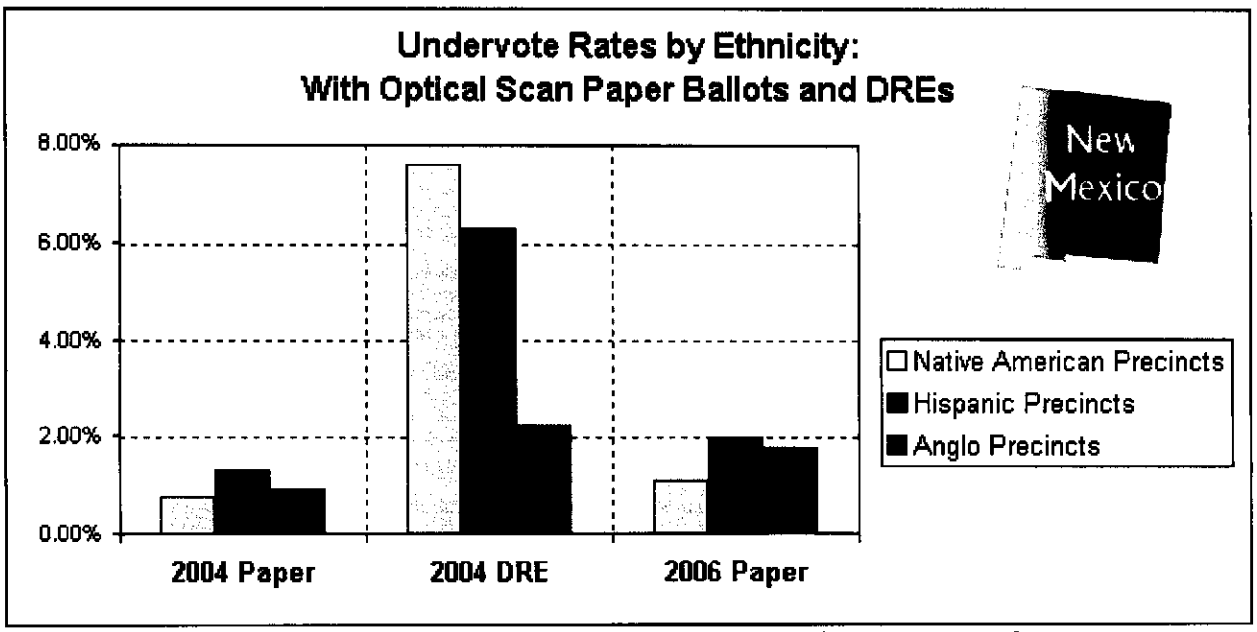
[4] The impact of the undervote is captured in this chart which was prepared by a voter's advocacy group:

- Paper ballots tabulated by optical scan systems have similar undervote rates for all ethnicities.
- Electronic ballots cast on Direct Record Electronic (DRE) voting machines in Anglo precincts have a similar undervote rate to the rate for paper ballots.
- Electronic ballots cast on DREs in Native American and Hispanic precincts have significantly higher undervote rates.



(Ex. C; *"2004 and 2006 New Mexico Canvass Data Shows Undervote Rates Plummet in Minority Precincts When Paper Ballots are Used.,"* votersunite.org, 2/25/07, www. votersunite. org/ info/NM_UVbyBallotTypeandEthnicity.pdf).

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(Ex. D).[5] Maryland also passed legislation in May, 2007 that calls for replacing its paperless DRE voting system with optical scan systems that will provide a paper record to allow for recounts of close races by the 2010 elections. (Ex. E).[6] After a review of the 2006 Iowa Governor's race showed that touchscreen voting machines had a significantly higher undervote rate than precinct based optical scan systems, Iowa enacted legislation in 2007 which mandates that all new voting machines be optical scans and a phased in replacement of the existing DREs.

Other examples of abject failures of DRE machines in actual elections are legion. For example:

- In November 2006, seven Ohio counties which used the DRE technology experienced "remarkably high" undervotes for all statewide offices, from US Senator to State Auditor and stood out in comparison to the rest of Ohio in 2006. They were also much higher than the undervotes in 2002 and 1998. (Ex. F).[7]

- In the November 2006 elections in Sarasota, Florida, ES&S iVotronic DRE electronic voting machines with no verifiable paper trail failed to record 18,000 votes for the Congressional candidates in a race that was decided by 369 votes. (Ex. G).[8]

- In a judicial primary in Tarrant County, Texas, in March 2006, 100,000 more votes were recorded than the 58,000 that were cast. (Ex. H).[9]

- A Review of the 2006 Iowa Governor's race showed touchscreen voting machines had a significantly higher undervote rate than precinct-based optical scan systems.

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[5] "*Governor Crist Signs Legislation Creating Paper Trail For Florida Votes*", Governor's Press Release, 5/21/07,http://www.flgov.com/release/9011.

[6] Maryland Senate Bill 392, http://mlis.state.md.us/2007rs/billfile/sb0392.htm.

[7] "*Large Undervotes in Seven Ohio Touch Screen Counties," Iowans for Voting Integrity*", http://www.votetrustusa.org/index.php?option=com_content&task=view&id=2680&Itemid=113.

[8] "*The Fight for Sarasota Voters*", People for the American Way Foundation, http://www.pfaw.org/pfaw/general/default.aspx?oid=23679;
"*FL: 18,000 votes in House races may be lost,*" Miami Herald, 11/9/06, http://www.verifiedvotingfoundation.org/article.php?id=6418.

[9] "*Vote spike blamed on program snafu*", Fort Worth Star-Telegram, 3/9/06, http://www.jregrassroots.org/forums/index.php?showtopic=17490.

In the 2006 Governor's race, Iowa counties that used precinct-based optical scan as the primary voting system had a cumulative undervote for Governor of 0.9%, and counties that used touch screen electronic voting machines as the primary voting system had a cumulative undervote of 2.4%. (Ex. I).[10]

- In 2003, Fairfax County, Virginia, voters in several precincts had reported that when they tried to vote for a particular candidate, an "x" appeared next to her name but then disappeared within a few seconds. After that candidate lost, county officials tested one of the machines in question and discovered that it seemed to subtract one vote for her out of every hundred tries. (Ex. J).[11]

- Similarly, in Wharton County Texas, when a businessman tried to vote in a statewide election, some of his votes on state constitutional amendments changed before his eyes. When election officials acknowledged the problem and offered to let him start over, he concluded that the equipment was unreliable and declined. He later complained to county and party officials who then decided to discontinue use of the touch-screen technology that the County had rolled out for the statewide election just a few weeks before. (Ex. K).[12]

- During the 2004 election in Carteret County, North Carolina, a touch-screen voting machine with no paper trail irretrievably lost 4400 votes because the manufacturer had wrongly told election officials that the system could store 10,000 votes when in fact it could store only 3000. Poll workers did not notice when the machine started indicating that it could not record any more votes. As a result, a new election had to be held for the Office of Agriculture Commissioner at a cost of $20,000. (Ex. L).[13]

Optical scanning devices, an alternative voting system, have not suffered from these same flaws. Indeed, in the wake of all of the problems experienced in other states, voter groups, newspaper editorials and scholars have overwhelmingly called for New York to adopt optical scanning device technology rather than DRE touchscreens. Just

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[10] *"Iowa: 2006 Gubernatorial Election Shows Paper Ballots the Most Reliable Voting Method,"* Iowans for Voting Integrity, 9/13/07, http://www.votetrustusa.org/index.php?option=com_content&task=view&id=2680&Itemid=113.

[11] *"Fairfax Judge Orders Logs of Voting Machines Inspected"*, Washington Post, November 6, 2005; http://www.washingtonpost.com/ac2/wp-dyn/A6291-2003Nov5.

[12] *"GOP in Wharton County back to old ballots"*, Houston Chronicle, 11/30/07Texas http://www.chron.com/disp/story.mpl/front/5340810.html.

[13] *"Lost Votes in N.C. County Prompt New Local Election"*, Computerworld, 12/2/04, http://www.verifiedvotingfoundation.org/article.php?id=5385.

last month, professors from more that 20 universities across the state issued a public letter warning of the pitfalls of DRE machines and urging use only of optical scanning devices. The reasons they cited included that optical scan systems "are inherently safer from tampering or shoddy programming, and enjoy greater public trust" and "are easier to use by voters and easier to oversee by poll workers." (Ex. M, footnotes omitted). Editorials from newspapers all over the state, including a New York Times editorial as recently as last week, similarly continue to advocate strongly in favor of optical scans. (A compilation of 29 of these editorials is submitted as Ex. N).

Thus, there can be no question that the experiences and actions taken by other states that have used and had experience with the DRE touchscreen machines, at the very least, raises serious questions as to their reliability and security. Those questions go to the heart of the constitutional rights of voters to be able to vote and have their votes properly counted. Having not yet purchased any system of electronic voting, New York is able to avoid the problems that have already proven to abrogate voters' rights. Under these circumstances, the *amici* strongly urge that any remedial plan neither permit nor require use or purchase of the DRE touchscreen machines.

Point II

To Require Full HAVA Compliance By The 2008 Presidential Election Would Impair The Very Rights HAVA Is Trying To Protect; Compliance Should Be Phased-In And Continued Use Of Lever Machines Permitted Until 2009

The Supreme Court has made clear that even where a violation of law relating to elections has been found, remedial relief must be timed so as to avoid disruption of the election process. As the Court stated in *Reynolds v. Sims* 377 U.S. 533, 585 (1964), after finding that Alabama's legislative apportionment scheme was unconstitutional:

> In awarding or withholding immediate relief, a court is entitled to and should consider the proximity of a forthcoming election and the mechanics and complexities of state election laws, and should act and rely upon general equitable principles. With respect to the timing of relief, a court can reasonably endeavor to avoid a disruption of the election process which might result from requiring precipitate changes that could make unreasonable or embarrassing demands on a State in adjusting to the requirements of the court's decree. As stated by Mr. Justice Douglas, concurring in *Baker v. Carr*, "any relief accorded can be fashioned in the light of well-known principles of equity."

In another case brought by the Department of Justice in Alabama challenging that state's HAVA compliance with respect to a voter registration list, the district court applied these principles and refused to enforce HAVA deadlines where to do so would "endanger... the election process." *U.S. v. Alabama*, slip opinion, Index No., 2:06-cv-392-WKW (M.D. Ala, July 21, 2006). (Ex. O). It stated:

> The potential for disruption of the November 2006 general election substantially outweighs any benefit of taking further action... *Id.* at 3.

In its prior order in this case, this Court also carefully balanced the need for remedial action with the impact compliance would have on upcoming elections:

> The Court recognizes that the State of New York will be unable to achieve full compliance with HAVA before the Fall 2006 elections and that pushing for full HAVA compliance in time for those elections would

> overtax State election capabilities and risk a breakdown in the conduct of upcoming federal elections. (6/2/06 Order, p. 2).

Thus, this Court structured a phased in remedy that would "provide a practical measure of compliance tempered by the need to ensure that the right of every voter to vote is not impaired and that the orderly conduct of the election process itself is not in any manner jeopardized." *Id.* While it was anticipated that the plan would lead to full compliance with HAVA by September 2007, the Court provided for a "further extension for good cause shown." *Id.* at 7.

Regrettably, HAVA compliance was not achieved by the projected September 2007 deadline. We agree that New York State's performance, or more accurately, lack of performance, to date regarding HAVA compliance is unacceptable. We also agree that a HAVA compliant system should be implemented as expeditiously as possible. Compliance, however, should not be done according to a timetable that sacrifices the time needed for a complete certification, testing, New York's regulatory and contracting processes, and training, all of which are necessary to ensure the ability of voters to cast their votes orderly, effectively and reliably. To require full HAVA compliance by the 2008 Presidential election, as the Department of Justice now demands, is unrealistic and would lead to far greater abrogation of voter rights than continuing to use the existing lever machines for that election.

There are two compelling reasons why the replacement of the lever machines should not be mandated for the 2008 presidential election. **First**, less than a year is simply insufficient time to (i) properly test and certify new machines, (ii) select a system that the State will have to live with for many years to come, (iii) purchase the system, (iv) verify the software and program the ballots for thousands of electoral races, (v) arrange

for storage and security of the machines, (vi) reconfigure and/or select new polling sites to accommodate power demands and new voting systems, (vii) secure adequate staffing (particularly since many precincts are already severely understaffed and many of the existing election inspectors have indicated that they will be retiring rather than undergo retraining on new equipment), (viii) train thousands of election workers to operate the new equipment and address as yet unanticipated problems that may occur, and (ix) educate the millions of New Yorkers, who have been voting for their entire lives on a non-electronic system, as to how to vote on the new equipment – all at the same time in the most demanding election of the four year cycle. Indeed, these are the very type of "precipitate changes" that the Supreme Court warned in *Reynolds* "could make unreasonable or embarrassing demands on a State" and result in "a disruption of the election process."

Second, even if these tasks could be accomplished before the 2008 Presidential election (a practical impossibility), the worst way to implement an entirely new and dramatically different system is by rolling it out all at once, during the election which historically draws the heaviest turnout. As Dr. Douglas W. Jones, an Associate Professor at the University of Iowa and a specialist in voting technology with extensive experience and publications in the field, explained in an affidavit previously submitted in this case:

> When states are pushed into adopting new voting systems within a short period of time, it is a recipe for disaster. I strongly recommend that no jurisdiction put a new voting system into service at such a time that its first use is in a major election. When a new voting system is put in place for the first time in a general election, any mistakes will have serious national consequences. Based on my extensive survey of and experience with such matters, requiring adoption of new voting systems within a short period of time leads to chaos. The problems in Montgomery County, Pennsylvania in November 1996 and in Miami-Dade County, Florida, in their August 2002 primary are good examples of what can happen if a county pushes

> for rapid introduction of new voting equipment with its first use in a major election. In both cases, a county acted in haste to put a new voting system in place on an accelerated timetable, and the result was, in one case, a major lawsuit, and in the other, a national outcry. Ideally, the first uses of new systems should be in low-turnout elections where the impact of the problems, if any, will be minimal. (Ex. P, Jones Aff., sworn to 1/23/06, ¶68).

This risk of chaos can be avoided by a phased in remedial action which will "provide a practical measure of compliance" while at the same time ensuring that the 2008 general election "is not in any manner jeopardized." The Plan *amici* propose that would meet these dual goals is as follows:

> **Plan For Phased In Replacement Of NY Lever Machines**
>
> A phased in implementation plan to expand accessible voting devices in 2008 but continue to allow use of lever machines until 2009:
>
> **By the 2008/February Presidential Primary:**
>
> Expanded use of HAVA compliant ballot marking devices ("BMDs") from the current implementation adopted in 2006, with a minimum of 5 BMDs per county and a minimum of one site with BMDs per 200,000 registered voters.
>
> **By the 2008 September Primary/General Election:**
>
> HAVA compliant BMDs must be available at each poll site across the state in sufficient numbers to serve the diverse needs and rights of the voters who choose to use these devices. Our organizations stand ready to confer with state and county election officials on what we believe the exact ratio of the number of BMDs per election district should be. BMD generated ballots at the polls will be hand counted on Election Night at the polls and treated as Emergency Ballots, not as Absentee or Affidavit Ballots. Optionally, and providing adequate staffing is available and training for staff has been performed, an optical scanner may be made available in each polling place.
>
> Lever machines would remain in operation for 2008.
>
> **By the 2009 September Primary:**
>
> All lever machines will be replaced with precinct based optical scan voting systems.

Finally, for all the reasons set forth in Point I above, any replacement of the lever machines with DRE touchscreen devices by order of this Court should be prohibited.

Rather, the solution should be HAVA compliant ballot marking devices and precinct based optical scanners.

Conclusion

HAVA was enacted to ensure the ease, accuracy and accessibility of voting. It is vital that in an effort to comply with the schedule suggested by HAVA that any order of implementation should not violate the statutory goals. Statewide replacement of the current lever machines in a presidential election year invites chaos, confusion and increases the potential for disenfranchising the state's voters at the polls. Additionally, given that New York State has experienced delays in HAVA implementation, it now has the opportunity to observe and learn from the experiences of other states which adopted new voting technologies without the benefit of hindsight. It is clear that the touch screen DRE voting systems adopted by other states without adequate testing and certification and now being abandoned have failed to realize the goals of having every vote cast and counted and to enable the public to trust that our elections, the bedrock of our democracy, are accurate.

For all the foregoing reasons, it is respectfully submitted that in any remedial plan for compliance with HAVA and/or this Court's prior order: (i) replacement of the lever machines with DRE touchscreen devices by order of this Court should be prohibited; rather, the solution should be HAVA compliant ballot marking devices and precinct

based optical scanners, and (ii) replacement of the lever machines should not be required by the November 2008 Presidential election; but by November 2009.

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Respectfully submitted,

Geri S. Krauss
KRAUSS PLLC
81 Main Street – Suite 500
White Plains, NY 10601
(914) 949-9100
Attorney for Proposed Amici Curiae
Northern District of New York Bar Roll No. 514830

Of Counsel:

John C. Bonifaz, Esq.*
Voter Action
*Not admitted in the Northern District of New York