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

UNITED STATES OF AMERICA,
Plaintiff

DECLARATION OF MARK CRISPIN MILLER

v

Case No. 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

Pursuant to 28 U.S.C. sec 1746, **MARK CRISPIN MILLER**, declares as follows:

1.I am a Professor of Media, Culture and Communication at New York University, and a well known election reform activist.

2. My books include, most recently, *Fooled Again: The* Real *Case for Electoral Reform* (Basic Books). This book has inspired and edified election reform movements nationwide, including those in Arizona, New Hampshire, Florida, Ohio, California, Minnesota, Washington, Illinois, North Carolina and New Jersey, as well as here in New York. I have also edited an important anthology of election-related writings – *Loser Take All: Election Fraud and the Subversion of Democracy, 2000-2008*, which

IG Publishing will bring out in February, 2008. This volume will include works by many well respected experts on the problems now bedeviling American elections. The book's contributors include, among others, David Moore, Lance DeHaven-Smith, Paul Lehto, Steve Freeman, Jonathan Simon, Bruce O'Dell, Bev Harris, Tova Wang, Bob Fitrakis and Steve Rosenfeld.

3. I maintain a blog entitled News from Underground (www.markcrispinmiller.com) whose primary purpose is to make the latest news of electoral problems, and the latest efforts at electoral reform, available to as broad a readership as possible. Relying on local news outlets, independent journalism and the foreign press, News from Underground has a large following throughout the election reform movement and, increasingly, the US media, which has thus far tended not to give this vital issue the attention it deserves, and demands, in a democracy.

4. Since the passage of the Help America Vote Act (HAVA) in 2002, the use of electronic voting machines has spread throughout the nation. The stated purpose of this law was to prevent the sort of chaos that had apparently been rampant at the polls, and at election headquarters, in South Florida following Election Day, 2000. Because that chaos seemed to have resulted primarily from the use of paper ballots and punch-cards, HAVA indirectly urged the use of computerized voting (or e-voting) machines instead. By now, therefore, well over 80% of the American electorate will now either cast their votes on, or have their votes counted by, computerized machines.

5. There are two kinds of e-voting machine: the Direct Recording Electronic (DRE) machine, and optical scanners, or op-scan machines. DRE machines appear to be the less trustworthy of the two technologies, as they are paperless, counting votes that are recorded purely electronically. Op-scans seem more reliable, because they automatically count paper ballots, and therefore leave a paper trail. Because of this more tangible record of voters' choices, some reformers have argued that optical scanners are highly preferable to DRE machines. Nationwide, however, op-scans have proven to be just as unreliable as DRE machines, for several reasons.
6. Democracy depends on fair and free elections, with vote-counts open and observable by all. Whether in the form of DRE machines or optical scanners, computerized vote-counts are by definition closed to human observation. Both types of machine transmit their totals, electronically, to central tabulators. There is no way to observe that process, or to verify those numbers in real time or with precision. This is just as much the case with op-scans as with DRE's.
7. Both types of e-voting machine are not only opaque, their tabulations wholly imperceptible, but both have also proven to be dangerously unreliable. First of all, both types of machine are, like all computers, prone to frequent breakdowns, freezes, crashes and programming errors. In the 2006 election, for example, op-scan machines malfunctioned in races nationwide. According to a partial overview by VotersUnite.Org, op-scans variously failed at certain polling sites in Athens County, Ohio; Montrose County, Colorado (as well as Denver); Greenville County, South

Carolina; Bannock County, Idaho; Mendocino County, California; Flathead County, Montana; Pawtucket, Rhode Island; Waterville, Maine; and thirteen counties in Kentucky. Aside from their destructive impact on the democratic process, such miscarriages have also caused the very sort of inconvenient and expensive glitch that supposedly had been unique to paper-based elections: long delays, ambiguous results and, therefore, costly administrative overruns. Op-scans also malfunctioned in Iowa's Republican primary in June of 2006, and again in that state's Republican straw poll in August of 2007, according to John Gideon of VotersUnite.org.

8. Such delicate machinery has proved to be susceptible not just to accidental snafus but to conscious and deliberate interference. No computerized machine, whether it is paperless or not, is any more trustworthy than the programmers who work with it, or who may secretly gain momentary access to it. Thus is such technology completely inappropriate for civic use. Although often hailed as more reliable than DRE machines, op-scans have been used in several highly dubious elections, whose outcomes were statistically impossible unless they had been rigged on purpose. In San Diego (CA 50), op-scans were used in the notorious primary and general congressional elections of 2006, in which Democrat Francine Busby's losses to Republican Brian Bilbray were extraordinarily suspicious. In Arizona, op-scan machines were hacked demonstrably in the 2004 election, a stratagem painstakingly discovered by election reform activist John Brakey, and confirmed by his associates at Audit AZ (a non-partisan watchdog group).

9. The susceptibility of optical scanners to malicious hacking has been noted by Avi Rubin, a computer scientist at Johns Hopkins University and longtime proponent of e-voting technology. In October of 2006, Rubin reported on a new study published by researchers at the University of Connecticut, who found that the Diebold Accuvote AV-OS, an op-scan machine, was highly vulnerable to deliberate "attacks." Rubin wrote:

> *The authors [of the study] show that "even if the memory card is sealed and pre-election testing is performed, one can carry out a devastating array of attacks against an election using only off-the-shelf equipment and without having ever to access the card physically or opening the AV-OS system box." The attacks presented in the paper include manipulating the count so that no votes for a particular candidate are counted, swapping votes for two candidates, and reporting the results incorrectly based on biases that are triggered under certain conditions.*
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> *The attacks in this paper are cleverly designed to make a compromised machine appear to work correctly when the system's audit reports are evaluated or when the machine is subjected to pre-election testing. Besides manipulation of the voting machine totals and reports, the authors explain how any voter can vote an arbitrary number of times using (get this), Post-it notes, if the voter is left unattended.*[1]

10. By and large, the optical scanners now available are manufactured and maintained by the same private companies that make and service DRE machines. The largest of those firms are Diebold, Election Systems & Software (ES&S) and Hart InterCivic. All three

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[1] From Avi Rubin's blog, http://avi-rubin.blogspot.com/search?q=Uconn+ in which he goes on to comment with regard to the 2006 report prepared on behalf of the state of Connecticut, http://voter.engr.uconn.edu/voter/Reports.html,

> **"Reading this report was a hair-raising experience for me. Diebold has clearly not learned any of the lessons from our 2003 report, and it is startling to see that their optical scan ballot counter is as vulnerable to tampering, vote rigging, and incorrect tabulation as the DRE."**

have long enjoyed very close relations with the Republican Party. In 2004, Wally O'Dell, CEO of Diebold (which is headquartered in Canton, Ohio), raised many eyebrows when he sent a fundraising letter out to prominent Ohio Republicans, stating that we was "committed to helping Ohio deliver its electoral votes to the president next year." For four years, Nebraska Republican Chuck Hagel served as CEO of ES&S (which is headquartered in Omaha), departing that position in 1996 to mount his own run for the Senate. (In both that race and the Senate contest later, ES&S machines were used to count the votes, with Hagel winning both times by surprisingly high margins.) Among Hart InterCivic's top investors is Statford Capital, the investment firm of Tom Hicks, a longtime friend and backer of George W. Bush. The point here is not that these private companies have close tie to Republicans per se, as the situation would be just as troubling if such politicians were Democrats. The point, rather, is that the e-voting machinery—DRE's and op-scans alike—is manufactured, sold and serviced by companies whose products can be programmed to serve the interests of any party, without any real public accountability.

I declare under penalty of perjury that the foregoing is true and correct.

_/s/_____

MARK CRISPIN MILLER

Executed on December 12, 2007