

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

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
v.)
)
NEW YORK STATE BOARD OF)
ELECTIONS; PETER S. 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.)
_____)

Civil Action No. 06-CV-0263
GLS/RFT

**UNITED STATES' RESPONSE TO STATE OF NEW YORK'S HAVA REMEDIAL
PLAN**

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On April 10, 2006, pursuant to this Court's March 23, 2006 Order, the Defendant New York State Board of Elections ("SBOE") submitted to the Court a proposed remedial plan for the State of New York's compliance with the provisions of Sections 301 and 303(a) of the Help America Vote Act ("HAVA"), 42 U.S.C. 15301 et seq. The proposed remedial plan was supplemented by a filing of the SBOE on April 20, 2006. The United States submits the following response to the SBOE's submission.

I. Background

On March 1, 2006, the United States filed its Complaint in this action, alleging that Defendants have failed to comply with Sections 301 and 303(a) of the Help America Vote Act of 2002 ("HAVA"), 42 U.S.C. §§ 15481 and 15483(a), relating to the manner in which states conduct elections for federal office. Specifically, the United States alleges that Defendants have: 1) failed to comply with Section 301 of HAVA by not having in place by January 1, 2006 for use in federal elections, voting systems meeting the requirements of Section 301; and 2) failed to comply with Section 303(a) of HAVA by not having in place on January 1, 2006, a computerized statewide interactive voter registration list meeting the requirements of Section 303(a). On March 6, 2006, the United States filed a Motion for Preliminary Injunction in this action, asking the Court to find that the Defendants have not complied with the requirements of Sections 301 and 303(a) of HAVA and to require the Defendants to submit to the Court a remedial plan for such compliance. On March 23, 2006, this Court entered an Order finding that the New York State Board of Elections (SBOE) is not yet in compliance with the requirements of Sections 301 and 303(a) of HAVA and ordering the SBOE to submit to the Court by April 10, 2006, a comprehensive remedial plan detailing how the Defendants planned to achieve

compliance with HAVA's mandates. The SBOE submitted a proposed remedial plan to the Court on April 10, 2006, which was supplemented on April 20, 2006 by the SBOE with the filing of a summary of planned implementation actions of the County (and New York City) boards of elections.

II. The Help America Vote Act of 2002

On October 29, 2002, HAVA was signed into law by the President. 42 U.S.C. §§ 15301-15545. Title III of HAVA, containing Sections 301 to 303 of the statute, includes certain "uniform and nondiscriminatory election technology and administration requirements" that apply in elections for federal office. 42 U.S.C. §§ 15481-15483.

Section 301 of HAVA, entitled "Voting Systems Standards," contains requirements that "[e]ach voting system used in an election for Federal office" must meet no later than January 1, 2006. Section 301 applies to all States. 42 U.S.C. § 15481. Among other things, Section 301 of HAVA requires that voting systems used in a election for Federal office must:

(a) provide a mechanism for a voter to verify and, where necessary, correct his or her ballot, including notification of, and the opportunity to correct, any overvote, 42 U.S.C. § 15481(a)(1);

(b) produce a permanent paper record with a manual audit capacity, 42 U.S.C. § 15481(a)(2);

(c) provide for accessibility for voters with disabilities in a manner that provides the same opportunity for access and participation (including privacy and independence) as for other voters, 42 U.S.C. § 15481(a)(3);

(d) provide for accessibility, consistent with the requirements of the Voting

Rights Act of 1965, 42 U.S.C. § 1973 *et seq.*, for voters with alternative language needs, 42 U.S.C. § 15481(a)(4);

(e) meet a specific error rate standard in counting ballots established by the Federal Election Commission, 42 U.S.C. 15481(a)(5); and,

(f) have a uniform and nondiscriminatory definition of what constitutes a vote and will be counted as a vote for each type of voting system, 42 U.S.C. § 15481(a)(6).

Section 303(a) of HAVA, entitled “Computerized Statewide Voter Registration List Requirements,” requires that “each State, acting through the chief State election official, shall implement in a uniform and nondiscriminatory manner, a single, uniform, official, centralized, interactive computerized statewide voter registration list defined, maintained, and administered at the State level.” Section 303(a) applies to all States that require voter registration for elections for Federal office. 42 U.S.C. § 15483(a). Among the requirements of Section 303(a) of HAVA for the statewide voter registration list are the following:

(a) The list shall serve as the single system for storing and managing the official list of registered voters throughout the State, 42 U.S.C. § 15483(a)(1)(A)(i);

(b) The list must contain the name and registration information of, and must assign a unique identifier to, each legally registered voter in the State, 42 U.S.C. § 15483(a)(1)(A)(ii)-(iii);

(c) The list must be coordinated with other agency databases within the State, 42 U.S.C. § 15483(a)(1)(A)(iv);

(d) Any election official in the State, including any local election official, must be able to obtain immediate electronic access to the information contained in the list, and

all voter registration information obtained by any local election official must be electronically entered into the computerized list on an expedited basis at the time the information is provided to the local official 42 U.S.C. §§ 15483(a)(1)(A)(v)-(vi);

(e) The State must provide the necessary support so that local election officials are able to enter voter registration information on an expedited basis, 42 U.S.C. § 15483(a)(1)(A)(vii);

(f) The list must serve as the official voter registration list for the conduct of all elections for Federal office in the State, 42 U.S.C. § 15483(a)(1)(A)(viii);

(g) Election officials must perform list maintenance with respect to the computerized list on a regular basis, 42 U.S.C. §§ 15483(a)(2) and 15483(a)(4);

(h) The State must coordinate the list with State agency records on felony status (where required by State law) and death, 42 U.S.C. § 15483(a)(2)(A)(ii);

(i) The State must ensure that the name of each registered voter appears on the list, only voters who are not registered or not eligible are removed from the list, duplicate names are eliminated from the list, and eligible voters are not removed from the list in error, 42 U.S.C. §§ 15483(a)(2)(B) and 15483(a)(4);

(j) The list must provide that no application for voter registration shall be accepted or processed unless it includes a driver's license number, for persons who have a driver's license number, or the last four digits of the social security number, for persons who do not have a driver's license number. For persons who do not have these numbers, the State must assign a unique identifier, 42 U.S.C. § 15483(a)(5)(A);

(k) The State must enter into agreements to match information from the list

against the State motor vehicle authority database, and the federal social security number database, 42 U.S.C. § 15483(a)(5)(B).

The State of New York is covered by and was required to comply with the requirements of Sections 301 and 303(a) of HAVA with respect to elections for federal office on and after January 1, 2006. 42 U.S.C. §§ 15481(d), 15483(d)(1)(B), 15541.¹ The State of New York is scheduled to conduct two elections in the State for federal offices in 2006: a primary election on September 12, 2006, and a general election on November 7, 2006.

III. **The Status of New York's Compliance with HAVA - Current and As Proposed**

This Court's March 23, 2006 Order finds that the SBOE is not currently in compliance with the requirements of HAVA Sections 301 and 303(a).² That is clear enough, as the plain language of HAVA sets a deadline of January 1, 2006, for placement of HAVA-compliant voting systems throughout the State and the implementation of a statewide voter registration list, and the record in this case demonstrates that neither of these requirements has yet been met. This Court's March 23, 2006 Order also required the SBOE to file with this Court by April 10, 2006, "a comprehensive plan for compliance with Sections 301 and 303(a) of HAVA."

The SBOE has submitted to the Court a proposed plan for HAVA compliance that envisions implementation in two phases - interim and long term. The Board's interim plan for voting systems involves "the identification of existing commercially available ballot-marking

¹ New York applied for and received a waiver of compliance with the statutory deadline of January 1, 2004, until January 1, 2006. 42 U.S.C. 15483(d)(1)(B)

² Although the Court's order makes no such finding with regard to the State, as we have set forth below, we believe that the State has clear obligations under HAVA and so must be bound by any remedial order ultimately issued by this Court to achieve compliance with that statute.

devices that meet the accessibility requirements of HAVA and New York law.” Such devices subsequently will be certified for use in the State and contracts will be entered into by the State with appropriate voting systems vendors to provide for the use of such systems in New York jurisdictions in time for the September 12, 2006 primary election for federal office. The State will consult with individual jurisdictions to determine the extent to which such ballot marking devices can be deployed in each jurisdiction. Following State authorization of use of the ballot marking devices, individual jurisdictions will choose what device each wants to use (upon default, the State will make such choice for a jurisdiction (or jurisdictions)) and the State will contract for purchase and delivery of the voting system(s) to the jurisdictions. The interim plan also provides for acceptance testing of newly-delivered voting systems as well as for comprehensive poll worker training and voter education on use of the new systems. In the long term, the SBOE has proposed full replacement of all lever voting machines in the State of New York by the time of the fall 2007 state elections and a procedure for certification, contracting, purchase, delivery and acceptance testing of fully HAVA-compliant voting systems to replace the lever machines.³ With regard to compliance with HAVA’s requirements for a statewide voter registration list, the State proposes an interim voter registration system to be implemented by mid-July 2006, to be followed by development and implementation of a permanent statewide voter registration list scheduled for completion in the spring of 2007.

It is significant to note, as is set forth in more detail below, that what the State proposes

³ The SBOE has also proposed compliance by July 1, 2006, with the requirements of HAVA Section 301(a)(6), 42 U.S.C. 15481(a)(6), concerning the adoption of uniform and nondiscriminatory standards defining what constitutes a vote and what will be counted as a vote for each category of voting system used in the State.

to do on an interim basis does not achieve full compliance with HAVA. With regard to voting systems, the State proposes what can only be viewed as far less than even minimum compliance, since the interim plan deals only with compliance with Section 301's requirements of voting system accessibility for individuals with disabilities and, even then, only provides for partial - and far from full - compliance with HAVA's requirements in that regard. While the State's interim proposal for compliance with HAVA's statewide voter registration list requirements comes closer to full HAVA compliance, as set forth below, it still stops short of that goal. Specifically with regard to HAVA-compliant voting systems, the State's inability at this point to propose greater HAVA compliance than is found in its proposal is indeed regrettable and in the end does a disservice to the voters whom HAVA was intended to benefit. However, the United States is mindful at this late date of the potential for disruption of the federal election process in New York if plans for full HAVA compliance are implemented in too hasty a manner, and the United States' comments here must be viewed in this regard. There should be no doubt that we seek full compliance with federal law as soon as is practicable.

IV. The State's Proposed HAVA Compliance Plan

A. Implementation of HAVA's Voting Systems Requirements

1. Interim Voting Systems Plan for the Fall Elections

a. Limited HAVA Compliance

The SBOE plan proposes only limited compliance with HAVA's voting systems requirements by the time of the fall 2006 federal elections. First, while the proposed plan provides for the replacement of all lever voting machines in the State at some indefinite point in the future, the plan does not propose replacement of the lever machines in any State polling

places until after the fall elections, although it does contemplate additional voting devices being made available, as described below. Second, the plan proposes only partial compliance with HAVA's requirements that voting systems be accessible to individuals with disabilities. Rather than providing for the placement of at least one accessible voting system in each polling place in the State, as required by Section 301(a)(3) of HAVA, the State proposes a limited jurisdiction-by-jurisdiction approach to provision of accessible voting systems based in large part on what individual jurisdictions advise the State they can achieve in time for the fall elections. In addition, the plan fails to include clear objective standards or controls over the jurisdictions to assure a serious effort toward compliance.

The State's interim voting systems plan clearly does not achieve full compliance with HAVA. First, the State's lever machines do not comply with the mandates of Section 301 of HAVA, at the very least insofar as they do not have the ability to produce a permanent paper record with a manual audit capacity, as required by Section 301(a)(2), and they are not accessible to individuals with disabilities, as required by Section 301(a)(3).⁴ Thus, pursuant to HAVA, these machines should be replaced by the 2006 fall elections. Second, placement of accessible voting systems in only a certain number of vote centers distributed geographically or otherwise throughout a jurisdiction, as proposed by the State, fails to comply with unequivocal HAVA mandates that each polling place have an accessible voting system.

Based on the record in this case and discussions between the parties, the State's position appears to be that, largely as a result of its own extraordinary delay and required state

⁴ The United States' preliminary injunction papers (Docket Number 18) and March 22, 2006 Letter Motion (Docket Number 36) cite the record evidence in support of this position.

administrative procedures for adoption of new voting equipment, it simply is not possible to replace all of its over 20,000 lever machines in its 7,285 polling places,⁵ as well as provide for full HAVA voting systems accessibility for individuals with disabilities in each polling place, in time for the fall elections, without causing overwhelming electoral chaos. Indeed, as the United States has pointed out before, the State still has not even begun the process of certifying fully HAVA-compliant voting systems for ultimate purchase by the State's local jurisdictions. It was not until yesterday, April 27, 2006, after months of consideration, that the SBOE even adopted new voting systems certification regulations as required by State law. In addition, subsequent voting systems setup and security, training of elections officials and voter education also remain to be done. As the United States has made clear in its filings in this action, we believe strongly that the position of HAVA non-compliance in which New York finds itself is one of its own making, occasioned by inordinate delay at various levels of state government. As a result, New York did not even really begin its efforts aimed at implementation until just mere months before HAVA's requirements went into effect, literally two to three years later than other states, leaving the State further behind than any other in the country. However, and with great reluctance, the United States recognizes that the State's inaction and delay have created the potential for electoral disarray if the State is required to attempt replacement of all lever machines and achieve complete voting systems accessibility by the fall, and we do not seek to require such actions where such disarray is, as here, a likely result. We thus will not oppose, given the

⁵Source: 2004 County Board Statistical Summary, prepared by New York State Board of Elections from information received from the County Boards of Elections, April 14, 2005 (pertinent pages found in Exhibit 3). According to an April 28, 2006 e-mail from Board counsel to counsel for the United States, of the State's 20,843 voting machines, 20,780 are lever style machines.

particulars of this situation, as detailed below, the State's plan for limited HAVA voting systems compliance for the fall federal elections, in light of all assertions by the State that full compliance is impossible.⁶

We do note, however, the significant costs to the State, and ultimately to its local jurisdictions and voters, of a plan that does not by the time of the fall elections replace lever machines in any polling places and that does not achieve full voting systems accessibility in the vast majority of polling places. As we have indicated previously to the Court in our preliminary injunction papers, Defendants have received \$221,000,000 in federal funds under HAVA. Of those funds, almost \$50,000,000 was granted pursuant to Section 102 of HAVA, 42 U.S.C. § 15302, for the replacement of lever voting machines. This \$50 million grant was conditioned specifically on replacement of New York's lever machines in time for the September 2006 federal primary. If New York does not meet this specific condition, HAVA provides that the State will lose some or all of these funds. 42 U.S.C. 15302(d). Moreover, the remaining approximately \$171 million that New York has received under HAVA is also at risk because it is comprised of several different grants, each of which was conditioned on the funds being spent or allocated for their intended purpose in compliance with HAVA's terms. Those terms include the

⁶ We are aware of the well-intentioned arguments of those who believe that until full compliance with HAVA's accessibility standards can be achieved, there should be no attempt at even partial accessibility compliance. While we seek no less than full compliance with HAVA in the future - and New York has proposed a time for full compliance - we also are mindful of the thousands of individuals with disabilities who may be able to vote in a more accessible manner through the limited efforts at HAVA compliance that the State proposes here, and so believe even such limited efforts to be of the utmost importance and consistent with the goals of HAVA. It would appear that the State's plans for full compliance by the fall of 2007 provide the State with sufficient time for exploration of voting system accessibility options and reasoned discussion with those interested in providing full accessibility for New York's voters with disabilities, as required by HAVA and other federal statutes not involved here.

specific deadline for compliance with HAVA's voting systems and statewide voter registration list requirements - January 1, 2006 - set forth in the statute.⁷

b. Jurisdiction-by-Jurisdiction Interim Compliance Plans

The SBOE has begun the process of consulting with jurisdictions in the State to determine the extent of their participation in the State Board's proposed interim plan for accessible voting systems compliance. On April 20, 2006, the SBOE filed with this Court a supplement to its proposed remedial plan, which consists of a detailed chart (Exhibit 1) indicating, among other things, for each jurisdiction in the State, information concerning the number of accessible voting devices that each jurisdiction will plan to use in the fall 2006 federal elections, the locations of those devices, the number of voters with disabilities estimated to utilize the devices and whether the jurisdiction will be providing transportation services to these specific polling locations for voters with disabilities. It is our understanding, based on discussions with counsel for the State and the Board, that this chart has been compiled based on information gathered by the State in a survey of all jurisdictions begun after issuance of this Court's March 23, 2006 Order. All jurisdictions have responded to such survey, although some responses are not as complete as others. The United States has been provided copies of these survey forms by the SBOE and has been able to review the same.

⁷ As we have indicated in our preliminary injunction papers as well as in oral argument to the Court at the March 23, 2006 intervention hearing, the United States does not seek nor can it seek in this litigation to recapture any HAVA funds already distributed to New York. Our enforcement authority under HAVA is limited to enforcement of the specific requirements of Title III. We make these statements here to bring the attention of the Court to the plain and in some cases absolute language of HAVA that should serve as an incentive to the State to make some greater effort at lever machine replacement and placement of accessible voting machines in the State for the fall elections if at all possible.

As can be seen, the attached chart indicates that jurisdictions in the State will be participating in the State's interim voting systems remedial plan in different ways. One jurisdiction - Montgomery County - will be attempting placement of accessible devices in all of its polling locations. This jurisdiction is to be commended. Others will be providing accessible machines in several locations throughout a jurisdiction (e.g., by assembly district, geographically dispersed throughout a jurisdiction, etc.), or at one centrally-located place (in many cases, at the office of the local Board of Elections). The chart indicates that there will be at least one accessible voting device in use in every jurisdiction in the State for the fall federal elections (See Exhibit 1).⁸ It is our understanding that it is the intent of the State's plan to attempt to serve the entire population of voters with disabilities in each jurisdiction in the State through placement of these machines. In other words, we understand the State's proposal to be that available accessible machines will provide all voters with disabilities in each jurisdiction with the ability to vote the ballot appropriate to the voters' residences. This should be the case in this instance of limited HAVA compliance.

We understand the State's proposal for the jurisdictions to work as follows: 1) where accessible devices will be placed in each polling place in a jurisdiction, such devices will contain ballot styles provided to all persons registered to vote in such locations; 2) where accessible devices are placed in more than one but less than all polling places in a jurisdiction, either a) each machine will contain all ballot styles for the jurisdiction, or b) all machines combined will

⁸ As can be seen, the specific locations for placement of accessible ballot marking devices in individual counties are not set out in full. This Court should require that the SBOE advise the Court and the United States by June 15, 2006, of these specific locations for each jurisdiction in the State.

contain all ballot styles for the jurisdiction, with each voting location serving voters residing in a certain geographical portion of the jurisdiction; and 3) where an accessible device is placed in just one “vote center” location in a jurisdiction, that device will contain all ballot styles for the jurisdiction. In the case of New York City, we understand most recently (not reflected on the SBOE chart), that the City currently plans to establish only 5 “vote centers,” or only 1 in each of the five counties (or boroughs) that make up the City, which collectively will provide all ballot styles for New York City.⁹

At this time, it appears that all New York jurisdictions have responded to the State’s recent request for information regarding participation in the State’s plan for interim HAVA compliance.¹⁰ Based on the compliance plan submitted to the Court by the SBOE and discussions with SBOE counsel, it is the clear understanding of the United States that, in the case of those jurisdictions that do not comply fully with the SBOE’s plan, the SBOE will make choices for those jurisdictions as appropriate: namely, the number and specific location of accessible ballot marking devices to be used in the jurisdictions for the fall federal elections and the type of devices that will be used. In approving a remedial plan, this Court should make clear the obligation of the SBOE to make such choices for these jurisdictions. Under these circumstances,

⁹ New York City has provided to the SBOE a specific detailed plan for compliance with the State’s proposed HAVA plan, and the Court should order the SBOE to promptly file such plan with the Court. We note that the selection of polling locations within the Counties of Bronx, Kings and New York will be subject to the preclearance requirements of Section 5 of the Voting Rights Act, 42 U.S.C. 1973c, for review to determine whether the attendant voting changes will, designedly or otherwise, create a retrogression in minority access to the franchise.

¹⁰ With regard to Erie County, the number of polling locations at which the county will place accessible devices is not known. It is our understanding that the SBOE is continuing its attempts to obtain this information from the County Board of Elections and will advise the Court and the United States immediately upon receipt of the same.

it will be the ultimate choice of such jurisdictions that do not avail themselves of the State's HAVA compliance efforts to risk possible enforcement action for non-compliance with HAVA and State law.

While the jurisdiction-by-jurisdiction plans for interim HAVA compliance, as indicated above, fall far short of HAVA's requirements, we acknowledge that they will provide some measure of accessibility for individuals with disabilities in the upcoming 2006 federal elections otherwise not available.¹¹ While the plans are thus, frankly, for the most part, very poor, they are better than nothing, and the United States is not in a position to state with assurance that the State of New York and its counties are capable of more.

c. Privacy and Independence for Voters with Disabilities

Section 301(a)(3)(A) of HAVA requires that voters with disabilities be provided the same opportunity for access to and participation in the voting process as for other voters, specifically including "privacy and independence." 42 U.S.C. 15481(a)(3)(A). Any plan for HAVA compliance, interim or long term, must provide for all actions necessary to ensure to the extent possible that voters with disabilities can vote in a private and independent manner. As an example, it may be that, in some of the polling locations where accessible ballot marking devices will be deployed pursuant to the SBOE's plan, such devices will be used only by a small number of voters with disabilities, and in some cases, only one such voter. In such instances, the State's plan should provide for use of such device by an additional number of voters such that the

¹¹ The chart submitted by the SBOE contains individual jurisdiction estimates of the number of voters with disabilities expected to utilize the accessible voting devices to be made available for the fall federal elections. Publicly available information strongly suggests that the counties severely underestimate this population and thus the potential need for accessible voting devices. See Lee declaration (Exhibit 2).

privacy of the voter(s) with disabilities is not compromised.

2. Long-Term HAVA Voting Systems Compliance

The State's proposed plan provides in the long-term for full compliance with HAVA's voting systems requirements. All lever voting systems in the State will be replaced with HAVA-compliant voting systems by the time of the fall 2007 State elections, and also by that time, each polling place in the State will have at least one voting system meeting HAVA's requirements for accessibility to individuals with disabilities. The United States expects that, if the State follows through with full implementation of this long term-strategy, New York should be in full compliance with Section 301 of HAVA no later than the fall of 2007. The record to date makes clear, however, that continuing court supervision of the State's efforts will be necessary to assure that even that deadline is met. In that regard, the State's long-term voting systems compliance plan contains no specific schedule for ultimate HAVA compliance. The Court should order the SBOE to develop and submit to the Court by July 15, 2006, a detailed schedule for long term voting systems compliance.

B. Statewide Voter Registration List Proposal

As the parties have indicated previously to the Court, they have been involved for months in ongoing negotiations aimed at resolving the issues in this litigation. The proposal for the statewide voter registration list presented in the SBOE plan reflects in large part the results of the parties' efforts to resolve this part of the case, and the United States does not oppose the State's proposal as set forth below.

The State's plan provides for interim compliance with HAVA through implementation of a short-term plan for a statewide voter registration list (NYSVoter I), to be followed shortly

thereafter by development and full implementation of a permanent statewide voter registration list (NYSVoter) that seeks to meet all of HAVA's requirements, and that will replace NYSVoter

I. Upon full implementation, NYSVoter I and NYSVoter, among other things:

(a) will serve as the single statewide voter registration system for storing and managing the official list of registered voters throughout the State;

(b) will be able to generate a computerized statewide voter registration list that is single, uniform, official, centralized, interactive, defined, maintained and administered at the State level, which contains the name and registration information of every legally registered voter in the State, and which shall be the official voter registration list for the conduct of all federal, state and local elections in the State;

(c) will assign a unique identifier to every registered voter in the State;

(d) will maintain one record for each registered voter in the State, including the statewide unique identifier, immediate voting history and current status of that voter;

(e) will ensure that all data in the system complies with the data standards established by the SBOE for the database;

(f) will provide for the remediation of all local election management systems in the State to ensure: 1) that such systems interface with NYSVoter I and NYSVoter to enable local election officials to enter all voter registration information into the statewide official list on an expedited basis at the time the information is provided to the local official; 2) that all data sent to the statewide list by the local jurisdictions meets SBOE standards; and 3) that all local jurisdictions submit updated voter registration data to the interim NYSVoter I system on a daily basis, and to the permanent NYSVoter system on a real-time basis, to enable complete

synchronization of the statewide list with the local lists at least once during each 24 hour period;

(g) will indicate if a voter is a first-time voter with no verified identification and flag that voter as requiring identification resolution in order to vote;

(h) will conduct periodic checks to determine the existence of duplicate registrations in the system;

(i) will be coordinated with the State Department of Motor Vehicles, the federal Social Security Administration (“SSA”), and appropriate state agencies that keep records of deaths and felon status in order to conduct verification of voter registration information and perform voter registration list maintenance functions as required by HAVA and the National Voter Registration Act (“NVRA”), 42 U.S.C. § 1973gg et seq.;

(j) will provide for state monitoring of local jurisdiction actions for compliance with SBOE regulations concerning NYSVoter I and NYSVoter.

Consistent with full implementation of NYSVoter I and NYSVoter and New York State law, the SBOE will draft and finalize separate regulations governing implementation of NYSVoter I and NYSVoter. The SBOE states in its proposal that it has been informed by the New York State Department of Motor Vehicles that, on February 23, 2006, the Department of Motor Vehicles signed and sent to the SSA, a Memorandum of Understanding between the New York State Department of Motor Vehicles and the SSA, as required by Section 303(a)(5)(B)(ii) of HAVA, 42 U.S.C. § 15483(a)(5)(B)(ii).¹²

¹² Pursuant to HAVA’s provisions, a state is required to take all actions necessary to conduct the verification of voter registration information required by Section 303(a)(5)(A) of HAVA, 42 U.S.C. § 15483(a)(5)(A) and Section 303(b)(3)(B)(ii), 42 U.S.C. § 15483(b)(3)(B)(ii). The proposed plan does not so state, as the SBOE apparently cannot commit to take action required of other state agencies such as the Department of Motor Vehicles. For

The United States believes that NYSVoter I, the interim solution proposed by the State, if implemented as described, still does not achieve full HAVA compliance insofar as it lacks the interactivity between the local jurisdiction and the statewide list mandated by Section 303(a) of HAVA. We understand, however, based on our discussions with the Defendants, that the State lacks the capability to achieve such interactivity in the short term in time for the fall elections. In all other respects, however, the interim solution as described appears to be aimed at compliance with HAVA's requirements and if implemented as described during the upcoming fall elections will go a significant distance towards achieving HAVA's requirement of a statewide list that will provide for voter access and prevention of voter fraud.

The SBOE also proposes in its plan to take all actions necessary to complete development and implementation by the Spring of 2007 of NYSVoter, a permanent HAVA-compliant statewide voter registration list.¹³ On December 15, 2005, the SBOE voted to develop and implement a permanent HAVA-compliant statewide voter registration list through the transfer of statewide voter registration list software from the State of Washington and subsequent modification of such software to meet New York State requirements. The United States agrees that, upon full implementation of NYSVoter as set forth in the proposed plan, New York should be in full compliance with Section 303(a) of HAVA. However, in order for the United States

this reason, among others, the remedial plan ultimately approved by this Court must bind the State and its agencies to take all actions necessary to carry out HAVA's mandates. We discuss this issue further below.

¹³ We note that Appendix C to the SBOE's plan, which clearly sets forth the functional requirements for both the interim NYSVoter I and the permanent NYSVoter system, is not referenced in the Board's plan as applying to the permanent system. We assume that this is an oversight on the part of the Board and our comments here are based on that assumption.

and the Court to monitor the progress of the SBOE in developing and implementing the permanent voter registration solution it has proposed, we believe it necessary for the SBOE to submit a detailed schedule to the Court by June 15, 2006, concerning the development and implementation milestones for the permanent registration system, including specifically the promulgation and adoption of regulations governing implementation of the system.

The United States' lack of opposition here to the State's interim and long term statewide voter registration list proposal is subject to subsequent review of separate proposed SBOE regulations for each system for consistency with HAVA.

IV. Other Necessary Components of the Remedial Plan

A. Reporting and Recordkeeping

The United States submits that, given the requirements of HAVA and the lateness of the State's actions to achieve interim and full compliance, it will be essential for both the Court and the United States to be able to monitor the efforts of the State to comply with the remedial plan ultimately approved by the Court. In order to do so, we believe it necessary and appropriate for the Court to order the SBOE to report periodically to the Court and to the United States in writing or through personal report from SBOE staff, concerning progress in implementing the terms of the remedial plan. In addition, the Court should order the SBOE to retain any and all records concerning its compliance efforts until the plan is carried out in full and, after that, for a period of 2 years, as required by 42 U.S.C. 1973gg-6(i), or for a period of 22 months, as required by 42 U.S.C. 1974, as appropriate. The United States should have access to all such records within a reasonable period of time. The Court should also order the SBOE to make appropriate State personnel available to the United States at any and all reasonable times in order to answer

questions and provide information concerning compliance issues that arise during the implementation of the remedial plan.

B. Court Retention of Jurisdiction

This Court should retain jurisdiction of this action in order to deal with potential issues of non-compliance by the State as it carries out this complicated plan that will not be implemented fully for some time. In that regard, if an issue arises concerning compliance and the parties are unable to agree on a resolution of the issue, either party should be able to bring the matter before the Court for appropriate resolution. The remedial plan entered by the Court should make clear that it resolves only those HAVA issues raised in the United States' Complaint and does not otherwise prevent the United States from taking any actions required to enforce any and all provisions of HAVA other than those that are the subject of this action.

C. Voting Rights Act Preclearance

Any remedial plan approved by this Court should make clear that the SBOE is required to obtain preclearance of voting changes occasioned by such plan as required by Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, as it affects the covered counties in the State.

D. The State of New York Should Be Bound by the Remedial Plan of the Court

The proposed remedial plan for New York currently before this Court has been submitted by the defendant State Board of Elections. Any remedial plan ultimately approved by this Court must bind all defendants, including the State of New York, to ensure compliance with its terms. As is set forth below, the plain language and the statutory scheme of HAVA both authorize the United States to bring an enforcement action against the State and implicate the State as a participant in carrying out a remedial scheme. New York State is a proper party defendant and

thus must be a party to the remedy.

Title IV of HAVA contains its enforcement provisions. Section 401 authorizes the Attorney General to bring suit against a state, as here, to enforce Sections 301 and 303(a):

The Attorney General may bring a civil action against any State or jurisdiction in an appropriate United States District Court for such declaratory and injunctive relief (including a temporary restraining order, a permanent or temporary injunction, or other order) as may be necessary to carry out the uniform and nondiscriminatory election technology and administration requirements under sections 301, 302, and 303.

42 U.S.C. § 15511. Both Sections 301 and 303 contain specific language placing the responsibility of compliance on the states (and jurisdictions): "each State and jurisdiction shall be required to comply with the requirements" by the effective date. 42 U.S.C. §§ 15481(d) and 15483(d)(1)(A) and (B). Pursuant to the plain language of Sections 301, 303 and 401, New York State is a proper party defendant to this enforcement action.

Although the New York State legislature has specifically delegated some responsibilities to the SBOE relating to HAVA, the delegation is not complete and an injunction against the SBOE cannot provide complete relief. For example, the statewide voter registration list mandated by Section 303(a) requires coordination between the SBOE, as chief State election official, the New York State Department of Motor Vehicles and other State agencies that will provide information regarding deaths and felony status. 42 U.S.C. §§ 15483(a)(2)(A)(ii), 15483(a)(5)(B), 15483(b)(3)(B)(ii). Although the State has authorized the SBOE to enter into the agreements with other unidentified State agencies to obtain this information, N.Y. Elec. Law § 3-103(4), the State is the entity able to compel those agencies to enter into and to abide by the agreements made with the SBOE. This would appear to be the reason, in the SBOE's proposal for its voter registration list, for its representation that the State's motor vehicle authority has

forwarded a proposed agreement to the federal Social Security Administration concerning HAVA's voter registrant verification provisions, without a representation that the motor vehicle agency will take the actions necessary under HAVA for such verification.

There is also action required of other state agencies for HAVA compliance. As is indicated in the SBOE's proposed plan and the record in the case, contracting authority in the State government, necessary for the crucial contracting schemes related to the development of the statewide voter registration list and the purchase of new voting systems, resides in the Office of the Comptroller. In addition, the State, not the SBOE, controls the election fund. HAVA requires that States receiving federal funds establish an election fund in the State treasury. 42 U.S.C. § 15404(b). As set forth above, New York State received federal funds to purchase HAVA compliant voting systems required pursuant to Section 301 and to develop and maintain the statewide voter registration list required pursuant to Section 303(a). Because there is an independent relationship between the several state agencies and an order against the SBOE alone will not compel the relief necessary for compliance with HAVA, the State is a necessary party to the action.

V. Conclusion

As set forth above, the State of New York is not currently in compliance with Sections 301 and 303(a) of HAVA, and the proposed compliance plan of the SBOE will not bring the State of New York into full compliance with HAVA in time for the fall federal elections in New York. Nevertheless, the State's plan is a roadmap for eventual full compliance with HAVA, and the actions the State and local jurisdictions will take to comply with HAVA for the fall elections will provide a measure of compliance tempered by the need for an orderly election process.

Thus, the United States submits that it does not oppose the Court approving the State's remedial plan for compliance with Sections 301 and 303(a) of HAVA, as supplemented by the filing concerning planned jurisdiction actions to provide accessible voting systems, subject to the following:

A. Voting Systems

1) Confirmation by the SBOE, with regard to voting systems accessible to individuals with disabilities that will be deployed for the fall federal elections pursuant to the State's interim plan, that the overriding principles are deployment of an accessible HAVA-compliant voting system(s) in each jurisdiction that will provide the opportunity to vote independently and privately to all voters with disabilities no matter their residence location in the jurisdiction;

2) No later than June 15, 2006, the SBOE must file with the Court, for each jurisdiction, the specific polling locations at which accessible voting systems will be deployed as part of the SBOE's interim voting systems plan and specific information concerning the geographical population of each jurisdiction served by each polling location;

3) No later than July 15, 2006, the SBOE must file with the Court a proposed detailed schedule for implementation of the State's long term proposal for voting systems;

4) The SBOE shall immediately file with the Court the current detailed plan for compliance with the State's proposed HAVA compliance plan submitted to the SBOE by New York City;

5) For those jurisdictions which, for whatever reason, do not timely comply with the State's plan for interim HAVA voting systems compliance, the State will make a choice for

such jurisdiction (or jurisdictions), as appropriate, as to the number and specific location of accessible voting systems to be deployed and the type of accessible voting system, consistent with the timeline set forth in the SBOE's plan;

B. Statewide Voter Registration List

No later than July 15, 2006, the SBOE shall file with the Court a detailed schedule for development and implementation of the NYSVoter permanent statewide voter registration list;

C. Miscellaneous

The HAVA compliance plan ordered by the Court should include, as set forth above, provisions with regard to reporting and recordkeeping by the SBOE, Voting Rights Act preclearance, as appropriate, of voting changes occasioned by the remedial plan, and Court retention of jurisdiction;

D. Scope of Remedial Plan

The remedial plan ordered by the Court should bind all defendants, including the State of New York, consistent with Rule 65 of the Federal Rules of Civil Procedure.

The United States requests a conference or a hearing with the Court to explain and discuss its position herein as the Court deems appropriate.

Dated: April 28, 2006

Respectfully submitted,

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