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New York State Board of Elections Commissioner Meeting on May 25, 2021

Commissioner Kosinski: Okay, with that meeting adjourned, I think we'll open up the meeting of the State Board of Elections Commissioners. The four commissioners I believe are on the meeting. I have Commissioners Kellner, Casale, and Spano, and we will go forward with our meeting. Our first agenda item are the minutes from both March 15<sup>th</sup> and April 22<sup>nd</sup> of this year. Is there any discussion or motion regarding those minutes?

Commissioner Kellner: I move we adopt the minutes for both meetings.

Commissioner Kosinski: Okay, all in favor say aye.

Commissioner Spano: Aye.

Commissioner Casale: Aye.

Commissioner Spano: Aye.

Commissioner Kellner: Aye.

Commissioner Kosinski: Opposed? So those are adopted. We will go onto our first agenda item which is the Executive Report from Bob Brehm and Todd Valentine.

Todd Valentine: We are, well it's obviously the last day for the Independent petition filing period is today. That started last week, so we don't have anything filed yet, here, but obviously we're dealing with questions that come from the County Board of Elections. You've already certified the primary ballot, but it should be noted that the primary early voting for the primary does begin on Saturday, June 12<sup>th</sup>, and obviously the primary election is scheduled for June 22<sup>nd</sup>. Related to that, the voter registration deadline is for this week, the end of this week, so that's preparing for the independent petition for the general, and obviously getting ready for the primary election. We do have our monthly call with the County Election Commissioner's Association scheduled for Thursday. We have a call tomorrow with the executive group to set the agenda for that, and obviously the focus is going to be on independent petitions, and what's going on for the primary election.

Legislation, so far, we see nine chapters come through this year, there's still three that have passed both houses but haven't been signed yet, so legislation and the legislature is still in session until the 10<sup>th</sup>, scheduled for the 10<sup>th</sup> of June, so there is still more to come, I guess. They did pass, we now have 4 ballot propositions for the fall. There's still a fifth one that could come to light, so that's why we have scheduled a July meeting so we can do the final certification for that. Obviously, we'll work with the Attorney General as required as a statute to develop the question and the abstract, and in time you can review that, and it's a back and forth, and we'll adjust that as we review it. So Bob?

Bob Brehm: Certainly with nine days of session left, we are not sure what other bills will pass. Friday was the most recent with Chapter 110, and that addresses the item that we discussed at the most recent Board Meetings with county boards meeting or desiring flexibility for early voting poll site, if it has to be in the largest political subdivision in the county, if they don't have any primary contest in that political subdivision. So the Governor signed that on Friday, and we sent a copy out to the county boards as Chapter 110 is the most recent. Certainly, we sent the four questions that we currently know of to the Attorney General with you picking July 28<sup>th</sup> as your meeting date. We asked the Attorney General to please have their advice and recommendations to us by July 1<sup>st</sup>, so that you have plenty of time to consider and review those words, so that we can be prepared by July 28<sup>th</sup>. I think we have a number of other items that I think will be covered as part of this agenda, so we'll save it for those units, but I think that's it.

Commissioner Kosinski: Okay, any questions of either Todd or Bob? Hearing none, we will move onto our next unit the Counsel's Office, Kim Galvin, and Brian Quail.

Kim Galvin: Thank you, Commissioner. The Counsel's office has continued to manage and track and participate in all of our open litigation matters. We've had the final settlement discussions, what we hoped to be the final settlement discussions on Hernandez, which was the accessible ballots and we've made great progress in shutting down the League of Women's Voters II case also known as CURES, to those people listening. We've included our prior guidance on accessible ballots, and we will be reissuing the CURES Guidance that has to be adjusted for a prior executive order, that was in place last year, regarding timing of the CURES that were returned after Election Day. Since our last meeting, we were served with another litigation matter of Ross v. New York State, challenging the illness provisions in the New Chapter Law. There was briefing conference set yesterday and a brief schedule has been set. We've continued to work with all the county boards of elections, and the caucuses, and the individual members, to answer the numerous questions regarding any new legislation that never seems to end. And there have been many, many questions on a variety of things related to the upcoming election and the ballot access.

The Campaign Finance Unit has been busy. The Compliance Unit, we'll have to distinguish them more clearly now I guess, webinars are scheduled for tomorrow, all through June and July, four have been conducted. Training has also, at eight live webinars on the new filing system. Attendance has been very high, sometimes as many as two hundred attendees. We've been able to continue the CPE and CLE credits, and the feedback has been great, so a shout out to the training unit. Contribution limits have been posted. Our staff is continuing to work with IT on the FIDAS updates. The 32 Pre-Primary report was due on 5/21. It's increased the call volume as this is the first time a lot of the filers are filing with the new system, but we're working through those. As always, we participated in the Counsel's staff and the Compliance staff, continue to participate in meetings throughout the building in a variety of other issues that may impact us. And one last note, since our last meeting when we had an over thirty-year tenured person leave,

we've had another retirement, Kathy Roff has retired. She was one of the most pleasant people that you could have ever met. Her work ethic was tireless, and her attitude was even better. She has gone on hopefully to play golf. On the 27<sup>th</sup>, we'll do the last day of another employee of ours, Josie Jackson. She has worked at the State Board for over thirty years, and has been an invaluable historical reference for us, and has carried out her duties in a more than professional manner. The staff is continuing to be cross trained to handle the duties that have been left unmanned by the loss of these three people. So, we're getting to the point now where the crunch time is here and we're going to look to back fill those particular placements as well. So, I think that's it for the Counsel's office. Oh, one other thing, we did get served with a case yesterday, interesting case in Monroe County. I'm not really sure, maybe Brian can shed some light on why we were served, as a party, regarding a party rating sort of matter in Monroe County, in the Conservative Party case. It will be interesting to see how that turns out. Brian, as always, has his statistics ready for our Enforcement or lack thereof, so I'm going to flip it to Brian and let him give you an update on that.

Brian Quail: Thank you very much. So we are at 233 Paid Internet Digital Ads having been filed, that's a little uptake there, given the IT activity in the current election cycle. In total, the compliance unit has received 164,574 filings, and we have processed 147,363 of those, but we are, the reservoir of unprocessed filings is not in a bad place, not withstanding pandemic pressures that obviously we're coming out of now. For the January periodic, there are 3,529 committees that have not filed, and for the July 2020 periodic 2,993 that have not been filed. Since the last meeting, there have been no hearing officer cases reported. There were none last year either, and I think that's it for me.

Commissioner Kosinski: Okay are there any questions of the Counsel? I guess I have one for Brian. As far as you're noting the number of cases that haven't had a hearing officer, is there any ability for a hearing officer to be appointed with the Enforcement Counsel position vacant?

Brian Quail: I don't think so. And so that underscores the main enforcement problem that we have right now, which is there isn't an Enforcement Counsel and obviously if, and when that changes, then hopefully the process will turn back on, but it was obviously never particularly robust. We only received in the 2016 twenty-seven hearing officer referrals, we're now well into the second year of having none, there were only two in 2019. So it can only go up from here if we have an Enforcement Counsel, but right now we don't, and there have been no hearing officers.

Commissioner Kosinski: Any other questions for the Counsels?

Commissioner Kellner: I guess I should add that the Governor is now very close to making a nomination for Enforcement Counsel, so this is on his radar and I would anticipate that we will have a new Enforcement Counsel before the legislature finishes its session.

Commissioner Kosinski: Okay, just on a personal note, I would wish the retiring staff well. I go way back with Josie Jackson of course, has been there a long time. I knew Josie when I worked there, so I wish them all well. Are there any other questions or comments of the Counsel's Office? Hearing none, we'll move onto the Elections Operations, Tom Connolly, and Brendan Lovullo.

Tom Connolly: Thank you, Commissioner. As was already mentioned, we also include fielding some questions from county boards with regard to the Independent Nominating Ballot Access period, as well as aiding them in their preparations for the June primary. We've also been assisting county boards with the process for ensuring that they have each of their unique ballot styles made accessible, by one of the identified remediation vendors. We visited the Oneida County Board and met the two new commissioners and their staff to go over operational processes, and also to identify where the Operation's Unit can best play a role in supporting them as they move forward. Brendan and I also visited the Westchester County Board on May 15<sup>th</sup> to discuss an issue that was previously identified where certain districts in the county have reported an unusual high number of black and void ballots for the 2020 general election. In meeting with the two commissioners, as well as their staff, we were able to ascertain additional information that we felt had been missing from the previous response that had been provided. We are working on a more formal report for you, and we will provide that to you before the next meeting. Testing has been completed on the RCV Voting Universal Tabulator software. Both the SLI and NYSTEK our testing partners have submitted their reports, which along with the report from our unit, had been provided to you, Commissioners. There is a resolution on the agenda later in this meeting. We are continuing our conversations with new voting system vendors, regarding submissions of systems to be expected this year. This does include Democracy Live, Clear Ballot, Hart and Dominion. At this time, Dominion has informed us that they are looking to submit their new system as soon as July. Hart has settled on sometime at the end of the year. Clear Ballot did come and do a demo here at the Board of their precinct base system, and they will be following up with demos of their backend Clear Design software, as well as their accessible Clear Access System next month. We continue to work internally as well as with NYSTEK, on the process that new voter registration systems have to comply with. And lastly, our staff has gone out to Chautauqua, Chemung, Essex, Ontario, Tioga, and Warren Counties in addition to New York City to perform acceptance testing on newly delivered systems. Brendan, do you have anything to add?

Brendan Lovullo: No, I'm good, thank you.

Commissioner Kosinski: Okay, are there any questions for Tom and Brendan?

Commissioner Kellner: I have one brief comment that, I noticed that our regulations on voting machine certification require compliance with the voluntary voting system guidelines adopted by the US Election Assistance Commission in 2005. And since 2005, the Election Assistance Commission has updated the voluntary voting system guidelines, and the most recent version, 2.0 was adopted earlier this year. And I suggest that we

should look at the regulation and consider revising our regulation to require compliance with the current voluntary voting system guidelines, set by the US Election Assistance Commission. So, I throw that out as a suggestion that Tom and Brendan could look at and consider whether we should revise our regulations at the July meeting.

Tom Connolly: We'd be happy to look at that.

Commissioner Kosinski: Let me ask if it's on a practical level, are we currently complying with the new regulations, even if our regulations don't require that when we do testing, are we complying with the new voluntary guidelines?

Tom Connolly: Right now the 6209.2 is the part of the regulations that reference the 2005 VVSG, that's 1.0. There was a 1.1 version, and then as Commissioner Kellner stated there is a 2.0 version now that was passed this year. What we'll have to do is even though 2.0 was passed by the EAC, the two VSTL's or the Voting System Test Laboratories, are not yet prepared to be testing them to the new requirements. They were waiting on the EAC to provide them with some additional information. So I know that even they're not necessarily prepared at the very moment to test the 2.0 standards. We definitely should try to figure out how best to modernize our regulations to retesting to newer requirements. Obviously, we want to make sure all the different moving pieces are aligned. So, Brendan and I will touch base with our testing lab SLI and try to get some additional information. If I need to reach out to the EAC, I certainly can do that as I'm friendly with the Commissioners, and we can try to figure out what their timeline for getting the necessary information out, so that we all can be testing to the new guidelines.

Commissioner Kosinski: Okay, anything else for Tom or Brendan? Hearing nothing, we'll move onto NVRA, John Conklin and Cheryl Couser. I'm sorry NVRA PIO, I apologize.

John Conklin: Thank you, Commissioner. The Public Information Office remains busy. We've been answering a lot of questions about independent petitions, and signature gathering, changes of party enrollment, the Campaign Finance Disclosure Public reporting page, the primary early voting, those have all been hot topics. The unit processed 108 FOIL requests in April. We updated the instructions on the Voter Registration form, as to felons pursuant to chapter 103. The unit continues to attend working group meetings for automatic and online voter registration projects as we go through the bid process. We continue meetings with IT and Compliance on the upgrades to FIDAS and the public site, pushing out weekly updates. We did have a webinar session with the Legislative Correspondence Association that I believe was fruitful. We got some good feedback from them and were able to interact very well with them. We participated as the other units have stated in the monthly ECA call with counties. We're about to reissue the annual SANS cyber hygiene, Cybersecurity training module for the county boards, and their county IT staff, and the state board. As Bob and Todd mentioned, we're tracking up to 5 ballot props for the November ballot. As you know, we have to advertise those in newspapers around the state. There has to be a newspaper

of record in each county. So we're working on a proposal with the New York Press Service on how much that would cost to do that. We haven't done one since 2017. So we should have that for the July meeting, or at least a portion of it. So, for the website, we've posted the legislative package that was approved at the last meeting. The changes are qualifications for voting pursuant to Chapter 103. We did the webcast for the April 22<sup>nd</sup>, PCFB meeting and the SBOE meeting. We also posted an online version of the 2021 law book that had to be sent out to be remediated for accessibility compliance. So we got that back, and that has been posted.

With regard to NVRA, we haven't had any visits since the last Board Meeting. One of the staff that helps those board visits, Patrick has retired so we're awaiting his replacement to resume the process.

Lastly, for the website accessibility coordinator, the 4<sup>th</sup> accessibility report was due and was given to the co-executive directors on Monday, May 17<sup>th</sup>. There are several projects affecting the website that are ongoing all at once right now. The IT unit is working with our vendor level access to make sure that we are compliant with all the web content, accessibility guidelines, and that is moving ahead, and we are, for the most part, really compliant with all those requirements. So Cheryl, do you want to do a grants update?

Cheryl Couser: Sure, as we spoke at the last board meeting in the State Fiscal Year 21/22 budget, two of our grant programs were reappropriated. We're working on a contract amendment and the cover letters for both the AIDS to locality Early Voting and the E-Poll Book grants were drafted and sent out to all the county boards on May 17<sup>th</sup>. And they began to return those, enabling us to send them that money. We're finalizing contract language with the Office of General Services on the two large grants that were provided in the budget, the Technology Fund, and the Early Voting Expansion Grant. We expect to have our final comments back to OGS soon and it'll take them a week or two to finalize and get us a contract. HAVA CARES will be giving that out in June, and we will be coordinating with the Office of General Services to have all the paperwork prepared, so we can refund the excess money that had not been spent down. For Cybersecurity remediation, we have been reaching out to all county boards that did not fully complete a contract. We were at ten, we're at eight. We e-mail, we call, our NYSTEK vendor that helps them with the cyber remediation plan has reminded them in their contact and we plan to put that reminder in our next webinar for the next new grant program to go over the Cyber Remediation Grant Program. But we've been calling, emailing, persistent, and there are eight that have not yet sent back the contract.

John Conklin: Thank you.

Commissioner Kosinski: Okay, any questions? Okay, no questions for John or Cheryl, we'll move onto ITU: Bill Cross.

Bill Cross: Good afternoon, Commissioners. I'll start with CAPAS-FIDAS, of course. We continue to make numerous updates, improvements to the systems, on our weekly release schedule. The largest improvement this period has been the contribution search,

which is largely based on feedback. We brought in the initial search and made all the filters optional, which was in high demand. We've also made significant changes to improve search speed, and overall performance of the system. We continue to do the same for other searches, including the 24-hour notices, which will be published tomorrow. We also continue outreach including, as John referenced the demonstration and Q&A session we had for the LCA. We are also continuing to publish all filing data through the New York State Open Data platform and have received positive feedback on that. For Online Voter Registration, and Automatic Voter Registration, we continue to work with the Office of General Services on the revised RFP. We expect that document to be completed this week and released within the next couple of weeks, with responses due in July. For NYESS Voter, we completed the ability for counties to upload, and more importantly update, their list of poll sites through an online process. The absentee ballot portal, as reported last month is now live. We've received approximately 3700 requests to date through the portal. For security, we've begun our preparation for the upcoming election, including contingency plans for the website hosting, and updating our contacts and communication plans, with our partner agencies and entities, including the Chamber, New York State Homeland Security, ITS, the Department of Public Services, the Election Infrastructure, ISAC, DHS, FBI, etc. We also continue to work with NYSTEK and the various counties, and so reference on the remediation plans and working with PIO to review and approve the reimbursements for those efforts. We are also following up with counties, each county was allocated a certain amount of consulting hours to our partner NYSTEK for those efforts, of which 22 counties have taken advantage of those hours. We are following up with outreach to the counties to make sure they know we're available to them, and for them to utilize them, as is NYSTEK through their efforts to reach the additional counties. The proposed cyber regulations remain out for comment, for June 1. And as Tom noted, we continue to work on development and documentation standards for the Voter Registration Systems. For Elections Infrastructure, we continue to work with the SUNY Center for Technology and Government on that project, for envisioning the future of elections infrastructure. And as always, we're continuing to work on multiple security efforts on our own infrastructure, and generally including enhanced logging, scanning, ticketing, inventory, etc.

And for website statistics, they are at about normal levels with approximately 160,000 views for the main site as of April 30<sup>th</sup>. And that is my report.

Commissioner Kosinski: Okay, thank you. Are there any questions for Bill? Hearing none, so Bill you feel that the CAPAS-FIDAS system is coming together, and that the needs of the public are being met as far as having access to our information on the website?

Bill Cross: Yeah, like I said, we've made numerous improvements. We're committed to a weekly release schedule that may move to a bi-weekly. We continue to work on the feedback we received, particularly around the searches and performance; and we've made great strides there, it does take some time to implement but again, with the release schedule we've committed to, we are working through that.

Commissioner Kosinski: Okay, thank you. I'll just mention Enforcement. I know still on our agenda, but since there's no Counsel, there's no report, not that we've had a report for the last couple of years, anyways. But are there any comments anybody wishes to make on the Enforcement Unit? Hearing none, we'll move on.

Next on the agenda is old business. Is there any old business to come before the Board today? I have nothing on my agenda, but does anybody have any old business they'd like to bring forward today?

Hearing none, we will move onto new business, and we have three items under new business. The first one is the Accessible Absentee Balloting for 2021, we have a resolution before us, and would one of the Counsels or Executive Directors just explain what this is about?

Kim Galvin: We can do that.

Brian Quail: Do you want to do it, or do you want me to do it?

Kim Galvin: You do it, Brian.

Brian Quail: Thank you. So this resolution is pretty much identical to the resolution that the Board adopted on 5/27/2020. So we're two days earlier this year, and it basically continues in place the Accessible Voting program that we initiated in 2020 before the June primary, and that we continued through the general election last year, and that we've used for the Village Election this year. In November of last year, for the November election we had in place a court order that was issued on August 19<sup>th</sup>. That order applied specifically to the 2020 election in November. We've identified to the court and to the plaintiff's, that we intended to continue these programs, and this is just memorializing the commitment to continue it. And obviously this subject matter is also related to the Hernandez lawsuit, which we're working on a settlement with respect to, that would apply further protection. So, sum in total, this is virtually identical, nearly word for word with the resolution that was adopted last year at about this exact same time and continues the program that we have advanced for the last primary, general, and village elections.

Commissioner Kosinski: Are there any questions about the resolution or the program, or is there a motion to adopt?

Commissioner Spano: Motion to adopt.

Commissioner Casale: Second.

Commissioner Kosinski: All in favor aye?

Commissioner Keller: Aye.



Commissioner Spano: Aye.

Commissioner Casale: Aye.

Commissioner Kosinski: Aye.

Commissioner Kosinski: Thank you, that is carried. Our second agenda item relates to the Rank Choice Voting Universal Tabulator. We again have a resolution before us regarding this. I think it'd be best if we had some kind of an explanation. I would think Tom or Brendan may want to explain. I know you mentioned this in your report, but maybe you could go into a little bit more detail about this.

Tom Connolly: Sure, I'd be happy to, Commissioner. So as we have mentioned over the past couple of meetings, New York City did submit the RCV Universal Tabulator Version 1.2.0 for testing by the State Board, it is a piece of software that they are hoping to use at the June primary in conjunction with the already certified ES&S system which they use. Basically, what this software does is take the cast vote records, or the CVR data which is basically an electronic interpretation of each individual ballot, and then takes that information from the ES&S system and runs it through the Rank Choice algorithm to determine the winner of Rank Choice contests. New York City is looking to use this software according to the Charter Amendment, which is just for the primaries for certain citywide offices, as well as special elections for those offices. We did look at that software, we did work at our testing partners SLI compliance as well as NYSTEK to settle on a scope of testing, and applying the various requirements in statute and regulation that we felt applied to this piece of software. We did go through that testing process once we agreed upon the scope of testing. We had provided to all of the Commissioner's copies of the testing reports from both of those partners. In addition to that, I also put together a report from the Operations Unit that is said to kind of describe the overall approach that we took, and the resolution and the report both mention a number of conditions of use should this piece of software be approved. Those conditions largely come out of functionality in the software that is not needed for the New York City approach, but was in the software to begin with. So with that, I'll be happy to answer any questions you may have with regard to the process, the reports, or the resolution.

Commissioner Kosinski: Are there any questions from the Commissioners?

Commissioner Kellner: I move the adoption of the resolution.

Commissioner Spano: I second.

Commissioner Kosinski: Okay, before we vote, I have a few questions I'd like to raise. I just want to, as you know, I've had some trepidation about this entire program right from the beginning. I feel that this adoption by the City Council, or actually by the voters of the City of New York, is outside the authority and the Election Law. This has not been approved by the State. It's been done simply at a local level. I think that is something

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that's very troublesome legally, in the sense that this conflicts directly with a New York State statute regarding run off voting in New York City. And I think when there's a conflict between state law and city law, State law governs. And I think that without State Legislative action, which has not been forthcoming, that this stands on very shaky legal ground to go forward as a program. We have a direct conflict with the runoff provisions in our state statutes which actually were even referenced in the resolution that was adopted at the local level in New York City that the 612 provisions of New York State law that requires a runoff when a known candidate for citywide office gets less than 40% of the vote, will now be eliminated by this run off process. And while that may be something the city wants to do, I think without state authority, they don't have the authority to do that. But that's in essence what's happened here. I would note that in the resolution, that was adopted at the city level, there is references to other state laws that have been superseded by this provision. Section 91.10, section 91.12, other sections have been amended by this, other sections I say of the State Election Law. And again I think this goes against the authority of the local government to do. You know that said, I know we discussed this earlier in the year and we did agree to go ahead with this testing regiment. It's apparent that the City is intent to go on with Rank Choice Voting. I know they've done it. I believe in March they held an election under Rank Choice Voting, under this new City authority. They had to do a hand count in order to conduct that election. I think hand counts, in my estimation is the worst way to conduct an election. I think certainly a voting system, or a voting machine would be better to count ballots, than them doing hand counts. With that in mind, I agreed that we would go ahead with this approval, this testing of this software, that has now been through the testing process by our testing agents SLI and NYSTEK, and I just, well I feel that the system is a better way to count ballots, there's no way, I don't want this to be interpreted as my thinking that what the City is doing has been approved. Frankly, why the State Legislature had not weighed in on this, I don't understand. I mean it would have been an easy fix, if the State wanted to make the state law confirm with the City provision. They could have eliminated the runoff; they could have done other Election Law Amendments. They've done numerous Election Law amendments in the last 2 years as we've seen, maybe 67 amendments, none of them have touched on runoff voting in New York City. I find that curiously that it seems it would have been very easy for the State Legislature to just warrant state law and eliminated any legal hurdles that the city may be facing here. But they choose not to, that implies to me that there wasn't approval at the State level for this particular program. With that in mind, that's why I raised my concerns and I continue to have those concerns. I think that they've overstepped. And I think it raises really a precedent setting type of a program now, where if we go along with this, which we are with this testing, as a State Agency, it really begs the question of why local governments can't just enact new election processes in their localities for the local offices that supersede or contradict even state law? So we might see a county that decides they'd like to have say IDs at their local votes for local offices, impose a Voter ID program for voters for local office in their county, and it appears that we are basically consenting that that would be something that they'd have the authority to do. So there's any other of other provisions that localities could enact, that would create a whole mishmash of voting around the state without any state oversight, without any state authority, which I think

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potentially leads to confusion of the voters. I think there's a lot of overriding concerns here, when we allow localities to just enact any provision they see fit on local office, without state approval. We have a state regimen for elections in this state, it's done statewide, it's done to be consistent, it's done to make sure the voters understand how voting works so they aren't confused on how to go ahead and vote. I think that's the best system for a state to enact, and I think now that we've allowed New York City to go ahead with something like this it opens up the doors of other localities doing something themselves that they decide is a way they want to conduct their elections at a local level. I think that's a troubling precedent, and I'm not in favor of that. But again, that said, we've done this testing, I think that counting ballots through a system like this, is better than counting ballots by hand, and since that seems to be the option that the City is facing right now, I am not opposing this particular resolution today, and allowing the City to use something that I think the State approves. I do think there is another important principle at play here, which is that localities should not be using voting systems or any voting software that has not been approved and tested by the State. So I was glad that the City at least deferred to us, in the sense that they would not use this software until it had been put through a testing regimen that had been conducted under this Board. So I am pleased that they recognized that before they implemented this system, they needed to get some approval from us before they did it. And I know they've been waiting for us to do this and they have been conducting their elections by hand. But I know that there's a big primary coming up in June, the citywide primary, and conducting that one by hand I think would be very burdensome for the City board. So with that in mind, I'm not opposed to this. But I did want to raise my concerns which I still have. I still think they are warranted, and I think that this is a bigger issue than merely whether New York City wants to adopt Rank Choice Voting as their new voting process. So those are the comments I wanted to make. I don't know if there's any other comments by any other Commissioners. But we do have a motion on the floor.

Commissioner Kellner: I have three points that I would like to make. One is just on our certification process, the second is just to address the legal basis that Commissioner Kosinski just discussed. And the last, to point out that there is still one open item that the City needs to address.

So first, I want to thank Tom Connolly and Brendan Lovullo for supervising this process. The City, actually it was their vendor, the Rank Choice Resource Center only submitted this system for certification in the first week of March, and here it is just 10 weeks later, and we are giving certification approval, on a very abbreviated schedule. And I think that people do not fully appreciate the thoroughness of the New York State Certification process. There were some minor issues that were found with this software, not withstanding the fact that there are a dozen other jurisdictions in the country that are using it, and I'm very proud that New York does have the gold standard when it comes to the certification of our voting systems and voting equipment. It is very productive because it's designed to anticipate problems before they arise, by testing in advance, and not learning the hard way through negative experience. That being said, just to briefly address the legal basis. Commissioner, Article 9 section 2 of the New York State

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Constitution explicitly provides that every local government shall have the power to adopt and amend local laws relating to the mode of selection of its officers. And on two separate occasions, the Court of Appeals has upheld local jurisdictions who have adopted their own procedures for election of officers. The first time was in 1927 in the case of *Barron v. City of Rochester*, and more recently, in a case involving the City of Schenectady *Blakey v. Power* in 1963, the Court of Appeals has upheld local adoption of procedures for choosing their officers that vary from the State Election Law. And the State Election Law itself says that in section 1.102 that where a specific provision of law exists and any other law which is inconsistent with the provisions of the Election Law, such provisions shall apply, unless a provision of the Election Law specifies that such provision shall apply notwithstanding any other position of law. So the important, is that jurisdictions can adopt local laws with respect to the mode of selection of their officers, and we should be respecting that.

And of course, no one brought a lawsuit directly challenging the New York City Charter Amendment, and the one lawsuit that said that the City wasn't implementing Rank Choice Voting properly, the court has ruled twice now against granting any kind of preliminary injunction. So, I respect that we don't always agree, but at least we've each made our record on the subjection.

And then finally, the one open item, that was identified in the course of certification testing, is that there is a security gap, that in order for this tabulation system to work, the cast vote records from the scanners have to be imported into this tabulation system. In the other jurisdictions that are using this tabulating system, I don't think anybody's actually raised the question, how do you know that the records that are being fed into the tabulation system are the same as the records that came out of the scanners? And there is a security gap there and the recommendations that are contained in the reports from our testing labs and in the resolution that we've adopted today, basically require the City to adopt security procedures, so that everyone can be assured that the records going into the tabulation system are the same as the records that came out of the scanners. And so, the City still needs to repair those security procedures as well as the rest of the procedures for using this tabulation system, and for doing the mandatory audits that the Election Law and the City Charter require post-election, on the tabulation, and I hope that our Election Operations Unit will stay on top of the City to make sure that they produce these procedures, that the procedures are made public so that everyone will understand what the rules of the game are, and will be able to follow up on it. That being said, I'm very grateful for the work that the Operations Unit has done, as well as our testing authority, in order to turn this around in such short order. And I certainly support the resolution as drafted.

Commissioner Kosinski: I just want to make a couple of comments I guess regarding that. One is just on the legal front; I would note that I don't believe those cases that were cited dealt with a direct statutory contradiction like we see here, where we have a State Law specifically calling for a runoff, if there is a certain election result or primary that is now being superseded by a local city law. So I think that's clear difference on the legal

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front. But I don't want to belabor that, I think we've made our points. I do note that there are a few items in this resolution that I think, and Tom, I think you might have touched on these, but you did note that there are a number of processes that this software will allow, that is not approved for New York City use, and they are enumerated in the resolution itself. So, how do we make sure that the City is not going to use the software that's not approved by our approval process in using this software in June?

Tom Connolly: Well I think obviously, the resolution sets out the conditions of use. The functionality of that is listed in both the resolution and the report, are items that are actually not used by the New York City model in the first place. So there's really no need for them to be using those functions of the software, in some of the testing reports from our partners it was identified that even though those functions are not being used, they should probably be removed from a future release. That being said, we would certainly work with the City Board as we have been through this entire process, to ensure that the software is configured properly on the proper hardware. And to speak to Commissioner Kellner's comments about additional procedures which may be needed, we've already identified a number of those with the City Board, with regard to the ones specific to the identified potential gap between the Cast Vote Records from the ES&S EMS system Electronic management System, and the separate RCV tabulator system. We have already identified a similar process that the City Board uses for the encryption and hashing of those files, that would allow for there to be confirmation that the files when they leave the one system are indeed unchanged when they get to the other system. We've already begun the discussions with the City Board, but obviously they were waiting for the Full Board approval of this Board before moving forward with the development of those procedures.

Commissioner Kosinski: Okay, now is that because the tabulator used here is being used in other jurisdictions, and they do engage these particular processes?

Tom Connolly: Right, so there are a number of different ways to do Rank Choice Voting, sometimes there is a single winner, which is the case in New York City, sometimes there are multi-winners. There's also the matter that's mentioned in the resolution of the report, about the breaking of a tie. The new Committee Charter Amendment, and the City Board have already set forth a procedure for breaking a tie, should it occur. So that functionality would not be used in this tabulator. So I think that we identified early on, as Commissioner Kellner had mentioned, there were some issues, both with the software, but also with the original configurations that were submitted. When this was submitted, it was submitted on Windows and Apple and also a Lennox platform. Because of the timeframe that we were trying to accomplish this under, which was hopefully to have the testing completed in time, where the Commissioners could make a decision before the City's June primary, we decided to focus solely on the configuration that was expected to be used in New York City which is the Windows configuration and likewise we decided to focus on where the feature set that would be used in New York City as well.

Commissioner Kosinski: Now this will be used for both tabulating Election Day balloting as well as absentee balloting, affidavit balloting, and the other paper balloting that will be going on?

Tom Connolly: Correct. So, obviously in order to run the Rank Choice Voting calculations they would need to know all of the kind of universe of ballots, and that would include early voting, election day, and then the other paper ballots such as the absentee and affidavit that you mentioned.

Commissioner Kosinski: Okay. Okay, are there any other questions or comments regarding this? Commissioner Casale.

Commissioner Casale: Yes, I just want to explain my vote. I plan to vote for this resolution because I don't think it would be fair to the hard-working employees of the New York City Elections to force a hand recount when this technology is available to them. But by no means do I want my vote construed as either supporting or endorsing Rank Choice Voting, as I agree with you Commissioner Kosinski, it was not properly implemented in the city.

Commissioner Kosinski: Thank you. Any other comments? We have a motion on the floor to adopt, all in favor aye?

Commissioner Kellner: Aye.

Commissioner Casale: Aye.

Commissioner Kosinski: Aye.

Commissioner Spano: Aye.

Commissioner Kosinski: Opposed? And that is adopted.

That is the third new business item, and we'll move onto the last new business item, which is a salary resolution, resolution 21-12. Is there any discussion? Is there a motion? This is about I believe raises for the co-executive directors.

Commissioner Kellner: I think the co-executive directors have been doing an outstanding job, and there would be no basis at all for withholding the statewide increase for management employees so I'm very happy to move the resolution.

Commissioner Casale: Second.

Commissioner Kosinski: Moved and seconded. All in favor?

Commissioner Kellner: Aye.

Commissioner Casale: Aye.

Commissioner Spano: Aye.

Commissioner Kosinski: Aye. Opposed? That is also carried unanimously. That concludes my agenda under new business, and we could have an Executive Session if someone feels the need for one. If not, I would entertain a motion to adjourn. I believe we've scheduled our next meeting for July 28<sup>th</sup>, pending the need for an interim meeting to deal with any petition challenges, or anything else that may come up. I believe at the same time that we would be conducting a Public Campaign Finance Board Meeting, again, on July 28<sup>th</sup>, unless something comes up in the interim. And with that in mind, if there is no other business to come before the Board, I would entertain a motion to adjourn.

Commissioner Casale: So moved.

Commissioner Kosinski: And seconded. All in favor aye?

Commissioner Kellner: Aye.

Commissioner Casale: Aye.

Commissioner Spano: Aye.

Commissioner Kosinski: Aye.