

1 UNITED STATES DISTRICT COURT
2 NORTHERN DISTRICT OF NEW YORK

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4 UNITED STATES OF AMERICA,
5 Plaintiff,

6 -versus- 06-CV-263

7 (ORAL ARGUMENT)

8 NEW YORK STATE BOARD OF ELECTIONS
9 et al.,

10 Defendant.

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14 TRANSCRIPT OF PROCEEDINGS held in and for the
15 United States District Court, Northern District of New York,
16 at the James T. Foley United States Courthouse, 445 Broadway,
17 Albany, New York 12207, on THURSDAY, DECEMBER 20, 2007, before
18 the HON. GARY L. SHARPE, United States District Court Judge.

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2 APPEARANCES:

3 FOR THE PLAINTIFF:

4 UNITED STATES DEPARTMENT OF JUSTICE

5 BY: BRIAN F. HEFFERNAN, Assistant U.S. Attorney

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8 FOR THE DEFENDANT BOARD OF ELECTIONS:

9 TODD D. VALENTINE, ESQ.

10 PAUL M. COLLINS, ESQ.

11 ALLISON CARR, ESQ.

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14 FOR THE STATE DEFENDANTS:

15 HON. ANDREW M. CUOMO, New York State Attorney General

16 BY: JEFFREY M. DVORIN, AAG

17 BRUCE BOIVIN, AAG

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20 FOR THE NASSAU COUNTY MOVANTS:

21 OFFICE OF THE COUNTY ATTORNEY, NASSAU COUNTY

22 BY: PETER J. CLINES, ESQ.

23 LORI BARRETT, ESQ.

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1 (Court commenced at 9:00 AM.)

2 THE CLERK: The date is Thursday,
3 December 20, 2007, at 9:00 AM. In the matter of the United
4 States of America versus New York State Board of Elections,
5 et al., case number 06-CV-263. We are here for a motion
6 hearing. Can we have appearances for the record, please?

7 MR. HEFFERNAN: Brian Heffernan for the
8 United States.

9 THE COURT: Good morning.

10 MR. CLINES: Peter Clines for proposed
11 intervenor Nassau County.

12 THE COURT: Good morning.

13 MS. BARRETT: Lori Barrett for proposed
14 intervenor Nassau County.

15 MR. DVORIN: Jeffrey Dvorin on behalf of the
16 State of New York.

17 MR. BOVIN: Bruce Bovin, New York State
18 Attorney General's office, on behalf of the State of New
19 York.

20 MR. VALENTINE: Todd Valentine, New York
21 State Board of Elections.

22 MS. CARR: Allison Carr for the State Board
23 of Elections.

24 MR. COLLINS: Paul Collins for defendant
25 Stanley Zalen.

1 THE COURT: Good morning.

2 MR. COLLINS: Good morning, your Honor.

3 THE COURT: Be seated, please. Let me give
4 you an opening statement about where we're at and what's on
5 the table, as far as I'm concerned, and what's not, and then
6 we'll take the issues up in some order that seems
7 appropriate.

8 In October 2002, Congress passed HAVA. By
9 January 1 of 2006, every state in the union was required, by
10 Congress, to meet certain minimum voting standards by
11 January 1 of 2006. As we sit here today, every state in the
12 country has complied except New York State. Accordingly,
13 the United States sued on March 1 of 2006.

14 On March 23rd of 2006, the Court issued an
15 injunction. That injunction reflected New York's concession
16 that it was in violation of HAVA, which was the first aspect
17 of the United State's complaint, a declaration by the Court
18 that New York State was in violation of federal law.

19 On June 2nd of 2006, the Court issued a
20 remedial order requiring New York State to take specific
21 actions towards full compliance with their acknowledged
22 violation of federal law. Here we sit, 16 months later, and
23 New York has failed to comply with this Court's remedial
24 order with federal law.

25 I understand attorneys represent clients.

1 Unfortunately, they're often the medium for the Court to
2 communicate with the clients. They're the ones that got to
3 sit and listen to it, take the message back, so I understand
4 all that, so I don't have anything that's directed at the
5 lawyers, but I've got a lot that's directed at the clients.

6 I don't know what anybody or everybody wants
7 me to do. I've read the newspapers, I've watched the TV
8 reports, I've listened to the pundits on behalf of the
9 intervenors and everybody else about what it is I'm doin'
10 today, but nobody's talked to me about it and I'm the one
11 that's doin' it. And as I sit here, I'm embarrassed. I'm
12 61 years old, I have been a New Yorker for 61 years, and I'm
13 a federal citizen as well, and I'm embarrassed on behalf of
14 the State of New York that it thinks, for whatever its
15 reasons are, and the only people I can excuse I suppose are
16 the courts because I can't find any intervention by New
17 York's courts in this process, but I find a lot of
18 intervention by the executive branch, I find a lot of
19 intervention by the legislative branch and I find a lot of
20 intervention by people as proposed amicus curiae who have
21 all the answers. They disagree with one another, but they
22 all have all the answer. It doesn't stop the fact that I'm
23 embarrassed.

24 Why is it that New York thinks that it can
25 thumb its nose at the federal government and not comply with

1 federal law? The United States, in a paragraph or two in
2 its enforcement brief, says, and I've never heard anything
3 from the defendants to the contrary, that the Congress has
4 the right to preempt state law insofar as the electoral
5 process is concerned in federal elections. So, when I look
6 at what's transpired over the last 16 months, while one
7 argument or another may be better or worse than the next
8 about why compliance hasn't occurred, noncompliance is not
9 an answer. New York must comply. It was to have complied
10 by January 1 of 2006. New York is in violation of federal
11 law.

12 There are limits to what anybody wants me to
13 do about all of this. But I don't know that I don't have
14 options beyond what I see in the papers. I suppose I could
15 follow the example of Eisenhower in 1957 and call out the
16 National Guard and make them install machines in compliance
17 with federal law. We didn't let Little Rock, Arkansas,
18 thumb its nose at the country and we are not gonna let New
19 York thumb its nose at the country. New York must comply.
20 Noncompliance is not a choice.

21 It is not beyond the scheme of what's
22 available to me, by power, that I could issue, if the
23 Government saw fit to make the motion, which it hasn't, and
24 I understand what the federal government is doin' here, we
25 all understand what the federal government is doin', they

1 don't want to bring suit in the first place. They don't
2 want to be here anymore than any of the lawyers on behalf of
3 any of the clients want to be here this morning. What they
4 want is compliance. But if they were to bring the motion, I
5 don't know why, as an alternative to the National Guard, and
6 again I've not seen this by the pundits as one choice, why
7 couldn't I lock up the Commissioners of the State Board of
8 Elections tomorrow morning for Christmas and give 'em the
9 key to the jail door and tell 'em as soon as they comply
10 with the remedial order that I put in place, I'd let 'em
11 outta jail? That's called contempt. That's an option.

12 What seems to me to be the ridiculous option
13 is what I see everybody talking about, which is you want me
14 to do your job. You want me to pick voting system standards
15 for you, through a special master or otherwise, you're
16 asking the federal court to do what New York State, in
17 dereliction of its responsibilities refuses to do. I
18 suppose you would want me to conduct brain surgery this
19 afternoon, too, but there are limits to what I ought to do
20 and should do as opposed to what I ought to force the people
21 who are responsible for doing it to do.

22 There's my speech. So, as a New Yorker, I'm
23 not happy. As a federal judge who drew the short straw on
24 the random wheel of assignment in this case, I'm not happy
25 either.

1 All right. What's pending before me? The
2 following: On November 5, the United States moved to
3 enforce this Court's June 2, 2006, remedial order. That's
4 docket 134. New York State has filed an order to show cause
5 seeking joinder of 58 county Boards of Elections, pursuant
6 to Rule 15 and 19. I'm not sure I understand 15, but it's
7 irrelevant, the real thrust is 19.

8 I have before me a motion by Nassau County
9 Board of Elections and the Nassau County Legislature seeking
10 reconsideration of my previous decision denying their motion
11 to intervene pursuant to Federal Rules of Civil Procedure
12 24. The current motion is docket 144. The prior motion is
13 docket numbers 100 to 101, and the Court's decision denying
14 the previous motion was issued as a July 19, '07, text
15 order.

16 I have before me various motions seeking
17 permission to file amicus briefs on behalf of individuals
18 and organizations as follows:

19 Edward J. Stiles, individually as a voting
20 machine technician, docket number 168.

21 New York State Assembly Men and Women, Sandra
22 Galef, Ginny Fields, Jeffrey Dinowitz, Barbara Lifton, Fred
23 Thiele, Harvey Weisenberg. That's docket 169.

24 Geri Krauss on behalf of the New Yorkers for
25 Verified Voting; the League of Women Voters of New York

1 State; the New York Public Interest Research Group; and
2 Citizen Action of New York. Docket Numbers 146 to 150.

3 Jeffrey Wait, on behalf of the Election
4 Commissioner's Association of New York. Docket 163.

5 The Chemung, Fulton, Orange, Schenectady,
6 Ulster and Washington County Boards of Elections, through
7 individual electors. Docket Number 173.

8 Andrea Novick, on behalf of ARISE, Citizens
9 for Voting Integrity, New York; Connie Hogarth, Center for
10 Social Action at Manhattanville College, New York;
11 Del4Change, New York; Dutchess Peace Coalition, New York;
12 New York Citizens for Clean Elections; Northeast Citizens
13 for Responsible Media, New York; Peacemakers Voting
14 Integrity Project, New York; Rhinebeck Democratic Committee,
15 New York; Shandaken Democrat Club, New York; Ulster County
16 Democratic Women, New York; Where's the Paper, New York;
17 ulster County Legislator Susan Zimet; Ulster County
18 Legislator Gary Bischoff; Dutchess County Legislator Joel
19 Tyner; Ulster County Legislator Peter Liepmann; Professor
20 Mark Crispin Miller, New York University, author, "Fooled
21 Again: The Real Case for Electoral Reform;" Professor
22 Steven Freeman, University of Pennsylvania, author, "Was the
23 2004 Presidential Election Stolen? Exit Polls, Election
24 Fraud and the Official Count;" Harvey Wasserman, Free Press
25 Senior Editor, columnist and co-author with Robert Fittrakis

1 of "How the GOP Stole America's 2004 Election and is Rigging
2 2008;" Robert J. Fitrakis, Executive Director, Columbus
3 Institute for Contemporary Journalism; Abbe Waldman DeLozier
4 and Vicke Karp, authors, "Hacked! High Tech Election Theft
5 in America;" Pokey Anderson, journalist, broadcaster;
6 Election Defense Alliance, national; Nancy Tobi, New
7 Hampshire Fair Elections Committee -- New Hampshire is
8 weighing in on New York's law. AUDITAZ, Americans United
9 for Democracy, Integrity and Transparency in Elections,
10 Arizona; Arizona is weighing in on New York's law. Voter
11 Confidence Committee, California; California is weighing in
12 on New York's election law. Protect California Ballots;
13 apparently interested in what the New York State Board of
14 Elections will do to California ballots. Video the Vote,
15 Florida; Florida weighs in. Coalition for Voting Integrity,
16 Pennsylvania; Pennsylvania weighs in. Rady Ananda, J30
17 Coalition, Ohio; they weigh in. Coalition for Visible
18 Ballots; Texas weighs in. Those are Dockets Number 152, 158
19 to 159 and 164.

20 And Courtney Totter, on behalf of the
21 National Multiple Sclerosis Society, manager of advocacy
22 services; Steven Holmes, on behalf of Self Advocacy
23 Association of New York; John Herrion, on behalf of the
24 United States Spinal Association; Ann Hardiman, on behalf of
25 the New York State Association of Community and Residential

1 Agencies; Brad Williams, on behalf of New York State
2 Independent Living Counsel; Edith Prentiss, on behalf of
3 Disabled in Action of Metropolitan New York, Inc.; Michael
4 Godino, on behalf of the American Council of the Blind of
5 New York; and Lawrence Carter-Long, on behalf of the
6 Disabilities Network of New York City. That's Docket Number
7 174.

8 All right. Let's take up the amicus curiae
9 filings; I take it up by way of ruling. What I required was
10 that those seeking to file something by way of amicus do it
11 by motion and accompanied by their submission. The last one
12 that I read on behalf of the disability groups, at least
13 that one sought permission to file their brief in January.
14 I grant all of the motions to file amicus briefs.

15 Let me talk about the parameters of that
16 grant, what I will do with those amicus briefs and what I
17 won't do with those amicus briefs. To the extent that they
18 have some bearing on a decision that's before the Court, I
19 will consider the briefs. The briefs and the granting of
20 the motion does not carry with it the right to be heard
21 beyond what has been filed pursuant to the Court's
22 permission, which is the brief itself. Unless I order
23 otherwise, I intend to not hear from any amici orally. As
24 to the permission to file the brief in January, I grant it,
25 consistent with the order I just entered. I will accept no

1 future filings unless it's done by motion, accompanied by
2 the brief. Otherwise, I will sua sponte deny it and reject
3 it. If it's properly filed with the motion, accompanied by
4 the brief, I will take it on submit and I will make a
5 decision whether the content, following my review, has any
6 relevance to any decision it is that I have to make.

7 The relevance of the positions that are
8 sought in the main by the amicus curiae briefs have to do
9 with the selection of machines or equipment that may or may
10 not meet the minimum standards of HAVA. There are other
11 points of view that relate to implementation -- in
12 particular, the County Boards of Elections -- and I have
13 three set submissions in that regard, and perhaps, depending
14 on what I do with Nassau County's motion to intervene, I
15 might consider their papers as amicus papers. It's another
16 reflection of a point of view on behalf of the County Boards
17 of Election. Any questions about my amicus order by any of
18 the parties?

19 Okay, let's take up the intervention motions.
20 I am gonna call them that, and by that I'm talking about
21 Nassau County's motion for reconsideration of my prior order
22 denying their motion to intervene, and I'm lumping into
23 that, under Rule 19 -- I know Nassau County's is Rule 24 --
24 I'm lumping into that the motion by the State Board of
25 Elections to join the 58 County Boards of Elections. Let me

1 hear from Nassau County.

2 MR. CLINES: Good morning, Judge. Thanks for
3 the opportunity to address the Court on this, and I want to
4 state to the Court that we're not seeking to needlessly
5 complicate the proceedings here. If there were a way that
6 we could not be involved in this, we would love not to be
7 involved in this debacle, but however way you slice it,
8 Nassau County and the other local Boards are the ones that
9 are gonna be carrying out whatever enforcement order this
10 Court eventually issues. And we just can't --

11 THE COURT: But you don't speak on behalf of
12 all County Boards, do you?

13 MR. CLINES: No, but we are similarly
14 situated, Judge.

15 THE COURT: Did you see the amicus brief
16 filed with me by Chemung, Washington, Schenectady and the
17 other counties?

18 MR. CLINES: I have taken a look at them. I
19 can't say I have committed them all to memory and I do know
20 there are differences between large and small counties. But
21 there are many downstate counties similarly situated to us.

22 THE COURT: You certainly have to recognize
23 that difference, don't you, because your biggest complaint
24 is you can't comply with the fall of 2008. They all say,
25 "Judge, if you will just order the State Board of Elections

1 to do what they were supposed to do 16 months ago, we'll
2 comply by the fall of this year."

3 MR. CLINES: But -- I understand, Judge, but
4 the reality is that we have 860,000 voters, where some of
5 these upstate counties have a fraction of that, and even our
6 number of voters pales in comparison to the City of New
7 York.

8 THE COURT: I'm not throwin' stones. I'm
9 just sowin' seeds of dissent in the uniformity of the view
10 by the County Boards of Election.

11 MR. CLINES: I understand. And we would be
12 able to comply and get this done as quickly as possible,
13 but --

14 THE COURT: But isn't your point compliance?
15 What authority do you have to pick a voting standard in the
16 State of New York?

17 MR. CLINES: We have no authority.

18 THE COURT: State Board of Elections, isn't
19 it?

20 MR. CLINES: State Board of Elections.

21 THE COURT: And until they do their job, you
22 can't implement anything, can you?

23 MR. CLINES: Our hands are tied. But after
24 they do their job, we're the ones carrying out the order and
25 if we can't, we will be -- and this is all towards showing

1 what our interest is, although, frankly, I think that's a
2 phony issue, I don't think anyone here disputes that the
3 local Boards have an interest, but let me address that.
4 We'll be the ones who are subject to the chaos in our county
5 elections, we'll be the ones who stand to lose millions of
6 dollars. Nassau County, \$15 million in HAVA funding if we
7 can't comply.

8 Let me -- I'd like to hand up, if I may --

9 THE COURT: Can't HAVA funding come to you
10 from the federal government?

11 MR. CLINES: Comes from the State to be
12 distributed to us.

13 THE COURT: All right. So it's not the feds
14 or this Court that took any money away from you, is it?

15 MR. CLINES: Judge, the reality is if you
16 order a deadline that, respectfully, in our view, is
17 impracticable, it will be this order that eventually -- that
18 order that eventually causes us to receive the funding.
19 It's not a very long chain of causation.

20 THE COURT: I understand causation, but
21 that's true of every single person who submitted an amicus
22 brief. It's true of me as a New York citizen. I get to
23 vote every year and I've done it every year since I was 18.

24 MR. CLINES: But I don't think -- I don't
25 think there's anything more fundamental in the law than

1 distinguishing between a citizen's private interest that he
2 shares with every other citizen and some kind of official
3 special legal duty that he has.

4 THE COURT: So what legal duty is involved in
5 the Government's lawsuit that can't be vindicated without
6 you bein' here?

7 MR. CLINES: The legal duty to comply with
8 HAVA, 'cause we're the ones on the ground who roll out the
9 machines, we're the ones who have to do the system
10 selection, system purchasing, make sure there's adequate
11 storage, make sure there's adequate trucking, make sure
12 there's adequate security, try to recruit thousands of poll
13 workers and technicians, hold public hearings, make sure the
14 public knows how to use the new machines, we have to pay for
15 all the attendant costs with that.

16 THE COURT: All depending on what the State
17 Board of Elections does, right?

18 MR. CLINES: Absolutely, Judge. And I
19 understand that that's the -- one of the intermediate steps
20 in the chain of causation, but we're affected by the order.
21 There's no way around it and no one here disputes that.

22 THE COURT: Why can't the State Board of
23 Elections take your viewpoint into consideration in this
24 litigation?

25 MR. CLINES: Judge, if that were the

1 standard, then no one -- no third party affected by
2 litigation could intervene. We have a right to intervene
3 because we have a right to vindicate our own interests, and
4 if an order is eventually issued that we can't live with, we
5 need a right to appeal that order. But that's not our
6 objective. Our objective is to participate as a party so we
7 can come up with an order that everyone can live with. And
8 you're right, you're absolutely right, New York State can't
9 thumb its nose at HAVA, but if an order issues that is
10 impracticable, the end result is is that it'll just be a
11 piece of paper and on the ground there won't be HAVA
12 compliance or there will be chaos and the local boards could
13 end up losing millions of dollars.

14 I would like to hand up a transcript from a
15 State Court proceeding, Judge, that was concurrent with this
16 one.

17 THE COURT: Summarize it, because I deny your
18 application to hand up one more piece of paper for me to
19 read.

20 MR. CLINES: I will be glad to do that, if I
21 may just briefly summarize it and reflect what's in this
22 transcript. Judge Judith had asked Mr. Valentine, from
23 the State Board if it was possible that the local Boards
24 would end up footing the bill for HAVA implementation and
25 Mr. Valentine said, "I think the answer is 'yes' because the

1 responsibility for voting machines has always rested with
2 the County Boards of Elections and, specifically, in the
3 same year that we passed ERMA, we passed the County
4 Consolidation Act, which specifically moved the ownership of
5 all voting equipment to every County Board of Elections.
6 It's the County's responsibility to provide those devices."

7 We are an integral part of the process. Much
8 as I respect the views of the professor from the University
9 of Pennsylvania, it's night and day. We are an official
10 part of this process, and I think we have to find a
11 practical way to live with that and to make sure that the
12 local boards have a voice in what's going on as a party
13 because they're directly affected.

14 Initially, the judge apparently adopted the
15 United States' view that while we had an interest, and I
16 think this is fair, it wasn't going to be immediately
17 affected because the September 2007 deadline was superseded.
18 But, if the United States has its way with its current
19 motion, we're gonna be in exactly the same position as we
20 were last December.

21 THE COURT: Suppose I lock up the State
22 Boards of Commissioners until they submit a plan to me; how
23 are you in any different position than you were in last
24 September?

25 MR. CLINES: It -- well, you know, I think,

1 Judge, you can lock up the State Commissioners, but I'm not
2 sure that that's really gonna overcome the practical
3 technical problems of implementing HAVA by the 2008
4 Presidential election.

5 THE COURT: Who says the 2008 requirement is
6 in any order of compliance I am issuing or will issue?

7 MR. CLINES: All I can do is deal with what's
8 on the table now before the Court and --

9 THE COURT: What you've got is a prospective
10 motion on behalf of the United States on behalf of
11 prospective relief you're asking me to intervene, aren't ya?

12 MR. CLINES: Absolutely. 'Cause that's one
13 of the issues the Court would decide. If you adopt the
14 position of the United States, Nassau County -- its
15 interests would be impaired.

16 THE COURT: And what do you do about your
17 fellow Boards of Commissioners that say you're wrong, this
18 can be implemented by the fall of 2008?

19 MR. CLINES: With respect, your Honor, I
20 don't think they say we're wrong, I think they say they can
21 do it because they have a much easier task than we.

22 THE COURT: I understand. That's where we
23 started this conversation. But doesn't that say as between
24 the 58 counties there's not a single view there amongst them
25 either?

1 MR. CLINES: I'm not so sure that's true,
2 Judge. I don't think any of the counties would say that a
3 county who can't carry out an order to implement -- to
4 comply by fall of 2008 shouldn't intervene. I think the
5 small counties are just sayin' with respect to us, it
6 doesn't -- we can do it, just let the State Board certify.
7 I don't think it says don't let Nassau intervene because
8 they can't do it. I don't think -- I think that's really an
9 illusion of discord, I don't think that's --

10 THE COURT: Are you suggesting to me that you
11 meet the standards for mandatory intervention?

12 MR. CLINES: Absolutely, Judge. I don't
13 think there's any question about that. I think if there was
14 ever a case when a party met the standards for mandatory
15 intervention, it's this case.

16 What needs to happen, what interest needs to
17 be affected by the disposition, if not the interest in
18 orderly elections, in a Presidential election, especially in
19 light of recent history. And I know a lot of people are
20 tempted to play the 2000 Presidential election card, but,
21 frankly, that's one of the things that's motivating our
22 commissioners. They don't want to see that kind of -- a
23 repeat of that kind of chaos. And we can implement HAVA.
24 No one is saying that we shouldn't, but we're saying we need
25 the time to do it in a practically feasible fashion or it's

1 just gonna result in a calamity. And there's money and
2 there's basic civic electoral order. I can't think of any
3 higher interests, Judge. And those will be impaired. I'm
4 not sure what kind of showing above that would be required.

5 THE COURT: Thank you.

6 MR. CLINES: Thank you.

7 THE COURT: Let me hear from the State on its
8 motion to join the -- not the State, I'm sorry, the State
9 Board of Elections on its motion to join the 58 counties.

10 MR. VALENTINE: To a large extent, you know,
11 what Mr. Clines has argued with regards to Nassau County is
12 true in many of the other counties. They -- and as you
13 pointed out, they are a group of divergent interests and
14 each county is in a different position, which is why we
15 feel, at this point in the litigation, that it's necessary
16 for the counties to become parties. Because, you know, in
17 simple term, that's where the rubber meets the road. As I
18 explained in the State court proceeding that Mr. Clines
19 alluded to, you know, the State -- our state, New York, has
20 made a decision to put the control at -- ultimately, for the
21 ownership and operation of voting systems, at the county
22 level. They have not given that to the State Board.

23 THE COURT: Naw. They've given them the
24 right to implement, right? Implement, implement what the
25 State Board of Elections tells 'em they must implement.

1 Doesn't the State Board of Elections control what it is the
2 counties do? The counties are not free just to pick --
3 let's just take machines, and I know it's voting standards,
4 I know there's a proper term to it, I prefer to speak
5 English. Let's talk about machines. Can't just pick any
6 machine they want? They have to pick a machine certified by
7 your client, don't they?

8 MR. VALENTINE: That's correct, your Honor.

9 THE COURT: They have got to implement it
10 according to the standards you set, don't they?

11 MR. VALENTINE: That's correct, your Honor.

12 THE COURT: Isn't that what this lawsuit is
13 all about?

14 MR. VALENTINE: Right. But --

15 THE COURT: Who controls the money, by the
16 way, in response to his assertion, the \$220 million that the
17 federal government gave ya to do this job; who controls that
18 money?

19 MR. VALENTINE: That came from the Federal
20 Election Assistance Commission.

21 THE COURT: And it's currently sitting under
22 whose control?

23 MR. VALENTINE: It's in the comptrollers, in
24 an account, State of New York.

25 THE COURT: Comptroller is an official of the

1 State of New York?

2 MR. VALENTINE: Yes.

3 THE COURT: Not a county official?

4 MR. VALENTINE: No.

5 THE COURT: Therefore, the purse strings
6 relative to Nassau County's argument is in the State's hands
7 as well, right?

8 MR. VALENTINE: That's correct, your Honor.

9 THE COURT: So whether they get the money or
10 don't, or I order ya to return \$220 million because you got
11 federal taxpayer money that doesn't belong to ya 'cause
12 you're not doin' what you're supposed to do, that's an order
13 directed at the State, isn't it?

14 MR. VALENTINE: That's true, that would be,
15 your Honor.

16 THE COURT: Wouldn't be directed at the
17 county to relinquish anything?

18 MR. VALENTINE: No, not at this point, your
19 Honor.

20 THE COURT: Can't give up what they don't
21 have, can they?

22 MR. VALENTINE: No. They --

23 THE COURT: They argue they are entitled to
24 it, right?

25 MR. VALENTINE: Under State law, that's the

1 formula State legislature set out.

2 THE COURT: And, therefore, if something is
3 happening to their entitlement, their money, that's a
4 problem between them and you, isn't it? You, the
5 comptroller.

6 MR. VALENTINE: I understand.

7 THE COURT: I understand you don't represent
8 the comptroller. He's hidin' behind ya back there.

9 MR. VALENTINE: I understand.

10 THE COURT: Go ahead.

11 MR. VALENTINE: But our need for the counties
12 goes to that next step, you know, the State -- and it's at
13 this point in the litigation, and that's why this motion was
14 brought at this point. And your Honor, as he's ruled on
15 prior intervention motions, this litigation has moved
16 through phases, you know. It's not that the State Board has
17 done nothing. That's not true. We have actually made
18 strides towards compliance were HAVA.

19 One aspect not here today is really our
20 compliance with the statewide registration data base; that's
21 up and running.

22 THE COURT: I concur that's not before us. I
23 concur.

24 MR. VALENTINE: But we have made strides, we
25 have adopted standards that -- true, they were voluntary in

1 the nature that the federal government proposes, but these
2 were the standards that the federal government set out --

3 THE COURT: I don't want to get over into the
4 compliance aspect of this yet.

5 MR. VALENTINE: Okay.

6 THE COURT: I want to get into the aspect of
7 why there are legal interests of the County Boards of
8 Election, that the State Election Commission is standing
9 here before me saying we can't take care of the people we're
10 tasked by law to take care of, therefore, they need to be
11 parties to this lawsuit. Isn't that a fair observation
12 about what the motion is?

13 MR. VALENTINE: That's a fair observation and
14 the answer is that we --

15 THE COURT: I'm surprised it's one you'll
16 admit the answer is "yes," you can't take care of 'em.

17 MR. VALENTINE: No. Well, we can, but it's
18 the mechanism that's put in place in State law and necessary
19 to enforce the order of this Court, which is why we need the
20 counties in this litigation. The only enforcement tools
21 that are really open to the State Board of Elections is --
22 would be another court proceeding to enforce the order of
23 this Court. We feel that at this point, it would be
24 expedient to bring them into this action as opposed to
25 starting another State court action, which is the only tool

1 that the State Board has to enforce its authority. Doesn't
2 have civil orders it can issue. It can issue guidelines, it
3 can issue those orders, but to enforce them, the only tool
4 it has is a judicial proceeding. And an order in this stage
5 of the litigation --

6 THE COURT: What is it going to enforce?

7 MR. VALENTINE: We feel at this point it's
8 necessary for the counties to take actions in a very quick
9 manner.

10 THE COURT: How they gonna do that?

11 MR. VALENTINE: Once --

12 THE COURT: Take action on what? You haven't
13 done anything.

14 MR. VALENTINE: Well --

15 THE COURT: They can't take action until you
16 do something, and you haven't done anything.

17 MR. VALENTINE: We're almost --

18 THE COURT: Mind you, I understand I have the
19 lawyers in front of me and not the client.

20 MR. VALENTINE: I know.

21 THE COURT: Go ahead.

22 MR. VALENTINE: The State Board is at a point
23 where we are going to have, you know, assuming the machines
24 meet the standards, in short order --

25 THE COURT: Which depends on whether Bill

1 Gates is gonna give up the source code over Microsoft?
2 That's likely to happen about 3010, isn't it? So, New York
3 State will come into compliance a century from now?

4 MR. VALENTINE: No, I don't think so. I hope
5 not, your Honor. But there are other issues that still have
6 to be resolved, but we are taking steps towards that and we
7 feel that at this point, we're gonna need the counties, in
8 order to expeditiously enforce whatever order the Court
9 ultimately comes up with, some means of having them before a
10 judge to enforce whatever order ultimately this Court has
11 sought. We're at this point.

12 Admittedly, prior to this point, you are
13 absolutely correct that the burden was on the State Board to
14 get its job done. We feel we have approached that point
15 where we are nearing the completion of our portion of it and
16 at this point, that aspect of enforcement really has to get
17 pushed down to the local level. The State Board's only tool
18 to enforce that, as I said earlier, is a court proceeding.
19 We could bring another Article 78.

20 THE COURT: How have you satisfied your
21 obligations under my remedial order? Sixteen months ago, I
22 told ya to pick a machine, and here we sit, in December, a
23 week before Christmas, and you still haven't picked a
24 machine. How have you complied? You can't even submit a
25 plan to me. You got the Democrats arguin' with the

1 Republicans and you're paralyzed over a 50/50 split.

2 MR. VALENTINE: I wouldn't characterize it as
3 paralysis.

4 THE COURT: You might not, but as a federal
5 taxpayer and a federal judge, I do, I characterize it as
6 paralysis, paralysis by analysis, a thousand different
7 reasons why you can't comply. But it all comes back to what
8 I said in the first two minutes when I was on the bench:
9 Noncompliance is not an option. New York will comply.

10 MR. VALENTINE: And all sides have reiterated
11 their intention to comply.

12 THE COURT: I know. The question is when?

13 MR. VALENTINE: That's true, your Honor.

14 THE COURT: Yeah.

15 MR. VALENTINE: That does go towards the
16 steps that have been taken towards compliance. And,
17 obviously, there have been steps backwards in that time
18 frame, in that 16-month period, and we've tried to make an
19 explanation, as best as we could, in a coherent manner, what
20 has transpired during that time period. And the United
21 States has been fully aware of all of those steps. All
22 along the process, we've maintained an open line of
23 communication with them to apprise them of those situations.
24 Nobody has been happy with many of those results, but we
25 feel -- at least the State Board, I think, is unified in its

1 response in saying that we have set a very high standard for
2 these voting systems, and part of that was based on guidance
3 given us by the federal government. We feel that that was a
4 good way to go, and many of the amicus papers support those
5 standards. And unfortunately, the time frames that were set
6 out by Congress were unrealistic. Nobody has ever met any
7 of the time frames set out under HAVA. Nobody has met them.

8 THE COURT: Wait a minute. The time frame by
9 Congress is realistic. Forty-nine states have found those
10 time frames to be realistic enough that they've complied.
11 The only national embarrassment is the New York State Board
12 of Elections and the New York State officials who have
13 refused to implement that legislation. So, it wasn't so
14 difficult to comply that the rest of the country couldn't do
15 it. Why can't New York? Because you're paralyzed. Not
16 necessarily for bad or good reasons, it depends on what the
17 reason is. Some, in balance, more cogent than others. I
18 understand the comptroller denied certification on a system,
19 I understand this happened, I understand that happened, I
20 understand all these things happened. But the bottom line
21 is they happened, and the bottom line is it's true what the
22 Government says, federal law trumps New York law. So,
23 frankly, I don't care what the executive branch says,
24 whether that's the Governor, whether that's the comptroller,
25 whether that's some other component of the executive branch,

1 like the State Board of Elections. I don't care what the
2 legislature says, whether it's the legislators who have
3 submitted an amicus curiae brief, whether it is the majority
4 of the legislature that took the 2007 compliance date out of
5 the State Election Law. I don't care what they said.

6 The federal government has preempted this
7 field and says you shall comply. Now, it's true that New
8 York State may have higher machine standards than are
9 required by federal law. But it's also true what the
10 Government says is that Congress has told you you will meet
11 minimum standards and you'll meet them by January of 2006.
12 New York hasn't done that. So, if New York is paralyzed
13 over its inability to meet its higher standards, that's
14 irrelevant, because noncompliance with federal law is not an
15 option. It's off the table.

16 All we're dealin' with is what am I gonna do
17 about the fact that New York State refuses to comply with
18 its obligations under federal law? What more do you want to
19 add about the legal interest that cannot be vindicated --
20 we're over into enforcement, where I didn't want to go until
21 I was ready to go there, but I do want to stick and resolve
22 the motions for joinder or intervention.

23 MR. VALENTINE: I think enforcement is really
24 the basis for our motion for intervention at this point. We
25 see that that's a stage where this litigation is now headed

1 towards and they -- and the counties, as you've seen from
2 the numerous amicus filings by the counties, that they
3 are -- each county is in a different position; that's why a
4 single representative county, such as Nassau, would not
5 adequately represent the views of some of the smaller or
6 different league position counties, and that's why they
7 should all be moved in the case.

8 THE COURT: What does the federal government
9 want to tell me about the motions to intervene or to join?

10 MR. HEFFERNAN: I think, after this recent
11 colloquy, not much. But, first of all, your Honor, the
12 claim by the State Board that it doesn't basically run state
13 elections is really crazy. I mean, state law makes it very
14 clear that it's the Board that's in charge of the elections
15 in the state. The State has to control its own elections.
16 And so to make a claim, as it does, that it's unable to
17 carry out HAVA and that it doesn't have the statutory
18 ability to control the elections, in our view, is absurd.

19 Plus, your Honor, we've cited to the only
20 case law that we are aware of in this Circuit that deals
21 with the relationship between the State Board and County
22 Boards of Election and those make clear that the State Board
23 does oversee the county Boards of Elections. Section 3-102,
24 3-104 of the State Election Code makes it clear that the
25 State Board can take whatever actions are necessary to carry

1 out the law.

2 Carried to an extreme, your Honor, it really
3 is strange credulity. Is the State really saying it can't
4 control what the counties do? Let me give you an example.
5 Chautauqua County, I know nothing about it other than it was
6 in a Pat Metheny song, but, in any event, they decide, and
7 maybe because the State Board hasn't taken the necessary
8 actions to comply with HAVA, that they want to use a voting
9 machine, system that's accessible, otherwise HAVA compliant,
10 hasn't been certified by the State Board, and so they decide
11 we are gonna go out, buy these machines, put 'em in our
12 polling places because we are interested in providing access
13 for peoples with disabilities to vote.

14 Now, is the Board saying that they do not
15 have the power, they can't do anything about a county using
16 a system that has not been officially certified by the State
17 Board? If that's the case, then what's preventing counties
18 from all over the state from doing whatever they want? I
19 mean that, to me, that to me is strange credulity in this
20 case. To say, 18 months after the Court issued an order to
21 say -- I'm sorry, 18 months after we filed this case that
22 they can't comply with HAVA, you really have to question the
23 motives. Why are they now raising this issue with the
24 counties? Are they saying that 18 months ago they never
25 thought it would come to a point where they might have to

1 have the counties involved? I don't see it's any
2 different -- state law hasn't changed to the extent that 18
3 months ago counties were subject to the State Board but now
4 they're not. There's been no change in State Law, it's
5 still the same.

6 Secondly, you know, as the Court -- those
7 courts, in this Circuit have indicated, counties are not
8 necessarily indispensable parties where the State is
9 concerned. And if you're not a necessary party under
10 Rule 19, you can't be a party entitled to intervention of
11 right under Rule 24. That's what we've argued. That's why
12 we don't believe that Nassau County has intervention of
13 right status here.

14 And again, with regard to permissive
15 intervention, we maintain that bringing 58 more parties, 62
16 more parties, however more parties you want to bring in will
17 make this litigation totally unmanageable. In fact, your
18 Honor, and I can't cite to the exact County Board or
19 affidavit cited to, but one of the affidavits, I think it
20 was appended to the amicus submission of the Election
21 Commissioners Association, they admitted that to have all
22 the counties in the litigation at this point in time would
23 make this situation unmanageable. Yes, the counties are
24 different, the counties do things differently. But
25 Mr. Valentine first said they are pretty much all in the

1 same boat, but recently said, "Well, they are different."
2 So, we just say it will be unmanageable with all the
3 counties in here, and under case law from this Circuit, they
4 are not entitled to it. And the State Board is responsible
5 for running state elections, and if they can't do it, then,
6 as your Honor said, there's a problem here and maybe the
7 Court needs to take action to see to it that whatever has to
8 happen in order to get compliance with HAVA occurs.

9 Finally, one last thing, money. Your Honor,
10 the money that New York is sitting on right now, and I think
11 it's 98.5 percent of the \$220 million that they got from the
12 federal government, is in the state treasury, appropriated
13 by the State, doesn't belong to the counties, it was given
14 by the federal government to the State upon application
15 under HAVA to do certain things pursuant to a State HAVA
16 plan that the State developed, and those funds were given to
17 the State to carry out federal law, to carry out HAVA, to
18 take action consistent with what is going on, what HAVA
19 requires. So, it's not county money, it's State money.
20 It's supposed to be taken and supposed to fund things to
21 comply with the law. There is no compliance now.

22 And along those lines, and it's somewhat
23 strange, but at this point, \$50 million of that money, under
24 Section 102 of HAVA, was given to the State to replace lever
25 machines. Now, under the initial enactment of HAVA, states

1 had -- any state that got money under Section 102 to replace
2 lever or punch card machines had to replace those machines
3 by the first federal election after January 1, 2006.

4 Now, somehow, about four or five months ago,
5 in the middle of the Iraqi appropriations bill, that date
6 was changed --

7 THE COURT: Don't go there.

8 MR. HEFFERNAN: -- to March -- to the first
9 federal election after March 2008. So, at this point, if
10 HAVA is not complied with, if lever machines are not
11 replaced by next September, which is the first federal
12 election after March 2008 in New York, New York stands to
13 lose \$50 million. So, I don't quite understand where Nassau
14 County's concern about money comes in because they are
15 arguing, basically, for noncompliance. To a large extent,
16 it's arguing against its interest, it's arguing in favor of
17 losing the money the State stands to lose if it doesn't have
18 lever machines replaced by September of '08.

19 I rest my case, your Honor.

20 MR. CLINES: May I be heard, your Honor,
21 briefly?

22 THE COURT: No.

23 MR. CLINES: Your Honor, we've come a long
24 way on short notice.

25 THE COURT: No.

1 MR. CLINES: I will be very brief.

2 THE COURT: You had an opportunity to speak,
3 I gave it to you, you're done.

4 There's no need for me to summarize what's
5 already before me in papers. Nothing has changed since my
6 prior decision. For the reasons articulated by the federal
7 government in its response to both motions, the motion for
8 reconsideration on the motion to intervene by Nassau County
9 and the Nassau County Legislature, the State Board of
10 Election's motion to join, I adopt the reasoning, the
11 rationale and the citations to authority provided by the
12 federal government as consistent entirely with my view of
13 this case. I deny the motion for reconsideration, I deny
14 the motion to join the County Boards of Elections.

15 Let's take up the enforcement action. In
16 part, we've already done that. I want to understand the
17 State Board of Elections. I'm not happy with the State
18 Board of Elections. Now, let me say it in this fashion: To
19 the extent the State Board of Elections points to things in
20 State Law that have prevented them from doing one thing or
21 another, a piece of legislation perhaps, or an executive
22 decision by some other portion of the executive branch, I
23 understand why somebody in the shoes of the Commissioners of
24 the State Board of Election find themselves in a catch 22 as
25 they see it between State Law and federal law. I

1 understand, under the law of preemption, what the obligation
2 of a Court is, in terms of stacking up a piece of
3 legislation statewide and federalwide, and its obligation to
4 analyze it under the preemption doctrine, to leave in place
5 so much of the legislation as is not preempted, to the
6 extent it might or might not impede the federal legislation.
7 So that can get confusing over whatever the piece of
8 legislation is you're considering.

9 So, I don't have the specifics of preemption
10 in front of me, but let's fly above the trees for a second,
11 and in flying above the trees, I think it's a fair
12 assessment, and I don't believe New York will disagree -- in
13 other words, though those who represent other New York
14 interests other than you, on behalf of the State Board of
15 Elections, we'll hear from them in a minute, I'm not sure
16 that anybody in this courtroom disagrees with the fact that
17 federal law s State Law. Therefore, while I understand why
18 the State Board of Elections may feel constrained by State
19 Law, the bottom line is, when it comes to the 50 pound
20 gorilla in the room, which is me, the feds preempt State
21 Law, and when it comes to me, I'm reminded of Jim Croce,
22 don't pull on Superman's cape and don't spit into the wind.
23 I am not gonna raise a hammer; I refuse to do it, unless I'm
24 ready to drop it. I won't do that. I won't sit in court
25 and threaten anybody. I don't issue threats, I don't make

1 threats. I make promises. If I tell somebody I'm gonna do
2 somethin' if they don't do somethin', and if they don't do
3 it, then I'm gonna do what I told 'em I was gonna do. And
4 that's where we are at in the enforcement action.

5 And I don't want to hear a bunch of excuses,
6 whether it's to point to the New York State Legislature and
7 say they have prevented, or it's to point to some other
8 aspect of the executive branch and say they have prevented
9 it. The bottom line is noncompliance is not an answer.
10 Compliance is gonna happen. The question is how am I gonna
11 make it happen? You think about that for a second. And I
12 am gonna put the bullet behind ya there. What's the State
13 want to tell me about all of this? Why shouldn't I appoint
14 the Governor as a Special Master and make him put the system
15 in place?

16 MR. DVORIN: Well, your Honor, I think really
17 it's critical to view the situation as it now exists and how
18 we got there. The Court has expressed its frustration,
19 obviously, with lack of compliance. State of New York is
20 frustrated with it. But looking at the last 16 months,
21 since the remedial order was issued, what's transpired is
22 regular talks with the Department of Justice in an attempt
23 to come up with a solution, an attempt to come up with a
24 plan. We have not been sitting still during that period.

25 THE COURT: And I mean not to intimate that,

1 I'm aware of that, you all know that I know what's been
2 goin' on with the litigation. So, I'm not saying that the
3 State sat stagnant and hasn't had conversation, but you have
4 got to agree, don't ya, that we are nowhere in December of
5 2007? We don't have a plan. I have two plans in front of
6 me, a Republican plan and a Democratic plan.

7 MR. DVORIN: Your Honor, in terms of setting
8 the scenario, we engaged in those conversations and
9 Mr. Heffernan, in his brief, acknowledged progress was made.
10 I believe it was made through the February meeting with your
11 Honor and things were, in fact, proceeding. So, one, we
12 were talking with the Department of Justice.

13 Secondly, the Board was progressing on its
14 schedule that it had. Then -- and I am not here to give you
15 a litany of excuses, because I know it will get me in big
16 trouble --

17 THE COURT: I retain a sense of humor, so
18 feel free.

19 (Laughter.)

20 MR. DVORIN: At the risk of endangering
21 myself here, I really have to point to the problems, and
22 that is a critical problem that the Board faced, it was
23 dealing with an Independent Testing Agency that the EAC knew
24 had problems, that the EAC was looking at, and the EAC
25 didn't tell the Board for many months what was going on, and

1 once the EAC fully assessed that testing agency, determined
2 that it was not qualified, that it could not be certified.
3 At that point, New York was in no position to do anything
4 other -- the Board was in no position to do anything other
5 than look for a new testing agency. I don't think
6 Mr. Heffernan disputes that.

7 THE COURT: He's helpin' ya out.

8 MR. DVORIN: I don't think Mr. Heffernan
9 disputes that, and that is a process which took many months.

10 In going back to the point I made about
11 looking where things are now, the fact of the matter is that
12 in recent months, the Board -- and I hate to throw it back
13 to Todd, but he can express it more eloquently than I can,
14 thoroughly -- the Board has made, in recent months,
15 tremendous progress, which I think the Court should be
16 mindful of when it renders its decision. It has, in fact,
17 gone to a contract with a new Independent Testing Agency; in
18 fact that was -- that process was expedited through other
19 State agencies, including the Comptroller's office, and the
20 process for now securing a vendor or vendors for voting
21 machines has begun, and the process for testing, that will
22 be underway.

23 So, looking at where we are now and what the
24 Board has done once it had this new ITA onboard, I would
25 argue that the Board has shown its good faith and it now is

1 progressing, and, if allowed to continue to progress,
2 there's no reason to believe that it cannot comply in a
3 timely manner.

4 THE COURT: Progress according to what plan?

5 MR. DVORIN: Well, what the Board has
6 indicated is that they anticipate compliance in 2009. And I
7 assume --

8 THE COURT: Oh, I don't know that. I mean,
9 when I look at those two plans, I'm not sure one anticipates
10 compliance at some undefined date in the future.

11 MR. DVORIN: The --

12 THE COURT: I don't have a plan, do I?

13 MR. DVORIN: Well, you have a plan that was
14 submitted, admittedly on behalf of Mr. Zalen.

15 THE COURT: I have a plan submitted by the
16 Republican side, too, don't I?

17 MR. DVORIN: You have that, too.

18 THE COURT: Right. So the State Board of
19 Elections has said, "I can't do my job, here's two plans,
20 you decide, Judge." Isn't that what they've done?

21 MR. DVORIN: Well, and in addition to the
22 plans they submitted, they both did refer to anticipating
23 compliance in 2009. That was, I believe, the quote that was
24 in those documents. The State can appreciate the Court's
25 dilemma here of not having a single plan from the Board.

1 The State is not in a position to resolve that issue, but
2 there is, in fact a plan that has been submitted and there's
3 anticipation --

4 THE COURT: Don't you concur, though, that
5 the State has to resolve that issue under HAVA? Don't you
6 concur that HAVA preempts State Law and, as I said in the
7 beginning, I don't see any State decisions out there, so I
8 exempted the New York State Courts from my observations,
9 but, to one degree or another, either the executive branch
10 or the legislative branch has done something to interfere
11 with the full effect of HAVA, hasn't it?

12 MR. DVORIN: No, your Honor. Under the New
13 York State structure, the Board of Elections is -- if you
14 want to call it -- a quasi independent entity and it is
15 charged with implementing HAVA, overseeing elections.
16 That's the charge of the Board of Elections.

17 THE COURT: So, how 'bout the State
18 Legislature, let's take them. Can the State Legislature
19 pass a set of regulations which says the State Board of
20 Elections cannot approve a voting machine unless it meets
21 New York standards? And therefore, because it can't meet
22 New York standards, it doesn't comply with HAVA? To the
23 extent you might read a regulation in that way, is that
24 regulation constitutional or is that regulation preempted by
25 federal law, which says comply with HAVA?

1 MR. DVORIN: Well, what the legislature has
2 done is here are the standards we want, they are heightened
3 standards and, obviously, the Legislature can do that.

4 THE COURT: Certainly they can, nobody is
5 arguing with that.

6 MR. DVORIN: I cannot dispute, obviously,
7 under the Election Laws, the federal government has reserved
8 the power to regulate the time, place, manner of elections.

9 THE COURT: Federal elections.

10 MR. DVORIN: Thank you, federal elections.
11 And to that extent, yes, Federal Law would take precedence.
12 But as the law is now, the legislature did act, and what it
13 did was it passed a statute that implements HAVA and
14 regulations that implement the statute.

15 The other notion, where are we now and
16 looking forward? The State of New York's primary interest
17 here is in fair and orderly elections and ensuring that
18 every vote is counted, every vote is counted accurately and
19 every vote is counted as the voter intended. And --

20 THE COURT: What do you say in that regard?
21 If that's New York's aim, what do you say when the
22 Government quotes, I believe it was Senator Dodd, saying
23 there are many disabled housed in their homes who can't get
24 to a voting place and don't even try because there's not a
25 voting place that will accommodate them? So, if New York is

1 so concerned about its disabled voters, why has it sat on
2 its hands since 2006 and done nothing to accommodate them?

3 MR. DVORIN: Well, as your Honor knows,
4 internal measures were taken and --

5 THE COURT: That's the plan B measure?

6 MR. DVORIN: Yes, your Honor.

7 THE COURT: So, I suppose I could have
8 ordered plan B machines in all kinds of polling places
9 instead of one per county, right?

10 MR. DVORIN: Your Honor could order that, but
11 then you would be ordering the use of machines that have not
12 been certified, not been found to --

13 THE COURT: But they would have been
14 compliant, wouldn't they?

15 MR. DVORIN: They would not have been tested.
16 They would not have been determined, through objective
17 testing, to be compliant. That's the point. We can call
18 them HAVA compliant because they meet the general standards
19 of HAVA, but HAVA doesn't set forth any specific
20 requirements machines must meet to reach those general
21 standards.

22 THE COURT: It sets forth minimal
23 requirements, doesn't it?

24 MR. DVORIN: Absolutely, your Honor.

25 THE COURT: And do those machines meet the

1 minimal requirements?

2 MR. DVORIN: They can't be said to meet the
3 minimal requirements until they have been tested and
4 certified as meeting them. We can say they meet the
5 requirements, but New York has a system for determining
6 whether, through certification testing, they meet those,
7 standards and I would submit that New York ought to be
8 allowed to proceed through that process.

9 THE COURT: I've allowed the Board to proceed
10 through that process for 16 months, all pursuant to a plan,
11 and I don't have a plan. Not only have I gone through -- I
12 understand the pros and cons, I am not sayin' it's all and
13 nothing, I understand. The federal government understands.
14 Why they didn't bring a motion for contempt -- in some
15 respects, there are things they don't want to do either. I
16 know what directions he has from Washington without knowing
17 what directions he has from Washington. They are not
18 anxious to drop a club on New York State. They want
19 compliance with HAVA. That's what the direction from
20 Congress says. I don't know how I do anything when New York
21 is so paralyzed that I don't -- I got two plans in front of
22 me. What you're talking about is give them a chance to
23 implement, that's what you're really sayin' to me.

24 MR. DVORIN: Especially in light of the
25 progress that they have made. And one of the reasons -- I

1 don't want to read Mr. Heffernan's mind, but one of the
2 reasons he probably didn't bring a contempt motion is that
3 we were proceeding in a way that, at that point, the federal
4 government was satisfied, for much of the 16 months since
5 the remedial order was issued.

6 So -- well, to go back to the point looking
7 forward, one thing I do want to emphasize is yes, Federal
8 Law does preempt in this area. When we refer to State Law
9 and heightened standards, we do so because of our interest
10 in ensuring the fundamental integrity of the voting process,
11 that's why we refer to the State statutes and the State
12 regulations. And we also refer to them because the State
13 statutes, actually it's the regulations, explicitly
14 incorporate the standards of the EAC, the 2005 standards of
15 the EAC, which Mr. Heffernan argued in his papers should now
16 be discarded, you know, and tossed to the wind. The
17 regulations incorporate them, New York is working towards
18 meeting those standards, and I would submit that allowing
19 New York to do that in an orderly process is critical to the
20 confidence people will have in the voting process in this
21 state.

22 As you know --

23 THE COURT: Do you have an orderly process in
24 mind?

25 MR. DVORIN: I will rely on the Board to

1 articulate that.

2 THE COURT: Ahhh. So you don't have a plan
3 either, do ya?

4 MR. DVORIN: No. As I said -- I wish I did.
5 The point is it's the Board's charge to do that and New
6 York -- the State of New York has no reason at this point --

7 THE COURT: Can I ask the State of New York a
8 question that I'm gonna ask Mr. Valentine in a minute?
9 What's the State do when the State Board of Elections
10 refuses to do its job? What authority does the State have
11 to force the State Board of Elections to do its job? In
12 other words, can we all -- and I don't want to speak on
13 behalf of Mr. Valentine, I want to give him an opportunity
14 to respond to this, but can the State of New York and the
15 Court agree that it is the State Board of Elections that
16 must pick the machine?

17 MR. DVORIN: The way the -- the way the
18 statutes in New York are written, that is true.

19 THE COURT: All right.

20 MR. DVORIN: It's vested solely in the State
21 Board of Elections.

22 THE COURT: All right. So we agree on that
23 much. Now, what authority does the State of New York have
24 over the State Board of Elections when it does not do what
25 it is directed to do by State Law?

1 MR. DVORIN: Well, your Honor, we obviously
2 submit that it certainly isn't near that point right now,
3 that that would be -- that's a hypothetical question, but
4 the statute --

5 THE COURT: One that you would rather not
6 answer, too, right?

7 MR. DVORIN: I can see why your Honor might
8 think that.

9 (Laughter.)

10 MR. DVORIN: But the way that New York is
11 constitutionally structured and statutorily structured, it
12 is, in fact, vested with the ward. I mean, the State of New
13 York stands ready, through the Governor, to involve itself,
14 in whatever extent it can, to expedite the process.

15 THE COURT: Does the Governor have the power
16 to pick new Commissioners?

17 MR. DVORIN: I believe that they would --
18 they have -- would have to go through the nomination
19 process, which is a very restricted one, which essentially
20 gives the power to nominate to the party Chairman and to the
21 State Legislature, so really --

22 THE COURT: There is a process in place to
23 keep a balance on the State Board of Elections.

24 MR. DVORIN: Right. And that structure
25 reflects the independence of the Board, so it is embedded in

1 the New York structure.

2 As I said, the State, through the Governor,
3 however else, wants to do everything it can to expedite the
4 process. In fact, the Governor, this office we worked with
5 voted yes to expedite contracting and so forth, we are ready
6 and prepared to continue to do that. However, we do have --
7 the State power concerning the oversight of elections is
8 vested in this independent entity.

9 If I could just add, in terms of where we go
10 from here, Mr. Heffernan, in his papers, really refuses to
11 look at what's transpired since HAVA was enacted and what
12 the situation is now. As your Honor indicated, he read the
13 accounts and the facts concerning problems with machines,
14 they have been well publicized, and, in fact, in the last
15 week or so, there have been problems in Ohio and Colorado,
16 the most recent being Colorado, three days ago I believe,
17 where machines were decertified and they were decertified
18 for problems with security; that is, a vote cast might not
19 be recorded that way.

20 These problems have arisen since the first
21 election after HAVA and, in fact, EAC was prompted to
22 heighten its standards to the 2005 level. And I think it
23 would be remiss, it would have been remiss for New York not
24 to look at the experience of other states. I mean, one
25 reason the other states hurry to view this is they had no

1 background, no experience against which to measure what they
2 needed to do to take a cautious, deliberate, reasoned
3 approach to developing new technology. New York had the
4 benefit of that.

5 THE COURT: All 49 states, includin'
6 California, with Stamford and all those universities out
7 there, they're all stupid compared to New York? Be careful
8 with that argument.

9 MR. DVORIN: Well, I would say New York's
10 probably the best, but it's not really a point of casting
11 blame or whether they -- you know, they acted too quickly.
12 It's what happened. They didn't have that experience.

13 THE COURT: But you understand, don't you,
14 that, from my perspective, those are all arguments as to why
15 we, in New York, have not complied with Federal Law. And
16 I've already told ya noncompliance with Federal Law is not
17 an option.

18 MR. DVORIN: Your Honor -- and it's an option
19 that New York doesn't contemplate taking and the Board
20 doesn't contemplate taking. The only issue here is when
21 compliance has to take place.

22 THE COURT: That's already fixed. That was
23 January of 2006. New York's been in violation of that law
24 since January 1 of 2006.

25 MR. DVORIN: And, obviously, your Honor has

1 the authority to exercise its discretion, looking at the
2 balance of interests, looking at what's reasonable and fair,
3 to come up with, if it wants to, a date. We can't
4 acknowledge the date has past, but the issue is you have to
5 deal with things as they are now and, we would submit, deal
6 with it in a way that's consistent with the spirit of HAVA.

7 We keep talking about the deadlines. To, at
8 this point, grant a remedy that, for the sake of, let's say,
9 implementing in 2008 is at odds with the purpose of HAVA,
10 what was the purpose of HAVA? HAVA was a reaction to the
11 2000 election, the "debacle," to use Mr. Clines' word, of
12 the 2000 election. That's why it was passed.

13 THE COURT: Let me interject, for your point,
14 to say I understand that all too well, that aspect
15 concerning enforcement. In other words, it says nothing
16 more than if I were to say by August 31st of 2008,
17 compliance with HAVA must be had according to the following
18 terms and conditions by September 1st, and give everybody
19 one day to comply. Everybody would concede there's no time
20 to comply. That's really not the problem here. I
21 understand that point of view, and it's one I have in mind,
22 it's one articulated by the County Boards of Election, it's
23 one articulated by the State Board of Elections, it's
24 articulated by a lot of people and I understand that part of
25 any order of enforcement I draft must take into account the

1 obligation by the counties and everybody in the State to
2 implement HAVA. So, I know that's on the table, the federal
3 government knows that's on the table.

4 The real problem is is that we all recognized
5 that 16 months ago, and we said to the State Board of
6 Elections, "all right, we understand the difficulties New
7 York's had along the way. Give us a plan about how you are
8 going to implement this so we can work with you to get that
9 done so that we don't end up between some foolish Federal
10 Court judge, who's got a hammer in his hands that he's gotta
11 drop. That's where we don't want to end up." And here we
12 are, in December of '07, and we don't have a plan. So,
13 while I agree with you, we must be careful in whatever plan
14 we adopt to make sure we accommodate concerns about
15 implementation of that plan. You can't implement somethin'
16 you don't have.

17 MR. DVORIN: And that is obviously true, your
18 Honor. And really, the thrust of the State's position that
19 the Court should be mindful, as I'm sure it will be, of the
20 experiences of other states and so forth, problems that have
21 arisen, and the need to be mindful of those in implementing
22 HAVA going forward so that the intended purpose of HAVA is
23 carried forward.

24 The other point that we do make, obviously,
25 is that based on the submissions by the Board, which we have

1 no reason to dispute, it is simply not realistic and not
2 consistent with HAVA and not consistent with guaranteeing,
3 preserving fundamental rights of voters, to order that to be
4 done in 2008. It is for the Board to come up with a plan.
5 But what the State wants to do is protect that right to
6 vote, and that can't be done, that cannot be done fully and
7 assuredly if we're forced, if the Board is forced to fully
8 implement in 2008.

9 THE COURT: Who controls the comptroller?
10 Who -- I don't want -- wrong choice of words, forget it.
11 Nix it. Roseanne Roseannadanna, "Never mind."

12 Who represents the comptroller? Do you?

13 MR. DVORIN: Well, to the extent that we are
14 representing the State as embodied -- the people of the
15 State as represented through their State-wide officials,
16 yes. However, again, going into territory that I did with
17 the Board of Elections, the comptroller occupies a unique
18 spot under New York's constitutional system. He's an
19 independently elected official and has particular charges,
20 which Mr. Heffernan alluded to, in terms of the procurement
21 process and so forth.

22 So, yes, to the extent we represent the State
23 and its elected officials and the people through them, yes,
24 we do. To the extent that the comptroller can be ordered or
25 not ordered to do something, let's say, by the Governor,

1 well, that's -- in certain areas that can't be done.

2 THE COURT: What commitment is the Attorney
3 General prepared to give the State Board of Elections that
4 it's going to assist them in keeping all these disparate
5 interests at bay so that they can do what it is they're
6 supposed to do?

7 MR. DVORIN: Well, the Attorney General's
8 office has no independent authority, obviously, to regulate
9 or dictate what happens in this area. What we will do and
10 what we have been doing is trying to see what we can do,
11 through talking to various parties, talking to counties,
12 talking to Mr. Heffernan, talking to the Board, talking to
13 other State agencies involved, to expedite this matter.
14 That's the assurance I can give the Court. I cannot -- I
15 cannot, you know, pretend that we have more authority than
16 that, because it is limited to that extent.

17 THE COURT: Thank you. Okay, I gave ya time
18 to rest. Back on your feet. Explain to me -- start with
19 this explanation: What happens, from a legal standpoint,
20 when the State Board of Elections is paralyzed by a division
21 amongst them over some obligation that they have? In other
22 words, everybody in this courtroom believes that the State
23 Board of Elections, and I am gonna use the phrase I've used
24 as a shorthand, is the one with the authority to pick a
25 machine. Nobody disputes that. I don't think you do

1 either.

2 MR. VALENTINE: No, your Honor.

3 THE COURT: There are a variety of other
4 things I don't want to deal with right now that have to do
5 with what machine you pick, but the bottom line is it is the
6 State Board of Elections that has the responsibility to pick
7 a machine. So, if half the Board says A and half the Board
8 says B, how do you resolve that dispute internally in the
9 State Board of Elections?

10 MR. VALENTINE: Well, the way, just to answer
11 the question, and then I can go to the specific facts -- I
12 mean, the process that's set forth in the statute is that it
13 is a bipartisan Board and, obviously, with an equal number
14 of members, stale mates occur from time to time, and, in
15 many instances, the statute provides a default mechanism,
16 that if they fail, that this shall happen. And in the event
17 that the State Board fails to act in certain instances, we
18 would, obviously, open ourselves up to enforcement action by
19 the State itself if it rises to that level.

20 THE COURT: Or perhaps the feds.

21 MR. VALENTINE: Or perhaps. It would not be
22 the first time that we have been ordered to comply with
23 federal law. So, you know, I think we're in that process
24 now, your Honor. You know, we've recognized that the State
25 Board clearly recognized it was not in compliance.

1 THE COURT: Suppose I issue an order sayin'
2 provide me a plan within 10 days or else?

3 MR. VALENTINE: I -- to be honest, your
4 Honor --

5 THE COURT: Not two plans, not three plans,
6 not a left plan, a right plan, a Republican plan, a
7 Democratic plan. Submit to me a single plan within 10 days
8 or else. The jail doors will swing open.

9 MR. VALENTINE: To be honest, you'll probably
10 get pretty much what you have now because the plan -- while
11 there were separate submissions, obviously, and it did come
12 from two different sides of the Board, the elements of what
13 has to be done were the same. The only difference was
14 really with the specificity on promising dates on one side,
15 which had a complete list of dates --

16 THE COURT: Is it your view the machines must
17 meet the State certification standards under whatever plan
18 you issue?

19 MR. VALENTINE: At this point, as Mr. Dvorin
20 stated -- I mean, HAVA set forth the minimum standards,
21 that's true. But the only way -- and every other State has
22 this process, too -- that they had to go through --

23 THE COURT: Except they all met it and you
24 haven't.

25 MR. VALENTINE: Well, that's a separate

1 issue. The only way to prove that you meet the standards is
2 by -- is to actually test the devices that show up on your
3 door step to say, hey, does that audio function work so the
4 blind person can hear their vote?

5 THE COURT: What standards are you tryin' to
6 meet with your plan? Are you tryin' to meet New York
7 standards or federal standards?

8 MR. VALENTINE: To be honest, your Honor, we
9 are trying to meet federal standards first. That is the
10 first goal that we have met and the standards that the
11 State --

12 THE COURT: Have you met that? Do the plan B
13 machines meet the federal standard?

14 MR. VALENTINE: Actually, none of the
15 machines that are in use in the United States have been
16 certified to the current federal standards that are in
17 force. None of them meet that. No machine in the United
18 States meets those federal standards.

19 THE COURT: Do the machines in place in the
20 United States meet the standards that will be set in 2010?

21 MR. VALENTINE: No.

22 THE COURT: 'Cause we don't know what they
23 are, do we?

24 MR. VALENTINE: No.

25 THE COURT: How about 3010, we don't know

1 what they are either?

2 MR. VALENTINE: No.

3 THE COURT: In other words, what you're
4 givin' me is another thousand reasons why you've not
5 complied with Federal Law. I don't care what the current
6 standards are. There are a current minimum set of
7 standards, and you haven't met 'em, have ya? You don't have
8 a machine -- we all agree that when we walk in, pull the
9 lever and the curtain comes around us and we start clickin'
10 those things down, those machines that are in place, lever
11 machines in New York, do not comply with Federal Law; don't
12 we all agree with that?

13 MR. VALENTINE: Not a lever machine by
14 itself, no, your Honor.

15 THE COURT: How 'bout the machine -- let's
16 not parse words. Are the machines -- I just got done
17 votin'. It's the same machine I been usin' since I was 18.
18 Does that machine comply with Federal Law? Is there a paper
19 trail?

20 MR. VALENTINE: Some of the machines do
21 produce a paper audit, not all the lever machines do, so
22 there is -- some of the lever machines do produce that.
23 They do not produce a voter individual paper trail, but that
24 is not a requirement under HAVA, an individual voter paper
25 trail. What the lever machines fail to meet in HAVA, which

1 is why the State Board and the State has obviously seen the
2 need to replace them, is they do not provide the
3 accessibility for the voters who are disabled. That is the
4 failure of the lever machine, in our minds, the lever
5 machine. Although it hasn't been tested to the failure
6 standards, it counts the votes and has accurately; they have
7 for a hundred years. We have a track record on that aspect
8 of HAVA. What they fail to meet is that requirement to
9 provide those services to people who have special needs.

10 THE COURT: So how long are special needs
11 people supposed to wait?

12 MR. VALENTINE: What we're caught -- as you
13 pointed out, this is a catch 22. The devices need to
14 function accurately to count the votes for all the voters,
15 including those with special needs. And that is the
16 standard to provide those machines, what we have adopted, we
17 now have -- devices have been brought to the State Board for
18 testing to those standards, we're prepared to begin that
19 probably within the next ten days to two weeks, have that
20 testing begin, so that we can have at least -- and that's
21 the plan B machine, at least that aspect to accompany the
22 leverage voting device, so that accessibility feature is met
23 on HAVA, combined with the lever voting machine, of course.

24 So when you say there is no plan, there is a
25 plan, we are actually engaging in it, we have -- we are

1 using what we believe to be the current federal standards as
2 given to us by the federal agency that it was charged to
3 oversee HAVA, they set forth the standards, okay, those are
4 the federal standards that flesh out the language of HAVA,
5 so we've adopted those. We've got a laboratory that was
6 certified by the federal government to test to those
7 standards, they are now under contract and we've begun
8 working with them.

9 We've put out a contract or a bid to get
10 voting machines in here, they have responded to us, we are
11 about to complete contract negotiations with those vendors
12 so they're available for purchase first quarter of 2008, and
13 then the testing is -- to the extent it's begun, the devices
14 have shown up on our doorstep. We have begun the analysis
15 to see if they meet standards. New York State standards,
16 having been referred to heightened standards, aren't in the
17 way here. They have some additional accessibility features,
18 but the voting machine vendors have supplied us with those
19 machines, they supplied us with the machines that meet our
20 ballot configuration as New York State wants it. Those are
21 not in the way. There are other issues, that the vendors
22 have said that they can comply with all of our standards,
23 that we're not sure we agree with that, but they have stated
24 that they can meet those and we're prepared to move forward
25 with testing those machines and have those ready -- and

1 that's the difference in the plan, is the date when that
2 will be done. And this was true in other states, as
3 Mr. Dvorin, again, alluded, that while, yes, they purchased
4 machines, they have decertified machines and are
5 repurchasing machines and repurchasing machines. So you can
6 rush to get a device in there that meets all the
7 requirements, but --

8 THE COURT: Noncompliance with HAVA is not an
9 option.

10 MR. VALENTINE: I fully understand that, your
11 Honor.

12 THE COURT: What you're currently doin' is
13 givin' me another litany of the excuses of why the State
14 Board of Elections has not done its job. That's what you're
15 givin' me. Noncompliance with HAVA is not an option.

16 MR. VALENTINE: That's some of that, but what
17 I've also, you know, repeated, certainly laid out in our
18 papers, is what is it we are doing? What is it that we are
19 trying to do to get it in, to get a device that we believe
20 meets a minimum compliance standard with HAVA as soon as
21 possible, in the position that the State Board is in, trying
22 to, while Federal Law preempts State Law, and we can argue
23 with that --

24 THE COURT: No, you can't. That's my whole
25 point. No, you can't.

1 MR. VALENTINE: As you initially alluded to,
2 though, there are other aspects that, you know, in trying to
3 determine what preemption actually applies to, and that's
4 been the State Board's catch 22, you know, HAVA only adopted
5 the federal standards, it's a lot of the ancillary portions
6 that have been a problem, but we feel we've gotten beyond
7 that at this point. You know, we've actually moved forward
8 on that. And that's the difference in the plans is just
9 really the date when that's gonna get completed. It's -- to
10 be honest, it's very difficult to be able to pinpoint a date
11 and even in -- and Mr. Collins can describe this in further
12 detail, even in the one plan that was submitted which had a
13 detailed schedule that has not been met, the dates initially
14 set out were not -- that had been projected in that plan,
15 we're not quite there. We're -- you know, as our Board met
16 last week and analyzed that plan, you know, we were
17 proceeding along those lines that that's the general
18 guideline we're heading, we are about a month behind on that
19 projected, but I still think that we're gonna be able to get
20 that device early in 2008.

21 THE COURT: You needed to say that, didn't
22 you?

23 (Laughter.)

24 THE COURT: All right. I want to hear from
25 the federal government, but I am gonna take a 15-minute

1 recess first and then I will hear from the government. I
2 will be back on the bench at quarter of.

3 (Short recess taken at 10:30 AM.)

4 (Court reconvened at 10:45 AM.)

5 THE COURT: All right, let me hear from the
6 federal government.

7 MR. HEFFERNAN: Your Honor, you're right, I
8 don't want to be here. And the bottom line is if there had
9 been enough progress in carrying out HAVA's demands and the
10 demands of the Court's remedial order, I would not be here.
11 But there is plain, clear, substantial noncompliance with
12 the Court's order, and that's why we filed the motion to
13 enforce. I think the best way for me to argue, for arguing
14 is to use the State's response, in both their papers and
15 what they have argued in Court today. It's well written,
16 but I really don't think that it says very much. Let's
17 first look at what it does not say. They don't claim that
18 the State's HAVA compliant. It can't. They're not.

19 THE COURT: I've already declared they're
20 not, right?

21 MR. HEFFERNAN: Nor are they compliant today.
22 They haven't claimed that lever machines comply with HAVA,
23 and despite Mr. Valentine's statement before, they don't
24 comply, not only in terms of accessibility, but also in
25 terms of HAVA's requirement for manual audit capacity, a

1 piece of paper that the machine produces. It's not the
2 verified paper trail which is a requirement of State Law,
3 that's not what we're talking about. We are talking about a
4 machine-produced piece of paper. As I understand it, there
5 are a minimum number of lever machines in New York State
6 that has a printing attachment to print out a piece of
7 paper, but for a large majority of the lever machines in the
8 State, they don't have that, so they also don't comply with
9 HAVA in that regard.

10 And finally, in terms of what they don't say,
11 they don't dispute preemption applies here. Federal Law
12 must prevail over State Law. So, we have noncompliance with
13 Federal Law with this Court's order, we have current
14 machines that simply don't fit the bill, that can't comply
15 with Federal Law, and Federal Law has to prevail.

16 So, let's look at what they have said, look
17 at what they have said. First of all, they say that the
18 State Board -- the State's not to blame for any of this.
19 Instead, it's the United States, it's the Election
20 Assistance Commission, it's private voting system vendors,
21 it's Cyber, it's ITAs. All of this has put them in the
22 position they're in today.

23 Well, as you said before, your Honor,
24 compliance (sic) is not an option. And these excuses don't
25 really cut it. But the bottom line is, and as we've laid

1 out, substantially, in our papers, not only here, but when
2 we first filed our lawsuit, that time after time after time
3 there's been delay after delay, and for the State to
4 basically throw up his hands and say, "Hey, it's not our
5 fault," just is not accurate.

6 If I could just deal with one thing, the
7 Cyber issue that the State keeps bringing up. First of all,
8 I'm not aware that there's any responsibility of the
9 Election Assistance Commission at the time they were
10 evaluating Cyber for accreditation to get on the phone and
11 tell New York they were doing that and they had some
12 concerns. At some point, what they did was they felt that
13 they needed to keep that stuff before them, make a decision
14 and then issue that decision, which they did.

15 Secondly, the State Board found out about
16 problems, potential problems with Cyber in the fall of 2006
17 when it's own consultant, NYSTEC, notified the Board that
18 there were numerous problems that they had found in the
19 various things that were being developed by Cyber for the
20 Board. So they, at that point, for that basically the fall
21 of 2006, they knew about these problems. And they were
22 concerned about 'em.

23 Then, in January of '07, the New York Times
24 comes out with an article about BAC and Cyber. At that
25 point, and, in fact, as I recall the New York Times'

1 article, one of the Commissioners of the State Board
2 indicated that he had major problems with Cyber. The Board
3 then proceeds to investigate, but the bottom line is they
4 started to experience these problems in the fall of '06.
5 They certified a new ITA last month. That's over a year.
6 It's ten months since they learned of these problems that
7 the EAC had in January, and I think it's really indicative
8 of what has been going on in this remedial process is that
9 things get done on the schedule that the Board wants to do.
10 It's as if -- it's as if Federal Law, as if this Court's
11 order don't exist. We'll get them done when we get them
12 done. We're not working toward any particular election or
13 any particular time. Things will work out.

14 And I think that's also what is reflected in
15 the one plan that was submitted to the -- to us and to the
16 Court from the Republican side of the Board. I mean, I
17 think I referred to it as kinda the Rodney King plan, can't
18 we all get along. It's, you know, we're workin' hard, we
19 are gonna work hard and we will get there, we have all these
20 tasks to do, but we can't tell you when we will do it, we
21 can't tell you how we are gonna do it, we can't tell you how
22 many machines are gonna be used, but it'll get done, don't
23 worry about it.

24 Well, at this point, we are worried about it
25 because Federal Law says at this point it was supposed to be

1 done in January '06, it's now almost January '08, we don't
2 have any machines that are certified, haven't even started
3 the testing process, we just got an ITA.

4 To deal with the source code issue, the State
5 tries to slough it off by saying it's a premature issue.
6 Well, the bottom line is that once testing of machines is
7 finished, machines cannot be certified until that source
8 code issue is resolved. So what -- I mean what is the State
9 talking about, let's not deal with it now, let's come back
10 to the Court in a month or two and then deal with it? I
11 mean, that's why we filed a motion now. We need something
12 done now.

13 What we get in the papers and what we get
14 in the arguments today is really the same old thing. In
15 March '06, when we were dealing with this issue, when we
16 filed our complaint in Court, when the Court was dealing
17 with our PI motion, and then when the Court was dealing with
18 the various submissions of the parties that ultimately ended
19 up in the Court's June 2nd order, what we heard was we have
20 to move cautiously, we are moving as fast as we can, we have
21 an election coming up, we have to be careful, we don't want
22 to cause chaos in the election. Well, I don't, the
23 department doesn't, the United States doesn't and the Court
24 certainly doesn't. But we heard that in March of '06, we
25 heard it for September '06 elections, we heard it for the

1 September '07 elections and now we're hearing it for the
2 September '08 elections.

3 And at what point is it gonna stop? Your
4 Honor, there's always another election around the bend,
5 there's always another set, as the Court alluded to before,
6 of voting system standards around the bend. I mean, if
7 that's the standard that we're gonna use, then we might be
8 waiting until 2012 or 2020 or 3020. Because I think at this
9 point, the perfect is the enemy of the good. The State says
10 we want these systems and they have to be up to these
11 standards (indicating), yet these standards are constantly
12 changing and so, maybe we want to have the next set of
13 standards and maybe the next set of standards. Well,
14 federal law doesn't, at this point, allow that. It says you
15 have to meet certain minimum standards. Forty-nine states
16 have done it; they did it, if not in January '06, certainly
17 did it in time for the 2006 elections. New York has not.
18 It's the only State in the country that hasn't.

19 State Board is aware of that. The State's
20 aware of that. Everybody here is aware of that. But all we
21 get today are basically excuses on why it hasn't been done.
22 No commitment really to do anything in a certain period of
23 time, and we don't have a plan. Despite what the State may
24 say, we do not have a plan from the State or from the State
25 Board. We have two plans.

1 August 29th, we met in chambers with the
2 parties, your Honor did. We expressed our concern that the
3 State was clearly not in compliance, that progress had
4 stalled, we wanted the State to present to us a plan for
5 compliance. That's almost four months ago.

6 Little over a month later, we get a plan.
7 It's not a plan, it's two plans: One Democratic plan, one
8 Republican plan. It's now December 20th, it's
9 two-and-a-half months since then, it's a month-and-a-half
10 since we filed our motion to enforce, yet the Board still
11 has not been able to come up with one plan. The most recent
12 filing in response to our motion to enforce, and they had
13 extra time, as the Court is aware, to file that, we had
14 initially scheduled this for December 6th and the Court
15 granted a two-week extension, that entire period of time,
16 the four Commissioners of the State Board did not get
17 together and come up with a plan. So we have two. So, what
18 do we do? I mean, what do we do if the Board deadlocks on
19 the simplest little thing to carry out whatever is necessary
20 to comply with HAVA?

21 THE COURT: I couldn't get an answer out of
22 the State as to what they do when they're deadlocked. You
23 got one, under State Law?

24 MR. HEFFERNAN: Under State Law, no. I mean,
25 I know what the ability of a Federal Court is to carry out

1 its orders and --

2 THE COURT: We've already talked about that,
3 haven't we?

4 MR. HEFFERNAN: We alluded to that in our
5 papers, your Honor, and your Honor has raised today the
6 specter of contempt. There is a reason we didn't want to do
7 that. We are trying to work with the State Board, trying to
8 get the State Board to do something, but when you get
9 responses like we got, when you get one plan that's not
10 really a plan, it's a concept, kinda we will do things when
11 we get around to it, you begin to wonder if the State Board
12 has the willingness to do what it has to do under Federal
13 Law and also under State Law.

14 So, you know, we are frustrated, as is the
15 Court, and quite frankly, your Honor, if you look at the
16 filings that have been pouring into the court in the last
17 week, so are many of the counties in the State. Some of 'em
18 have suggested that the Court appoint a Special Master
19 anyway, that the Court take over the whole process. And,
20 again, we also have counties that say get the State Board to
21 do something right away and we can do that. And I applaud
22 those six counties that submitted something to the Court, it
23 was yesterday or the day before, that said, you know, we are
24 counties that want to comply and that can comply if the
25 Board only does what it's supposed to do.

1 That's why we are here. The Board needs to
2 do something, the Board needs to carry out Federal Law, the
3 Board needs to carry out State Law, it provides the
4 mechanism to run the elections in New York State and they
5 need to be ordered to immediately move forward and take the
6 actions necessary. And to the extent that the Court needs
7 to take action to basically supersede State Laws or State
8 processes, it seems to me that that is what is appropriate
9 now. I mean, we are past the point where we can continue to
10 get these "well, we have to run it by these people and have
11 to have these" -- this one- or two-week delay because the
12 bottom line is over the past year-and-a-half, while there
13 has been some progress that has been made, it's been
14 constantly characterized by delays of a few days or a few
15 weeks or maybe a month.

16 The State, in their papers, indicates that
17 we're critical of the fact that the Comptroller turned down
18 the first ITA contract or that the State Board had no
19 control over the Comptroller. Well, your Honor, the State
20 is a party here. It's not just the State Board, it is the
21 State, and the Court's order binds the State, and under
22 Rule 65, it binds anybody in concert or participation with
23 the State. And so, at the least, the State should be able
24 to take whatever action is necessary to get State agencies
25 and any other players in this process to take actions to

1 carry out the Federal Law. Otherwise, it seems to me that
2 the real chaos is in the State government. There has to be
3 some mechanism for carrying out the State elections. And if
4 it's not the State, then I really don't know who it is.

5 Couple more issues, your Honor. One that the
6 State keeps raising has to do with the 2005 EAC voting
7 system standards. They're called VVSG, Voluntary Voting
8 System Guidelines. You can really stop at the first word,
9 they are voluntary, there's no State that's required to do
10 that, HAVA doesn't require states to do that. The bottom
11 line is that 49 states have decided to utilize the 2002
12 standards. If New York chooses, as it has, to follow the
13 2005 standards, it can do that. But there's not carte blanc
14 given in HAVA if you do that to basically take forever to
15 come up with a set of voting systems, and that's what the
16 State is basically saying. They're saying, well, once we
17 get a machine that meets our standards, meets the 2005
18 standards, then we'll comply with Federal Law, but not 'til
19 then. And Federal Law would preempt any view like that,
20 your Honor. I mean, yes, HAVA says you can have standards
21 that are stricter than the minimum standards that HAVA sets
22 forth, but it says that you have to do things in a certain
23 period of time. We are not -- today is not January 1, 2006.
24 In another few weeks, we have January 1, 2008, over two
25 years, and we still don't have a machine.

1 So, we're frustrated, we're angry and we want
2 the State to comply with Federal Law. And we're here
3 because it appears, despite our efforts, despite the weekly
4 conversations, the fact that the State tells us that there
5 is a delay does not mean that there is not a delay. It just
6 means that there's a delay. And after all this time, the
7 delay is really taking its toll and that's why we're in
8 court, to have the Court deal with the intransigence with
9 the noncompliance. And as the Court said, Federal Law
10 preempts State Law and we are at the point where action has
11 to be taken.

12 Thank you.

13 THE COURT: Don't sit down yet.

14 MR. HEFFERNAN: Don't sit down?

15 THE COURT: Don't sit down. Let's just
16 presume, for the sake of argument, that I don't disagree
17 with a single word you said. That still leaves us, doesn't
18 it, in light of the Government's motion for enforcement,
19 that the Court come up with a remedy. In other words, if we
20 don't get lost in the trees, which in my view is where the
21 State is, they're wandering in the desert, they're lost,
22 they don't know who controls one another, they don't even
23 know how to resolve a dispute in their own agency, so they
24 don't know how to comply with New York State Law, much less
25 comply with federal law. So, if we start with that premise,

1 then what do we do to rectify that problem as a federal
2 entity? How ought the Court enforce its equitable powers to
3 do what New York State is incapable of doing, out of
4 incompetence, out of politics, out of a variety of factors,
5 internal disputes, discordant voices, there are just a
6 thousand different reasons as to why they have failed to
7 act, but what is it I ought to do equitably to either compel
8 them to act or to act in their stead? What is it I ought to
9 do from the Government's standpoint?

10 MR. HEFFERNAN: Well, your Honor --

11 THE COURT: We've already talked about I
12 could play Eisenhower and recommend to the President that he
13 send out the troops. We all know I'm not gonna do that.

14 The Government's not brought a motion for
15 contempt. I know why the Government hasn't brought a motion
16 for contempt, that's the last thing in the world the
17 Government wants to do is to hold anybody in contempt. And
18 absent some civil contempt citation, and remembering that I
19 don't pull on Superman's cape and I don't spit in the wind,
20 I am not gonna threaten to lock 'em up unless I fully intend
21 to lock 'em up. So, if we take those two things off the
22 table, then what is it the federal government wants me to do
23 to enforce my order? One of the things, it seems to me,
24 that you dance close to is appointment of a Special Master.
25 What's that mean?

1 MR. HEFFERNAN: Well, your Honor, there is
2 authority for the Court, in situations where the Court is
3 not necessarily in a position to take the time and have
4 the -- does not have the resources necessary to carry out --

5 THE COURT: The order myself.

6 MR. HEFFERNAN: Right.

7 THE COURT: If you left it to me, I might
8 order the only vote that counts is one that's on a hanging
9 chad, so that's why you don't want to leave it to me. So go
10 ahead.

11 MR. HEFFERNAN: I mean, there is authority in
12 federal case law for Courts to order appointments of Special
13 Masters whose sole business, basically, will be to carry out
14 the obligations that the defendants or the responsible party
15 needs to take in order to carry out federal law.

16 THE COURT: Who would I appoint as a Special
17 Master? Not specifically. Of type, character or quality.
18 Who did they appoint in Alabama?

19 MR. HEFFERNAN: In Alabama, they appointed
20 the Governor.

21 THE COURT: So maybe I ought to appoint the
22 Governor to take care of this problem.

23 MR. HEFFERNAN: Your Honor, we haven't moved
24 yet for appointment of a Special Master.

25 THE COURT: I know you haven't. You don't

1 really want to, do you?

2 MR. HEFFERNAN: But we also would not have
3 suggested it, though, if we didn't think the Court had the
4 authority to do so. I mean, what I think we need is an
5 order from the Court that basically advises the Board to
6 stick to a particular schedule, that there will be no
7 excuses for deviation from that particular schedule, which
8 we will monitor closely and which will give us the ability
9 to come immediately into Court and to deal with whatever
10 problems arise in carrying out the schedule that has been
11 set out. Now --

12 THE COURT: So, what you really think I ought
13 to do is give them some additional time to come up with a
14 new plan that sets those specific time frames in place with
15 the instruction that they're gonna meet them or else.

16 MR. HEFFERNAN: Well, I think that's one of
17 the things. I think, at this point, in terms of a plan for
18 going forward, I think we have reached the point now, on
19 December 20th, where for the Court to order there to be
20 anything done of any good consequence for the February
21 primary would simply not be practical.

22 THE COURT: It's impossible, that's part of
23 their point, certainly. That's my point saying I can't
24 order somethin' on August 31st and expect compliance the
25 following day.

1 MR. HEFFERNAN: But along those lines, your
2 Honor, and let me just say it up front, I think really the
3 focus here needs to be on accessibility. We started this
4 process back in 2006 and we determined that the most
5 important thing to deal with up front, again because of the
6 State saying it couldn't do everything all at once, was make
7 voting places accessible to persons with disabilities. It
8 was one of the major achievements with HAVA and it's
9 something the Department thinks is extremely important. And
10 so we started out with an extremely minimal plan for
11 accessibility compliance. We had pushed for more compliance
12 than ultimately ended up in September 2006, but that first
13 plan, that plan B plan, provided for at least one plan B
14 device, ballot marking device, in each polling -- in each
15 county. Many of the larger counties, Nassau County
16 included, had a larger number of polling places that had one
17 of these devices although for the larger counties not nearly
18 close to have one in each polling place, which again is
19 HAVA's requirement.

20 Now, throughout this most recent process, the
21 State, the State Board, the counties, everybody says, "We
22 really want to comply with HAVA, but..." Now, I think the
23 real proof of the pudding, in terms of perhaps where the
24 State and the State Board are coming from, and maybe even
25 some of the counties, is what has happened between

1 September '06, when we first started this plan B and now?
2 Because if, indeed, from our perspective, the State and the
3 counties were interested in serving the disabled population,
4 you would think that in a year-and-a-half, which is
5 basically what we have between September '06 and February,
6 the primary, there would be some enhancement of the ability
7 for people with disabilities to vote consistent with HAVA.
8 Or closer to being consistent with HAVA. But there has not.

9 I mean, the Board's plans -- both of the
10 Board's plans submitted make for no enhancement of
11 accessibility of voting systems for next February. So, you
12 really have to question how devoted they are to complying
13 with HAVA when, in an 18-month period, they can't come up
14 with a plan to increase the number of machines by as much as
15 one.

16 So, I think our focus here needs to be on
17 accessibility and the focus needs to be on next fall having
18 in place, in each polling place in the state, an accessible
19 voting system or voting device that will be HAVA complaint,
20 or as close to HAVA compliant as possible, and allow people
21 with disabilities to vote, to go to a polling place in their
22 neighborhood and vote along with everybody else, which is
23 what HAVA intended.

24 Now, I've seen a lot in some of the filings,
25 the counties in particular, that the machines that were in

1 place for September '06 and subsequent elections didn't get
2 a lot of use from people with disabilities. First of all,
3 it appears that some of the counties seem to think that they
4 know everybody in their county who has a disability and
5 presumes that nobody else really wants to use these
6 machines. But the bottom line is, first of all, Federal Law
7 says there has to be something in every polling place.
8 People with disabilities have a right, as I said, to vote
9 and to vote in their neighborhood polling place, and it's
10 not up to the county, not up to the State Board, to decide
11 to pick and choose what part of Federal Law they want to
12 comply with. Federal Law says it has to be done and it has
13 to be done.

14 And so, what needs to be done, and the focus
15 needs to be, and, in fact, one of the Board plans, the
16 Democratic plan, the Zalen proposal, the one that actually
17 has numbers, the one that actually has dates in it, comes as
18 close right now to doing just that as anything we probably
19 could propose.

20 Now, as I think Mr. Valentine wrote or
21 Mr. Dvorin indicated before, they're already behind schedule
22 here. That's the problem. We have time frames and
23 deadlines set and, all of a sudden, we are weeks down the
24 road. And then two days here, two weeks here, one week
25 here, at the end of a seven- or eight-month period, you lose

1 six weeks, and then you have the argument, "oh, we can't do
2 it, we don't have enough time." So, there needs to be a
3 specific schedule, a deadline for the State to take action
4 to put into place in every polling place in the State next
5 September accessible machines.

6 The process is ongoing, as the State
7 indicated. They have an ITA, they are in the middle of
8 looking at the machines that have been submitted, they're
9 going to be starting testing soon, but that's got to go
10 forward, we can't have these delays, and the State Board
11 then has to certify, they have to give the counties a
12 choice, there has to be a compressed time frame to do this.
13 And we do that, we can meet this deadline for next fall's
14 elections.

15 And I'll point out again that in his
16 affidavit submitted with the response to our motion to
17 enforce, you know, Mr. Zalen, the co-executive director of
18 the Board and who actually has been appointed as the Chief
19 State Election Official in the State by Governor Spitzer,
20 indicated that that time frame is the realistic time frame.
21 At the recent meeting of the Board last week that was
22 referred to. It appeared, based on discussion there, that
23 it was a realistic time frame, and so we think that that is
24 what needs to be ordered, that the Board needs to -- we need
25 to be assured that we can have -- we can take immediate

1 action and have immediate access to get the Court's orders
2 enforced.

3 THE COURT: How? If I were to provide them
4 an opportunity to submit a plan compliant with the
5 conditions the United States would like to see in that plan,
6 and if they do what they've done in the last 16 months,
7 which is promptly not meet the conditions of the plan,
8 what's the federal government proposing I do about that?

9 MR. HEFFERNAN: Okay. First of all, they do
10 have a plan; it's the Zalen plan. It has time frames, it's
11 a plan we can work on.

12 THE COURT: That would require me, would it
13 not, to tell the State Board of Elections the plan they're
14 playing under is the Zalen plan?

15 MR. HEFFERNAN: That is correct, your Honor.

16 THE COURT: That would, on my part, foster
17 the paralysis that they're currently suffering under, as
18 opposed to me telling them I give 'em X number of days to
19 submit a single plan to me and it better meet the conditions
20 that are in the Zalen plan.

21 MR. HEFFERNAN: I couldn't agree more.

22 THE COURT: There's a distinction there, in
23 my view.

24 MR. HEFFERNAN: My only addition to that
25 would be to the extent the Court was gonna give X number of

1 days, it would have to be a fairly short number of days.

2 THE COURT: I understand that. I understand
3 that. And --

4 MR. HEFFERNAN: Short of that, your Honor --
5 then again, your Honor, obviously it's up to us, up to the
6 United States to monitor what's going on. We have been
7 doing that. We moved in August, you know, we moved in
8 November. And it's also up to us to note for the Court any
9 deviation from what's going on here, because, obviously, we
10 have options other than what we've chosen to do so far. We
11 moved to enforce; we thought that was appropriate.

12 As the Court indicated and as we suggest, we
13 have options, in terms of perhaps moving for a Special
14 Master. There are other options, there are contempt options
15 and there may very well be other options. But at this
16 point, this is -- this might be one last chance for the
17 State Board to do what it's supposed to do. And if we don't
18 see the action within the time frame that's supposed to be
19 taken by not only the State Board, but other State entities
20 that may be involved in this process, then, ultimately, it's
21 up to us to do something about it.

22 THE COURT: Thank you.

23 MR. HEFFERNAN: Thank you.

24 THE COURT: You see where I'm at? What do
25 you want?

1 MR. VALENTINE: I -- you know, as I said, the
2 State Board has, you know -- to the extent there is some
3 disagreement with regards to the specific dates, the
4 ultimate steps in those plans are certainly something both
5 sides of the Board have agreed to. The elements of the
6 steps is not the issue. It's those specific dates. And the
7 problem with -- that are often, through elements that are
8 outside of the Board's control, that are -- make it
9 impossible to meet certain dates. An example is vote
10 machine vendors don't want to sell to New York, for
11 instance. You know, if they don't bring us a machine, it's
12 very hard for us to pick a machine, if it doesn't show up,
13 that even meets the minimum standards.

14 THE COURT: I don't control voting machine
15 manufacturers, so I certainly understand that explanation,
16 but that's not really why this process is delayed, because
17 manufacturers have refused to bring a machine. The process
18 is delayed because you're paralyzed by your own inaction, by
19 interference from other bodies associated with New York, be
20 they executive or legislative, by discordant voices in the
21 community dealing with your obligations as a public entity.
22 In other words, I'm not criticizing the difficult position
23 you're in, I understand it. You are the agency that has to
24 give a forum for all of these voices and make a decision
25 that best suits the interests of New York's citizens in

1 compliance with HAVA.

2 But I've already said that to the extent that
3 any of these organizations seek to impede you, Federal Law
4 preempts. So, I don't care what the Comptroller tells ya, I
5 don't care what the Governor tells ya, I don't care what the
6 Legislature tells ya. Federal Law preempts, and therefore
7 your obligation is to go forward and at least meet the
8 minimum standards under HAVA. I think it's laudatory that
9 you want to meet standards that far exceed the minimum
10 standards under HAVA. I'm not opposed to that, I think it's
11 great. But if it paralyzes you to inaction, then you're
12 stuck with the minimum standards under HAVA. You have to
13 get there. I don't want to have to force you to get there.
14 I don't want to have to appoint somebody to stand in your
15 stead to get there. But I will, if that's the only way
16 Federal Law is gonna be implemented in New York.

17 I think what the United States Department of
18 Justice would like is akin to what I would like. I would
19 like to see ya do it on your own. But it's gonna get done.
20 And the only question is am I going to give ya one more
21 chance to get it done? That's up to you, whether you want
22 that chance or whether you don't. But I'm not gonna
23 tolerate what I'm seein' and that's the message -- that's
24 where I started when I said I know I'm talkin' to the
25 lawyers, but they're the medium to the client, so the

1 message has got to go back to the client that I'm not gonna
2 tolerate what's gone on in the last 16 months and I don't
3 care what the excuse is. I don't want to hear the excuses.

4 Does the State Board want to submit a plan to
5 me akin to that identified by the United States in its
6 response to my last question, which is akin to the Zalen
7 plan, or doesn't it?

8 MR. VALENTINE: No, your Honor, the State
9 Board is prepared to do that.

10 THE COURT: When?

11 MR. VALENTINE: Well, if I could have a few
12 minutes to confer with a number of staff here.

13 THE COURT: Go ahead. Confer.

14 MR. HEFFERNAN: Your Honor, if I could say
15 one other thing, obviously we are not ending there. HAVA
16 requires compliance in a number of ways, it requires
17 compliant voting systems. To the extent we are talking
18 about one accessible system, one system in each polling
19 place, that doesn't end the story there.

20 THE COURT: I understand that.

21 MR. HEFFERNAN: Lever machines don't comply
22 with the Act, lever machines have to be replaced and they
23 have to be replaced as soon as is possible. And if that
24 means after the 2008 elections, then so be it, but we want
25 to make sure that the Board is not just planning to put

1 accessible machines and saying, well, that's the end of it.
2 It's not, it's not for HAVA compliance, and the State knows
3 that.

4 THE COURT: Nor do I intend it to be. I'm
5 talking about a plan that deals with full HAVA compliance.
6 That's what I'm talking about.

7 MR. HEFFERNAN: Thank you, your Honor.

8 MR. VALENTINE: No. And just to reiterate,
9 your Honor, the State Board and no member of the State Board
10 has said that, you know, the ballot marking device is
11 sufficient and lever machines will stay. We've never taken
12 that position.

13 THE COURT: I have two plans in front of me.
14 Am I gonna get one? I am not gonna find out the answer to
15 that until you have a couple moments to consult, am I?

16 MR. VALENTINE: Yes, please.

17 THE COURT: Go right ahead.

18 (Pause in proceedings.)

19 THE COURT: How did the caucus go?

20 MR. VALENTINE: I think it went very well,
21 your Honor. Yeah, again, starting with the elements that
22 are in the Zalen plan, as I said earlier, you know, there
23 was no question as to both sides of the Board had agreed
24 that those are the necessary steps to take place. The only
25 issue, and this is why, again, as you offered, and we will

1 accept your offer to allow us some time to make sure that
2 those dates are the dates that are accurate, again, in light
3 of the new testing vendor that we had on who can give us
4 more specific dates, what we would ask for is really 'til
5 January 4th to come back with that response plan, again
6 given a couple days lost in there because of the holidays,
7 but until January 4th to come back with those details. The
8 plan itself would be basically the plan that has the
9 elements that are in the Zalen plan, it'll be worked off
10 from that, so to the extent the Justice Department needs to
11 see the steps that occur and the approximate dates that are
12 in there, they're available to the Justice Department, they
13 have that today.

14 What we are gonna do in the interim time,
15 between now and January 4th, is what we're asking for is
16 time to be assured that those are the accurate dates,
17 particularly with regards to the testing from our vendors,
18 and that the delivery dates -- that we can be assured from
19 the vendors who have offered us machines in response to our
20 procurement can tell us more accurately when they can be
21 delivered to the counties, so, again, it goes to the next
22 step. But those are the dates that we are looking to put
23 together and have back to the Justice Department and to the
24 Court by January 4th.

25 THE COURT: What's the Government say? Hang

1 on a minute. Please.

2 MR. COLLINS: Your Honor?

3 THE COURT: I never meant to exclude you from
4 this this morning.

5 MR. COLLINS: Well, your Honor, sometimes you
6 don't want to stand up in a storm.

7 (Laughter.)

8 MR. COLLINS: Respectfully, your Honor, on
9 behalf of the defendant Zalen and half of the Board, what we
10 would urge is the Court to adopt the Zalen plan with the
11 proviso that Mr. Valentine has added that we gotta verify
12 the dates. What I'm seeking to avoid is the State Board of
13 Elections having to come forward with filing a plan,
14 because, as your Honor knows, many, many a slip between the
15 cup and the lip, and we can't have it here. I would ask the
16 Zalen plan and that we be afforded until January 4th to
17 flesh out the dates now that we have the new testing
18 authority on board.

19 Thank you for hearing me, your Honor.

20 THE COURT: Let me hear from the United
21 States.

22 MR. HEFFERNAN: Your Honor, I don't have a
23 problem with January 4th. I suppose I'm already hearing
24 what we've heard so much in the past, which is, well, we
25 will see what we can do and we may have to change some

1 dates, and the plan as submitted, in a couple months, might
2 not be quite viable now. I saw those suggestions in the
3 meeting the Board had last week. I mean, let the Board come
4 in on January 4th with a proposal that says what it's gonna
5 do and then it's up to us to make a decision at that point
6 whether that's sufficient and whether we need to take
7 further action to perhaps move on a faster schedule or do
8 something else.

9 And one other thing, your Honor, before you
10 say something, if I may. I don't want to give short strife
11 to the submission yesterday by counties that indicated that
12 they think they're prepared to submit fully compliant HAVA
13 systems next fall, and I would not want to preclude any
14 speeding up of the certification process or any possibility
15 that there might be systems available for counties to use
16 next fall which are fully HAVA compliant. As I said, the
17 focus should be on accessibility, because that's what really
18 needs to be done. And if you look at the difference between
19 HAVA compliant machines and lever machines, the
20 accessibility component is most important. But if we have
21 counties out there, and for all I know there might be more
22 than just the six counties, who really believe that if the
23 State Board gets, you know, gets moving, it can implement
24 fully HAVA compliant systems in the fall, ones that they
25 will continue to use past next fall, some ballot marking

1 devices or other systems they may be able to use, but their
2 concern is that if they use something next fall, that they
3 can't use again and some of that money they won't have
4 available for fully compliant systems. So I don't want to
5 preclude counties from being able to do that if they can do
6 that.

7 And if the State moves to get machines
8 certified in a faster fashion than they have proposed. I
9 don't want the State to feel that somehow they're off the
10 hook, like, okay, we just have to deal with accessible
11 machines and so we can forget about the full systems. My
12 understanding is that the testing of these systems is gonna
13 be proceeding on a parallel track, that there are lot one
14 and lot two devices -- in other words, full systems, as well
15 as ballot marking devices -- which have been submitted by
16 all three of the vendors which recently submitted. There's
17 another vendor that apparently has indicated an interest in
18 submitting machines and so, to the extent that the
19 certification process can proceed quickly, on both tracks,
20 for both ballot marking devices, as well as voting systems,
21 then there are some counties that can take advantage of the
22 voting system certification, then that's something we should
23 move on, not putting it off to the side while we only focus
24 on accessible ballot marking devices.

25 THE COURT: I would presume that the State

1 Board doesn't disagree with that assessment and, by all
2 means, I don't disagree with that assessment, I concur. In
3 other words, it's only possible to craft language to go so
4 far. There are always limits in language and it's better
5 that everybody understands what the extent is. I don't
6 disagree with a thing the federal government said here this
7 morning. The obligation is to get machines in place that
8 will accommodate the disabled. And if that can be done more
9 quickly by some counties than it can by others, and I've no
10 doubt that's true for the reasons that Nassau County has
11 articulated here this morning, and I neglected to say, by
12 the way, that -- I think I did, that I intend to take Nassau
13 County's motion for intervention and convert it as an amicus
14 brief and consider it together with the other counties'
15 positions in that regard. If I said it before, I'm sorry
16 for duplicating it; if I didn't, I intended to. So, I
17 concur with the observation. But I would expect the State
18 elections would concur, too. In other words, to say that
19 full compliance has got to occur by such and such a time is
20 not to say that partial compliance shouldn't occur along the
21 way as it's available and the counties are able to comply.

22 The point here is to move the process
23 forward. But is the federal government comfortable that the
24 Zalen plan puts the process in motion? That's what I
25 understood you to say earlier and, frankly, that's what

1 Mr. Zalen is asking me to send the message to the Republican
2 side that the Zalen plan will do.

3 MR. HEFFERNAN: Well, your Honor, as we said,
4 what it will -- ideally, what that plan will achieve is
5 accessibility of voting devices in polling places for next
6 fall. It does not provide for --

7 THE COURT: Complete.

8 MR. HEFFERNAN: -- fully HAVA compliant
9 devices.

10 THE COURT: So would you like to see, as a
11 part of the plan, another segment of the plan that deals
12 with the time frame for full HAVA compliance?

13 MR. HEFFERNAN: Yes, your Honor.

14 THE COURT: All right.

15 MR. HEFFERNAN: But also with the
16 understanding that to the extent, as I said, the
17 certification of systems that would enable counties to
18 implement full systems next fall, that that's something that
19 should be pursued by the Board.

20 THE COURT: All right. I concur. I concur.
21 Yes, sir.

22 MR. COLLINS: Your Honor, the Zalen plan does
23 have a time frame for full HAVA compliance, 2009.

24 THE COURT: I know it does. I know it does.
25 We all like to see full compliance by 2008, but I know the

1 plan has full compliance by 2009.

2 All right. Then the County Board of
3 Elections is going to submit a plan by January 4?

4 MR. HEFFERNAN: State Board, your Honor.

5 THE COURT: What did I say, County? State
6 Board, the State Board is gonna submit its plan by
7 January 4th. I am going to want to know, as promptly as
8 possible, what the federal government's position is
9 regarding that plan and whether further action is going to
10 be required by me in light of whatever the details are that
11 are in that plan. How would the federal government like to
12 respond to the State Board of Elections' submission?

13 MR. HEFFERNAN: Are you asking for a time,
14 your Honor?

15 THE COURT: Or a medium. You can do it by
16 electronic filing with a letter, if you'd like to.

17 MR. HEFFERNAN: Well, I think perhaps the
18 best way to proceed, since we're trying to get things done
19 as quickly as possible, would be perhaps to have a
20 conference with the Court within a very short time frame
21 after we get the submission from the State.

22 THE COURT: Then can I look for the federal
23 government to seek that conference with me and to schedule
24 it?

25 MR. HEFFERNAN: Yes.

1 THE COURT: And I will accommodate the
2 plaintiff in whatever fashion is necessary to expedite it,
3 because I don't want any of this to tarry. In other words,
4 what I have in mind is a plan in place and I expect
5 everybody's feet to be to the fire. And if not, then we are
6 gonna be back over enforcement issues that are more serious
7 than what we've accomplished here today. It's that simple.
8 And I don't threaten, I promise. And if I've got to put
9 somebody in place to do for New York what it can't do for
10 itself, I will do it.

11 Anything further?

12 MR. HEFFERNAN: No, your Honor.

13 MR. COLLINS: No, your Honor, thank you.

14 THE COURT: I appreciate everybody's
15 participation. Thank you.

16 (This matter adjourned at 11:35 AM.)

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CERTIFICATION:

I, THERESA J. CASAL, RPR, CRR, Official Court Reporter in and for the United States District Court, Northern District of New York, do hereby certify that I attended at the time and place set forth in the heading hereof; that I did make a stenographic record of the proceedings held in this matter and cause the same to be transcribed; that the foregoing is a true and correct transcript of the same and the whole thereof.

THERESA J. CASAL, RPR, CRR
Official Court Reporter

DATE:

