UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

-against-

NEW YORK STATE BOARD OF ELECTIONS; PETER S. KOSINSKI and STANLEY L. ZALEN, in their official capacities, and STATE OF NEW YORK,

Defendants.

06-CV-0263

(GLS/RFT)

MEMORANDUM OF LAW IN OPPOSITION TO THE UNITED STATES' MOTION TO ENFORCE THE JUNE 2, 2006 REMEDIAL ORDER

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Preliminary statement

The federal government moves for an order finding Defendants in violation of this Court's June 2, 2006 remedial order and in continuing violation of Section 401 of HAVA. The U.S. further asks the Court to "[e]njoin[] defendants to take immediate and specific steps to carry out their extant obligations under that Order and HAVA." Defendants respectfully request that the motion be denied.

The federal government's perspective on this case is captured in the remarkable opening sentence of its brief, which proclaims that: "[t]he issue that the United States brings before this Court is a simple one (Plaintiff's memorandum of law, p. 1)." Nothing could be further from the truth. Indeed, Plaintiff's characterization of the issue at hand as "simple" merely evidences a refusal to acknowledge the difficulties and complexity of overhauling a locally administered voting system that serves 11 million voters – who use 20,000 voting machines at 8400 polling sites in a state as geographically and demographically diverse as New York – and a failure to recognize the consequences of this change for those voters.

The alleged simplicity of the issue is belied by the various "remedial options" suggested by the government, among which is a plan requiring New York to "enhance[] greatly the availability of ballot marking devices for use by the disabled in the February 2008 primary"and to fully replace its lever voting machines (whether certified or not) with new systems in time for the Fall 2008 elections. (Plaintiff's memorandum of law, pp. 19-22). In reality, implementation of such a plan would require the State of New York – with only eleven months left before the next presidential election – to oversee the testing of multiple new voting systems; contract for the purchase, and obtain delivery, of such systems; work with the counties to train poll workers and educate the public on a totally unfamiliar technology; and sufficiently staff poll sites for the statewide introduction of

that technology.

Plaintiff asks the court to impose this monumental task upon New York, yet provides absolutely no evidence that what it seeks can realistically be accomplished. Nor does it provide any guidance to the court – other than musing that the court "may have to consider . . . placing compliance in the hands of the Court or others . . ." – on how to accomplish the specific remedial measures necessary to have New York fully implement HAVA's voting systems requirements in 2008.

New York, in fact, is already taking "immediate and specific steps" to comply with HAVA's voting systems requirements. But, to the extent that the federal government asks this Court to direct that New York deploy an entirely new voting technology within eleven months for use in a presidential election year, they seek an order requiring either the impossible, or the implementation of a plan which is unfeasible and would create the potential for chaos at the polls in 2008 – the exact opposite of what Congress intended in enacting HAVA.

The U.S. goes to considerable lengths in chastising the New York State Board of Elections ("the Board") for its failure to implement HAVA in a timely manner – going so far as to suggest that the Board is deliberately impeding HAVA implementation. However, as explained below and in the Affidavits of Stanley L. Zalen ("Zalen Affidavit") and Peter S. Kosinski ("Kosinski Affidavit") in opposition to the federal government's motion to enforce the June 2, 2006 Remedial Order[1], the delays have resulted largely from factors beyond the Board's control – including the federal Election Assistance Commission's withholding of negative information concerning the laboratory retained by New York to test voting systems being considered for certification – and from New York's

[1] The Zalen and Kosinski affidavits have been filed and docketed separately on behalf of those defendants.

insistence that the process for selecting and purchasing new voting systems not be compromised.

The issue before the Court is how best to achieve implementation given current circumstances – which, according to the federal government, are that New York is not close to achieving compliance with HAVA's mandates for voting systems to be used in federal elections (Plaintiff's memorandum of law, p. 21). It is against this backdrop that the U.S. asks the Court to mandate the complete replacement of New York's lever machines over the next nine months for use in the September federal primary.

The Court, in its June 2, 2006 Remedial Order, emphasized its obligation to temper any remedial measure "by the need to ensure that the right of every voter to vote is not impaired and that the orderly conduct of the election process itself is not in any way jeopardized (Order, p. 2)." The accelerated implementation which the U.S. seeks would place New York's election process in just the sort of jeopardy that this Court so carefully sought to avoid in its previous order. Indeed, an unrealistic implementation schedule, unrestrained by practical considerations, merely heightens the risk that the uncertainties which plagued the 2000 presidential election and led Congress to enact HAVA would re-occur in the thousands of precincts across New York.

As discussed below, the Board of Elections is pursuing a plan which it anticipates will result in the complete replacement of lever machines by the Fall of 2009 (Plan for Compliance dated October 2, 2007 submitted on behalf of Stanley L. Zalen ("Zalen Plan"), Dkt. n. 133, p. 9; Plan for Compliance dated October 2, 2007 submitted on behalf of Peter S. Kosinski ("Kosinski Plan"), Dkt. n. 130, p. 5). Furthermore, those plans indicate that the Board is working towards increasing the number of ballot marking devices available for disabled voters in the Fall 2008 election, and to possibly have one such device in each polling place by that time (Kosinski Plan, pp. 3-4; Zalen Plan,

p. 4).

Statutory and Regulatory Background

The Help America Vote Act of 2002

Enacted in the wake of the 2000 presidential election, the Help America Vote Act of 2002 ("HAVA"), was designed to improve the administration of federal elections. Of relevance to this motion, HAVA sets forth standards for voting systems used by states in federal elections and mandates that all voting systems meet specific requirements for verification of votes cast, audit capacity, maximum error rates and accessibility to voters with disabilities and to non-English speaking voters. 42 U.S.C. Sec. 15481,

HAVA authorizes financial assistance to states. Section 101 of HAVA provides funding for states to use in implementing the statute's mandated improvements to the voting process, including the standards for voting systems. Section 102 provides funds for states to replace punch card and lever voting machines.

Section 304 of HAVA provides that the requirements for voting systems set forth in HAVA are intended to be minimum requirements, and that states are free to establish stricter standards. In addition, HAVA leaves the specific methods for compliance with HAVA's voting systems requirements to the states' discretion.

New York State HAVA Legislation and Implementing Regulations

On July 12, 2005, New York enacted HAVA implementation legislation, authorizing the acquisition of new voting systems by local boards of elections and setting forth standards for all voting systems in New York State. 2005 N.Y. Sess. Laws ch. 181 (McKinney's) ("Ch. 181")

(ERMA). ERMA's voting system standards, which are delineated in Section 6 of Ch. 181 (repealing and replacing Election Law Section 7-202), incorporate all of the HAVA voting systems requirements and, in several areas, establish additional requirements. Section 6 goes beyond HAVA in requiring a verifiable paper audit trail. Section 7-202(1)(j). Compare 42 U.S.C. 15481 (a)(2). The New York statute also includes more demanding standards than HAVA for disabled accessible devices. Unlike the federal statute, Ch. 181 specifies the technologies to be used in conjunction with voting machines/systems to address particular types of disabilities. Section 7-202(2). Compare 42 U.S.C. 15481(a)(3).

In addition, with respect to new voting machines or systems, Ch.181 requires that SBOE: 1) approve voting systems and machines selected for use by counties; 2) create an election modernization advisory subcommittee to assess and recommend voting machines and systems that comply with state and federal law; 3) review the voting machines chosen by local boards of elections; 4) issue regulations specifying the manner in which contracts for the purchase of new voting machines or systems must be written; 5) approve and/or negotiate and enter into contracts for the purchase of voting machines and systems; 6) promulgate regulations regarding manual audits of voter verifiable audit records; and 7) determine the portion of federal HAVA funds to be allocated to each local election board for purchasing new voting machines or systems.

Chapter 181 initially required the complete replacement of all lever machines in time for the 2007 primary. Ch. 181, § 11. Although, as discussed below, New York has made considerable progress towards achieving HAVA compliance, the New York legislature recognized that meeting that goal was unrealistic and therefore amended Ch. 181, § 11 to remove the September 1, 2007 deadline.

The Certification Process in New York

Pursuant to Election Law Section 7-202, SBOE is responsible for certifying that voting machines used in New York State meet all statutory and regulatory requirements. Counties are required to choose replacements for their lever machines from a list of machines certified for such purposes by SBOE. See Ch. 181, Section 12.

The testing of voting machines for certification in New York State consists of three main components: 1) *security* (i.e., determining that the software and operating systems are secure from internal hacking); 2) *physical functioning of the machine* (i.e., can the machine withstand various environmental conditions, such as moisture, dust, and movement; and 3) *functionality* (i.e., whether the machines will count votes accurately) (Zalen Affidavit, ¶ 37; Kosinski Affidavit, ¶ 38). New York's Election law requires that the State Board engage an outside independent testing laboratory (ITA) to produce reports which assess whether or not those voting systems submitted by vendors for certification meet state and federal standards. Election Law, § 7-201.

POINT I

THE STATE BOARD HAS MOVED AS EXPEDITIOUSLY AS POSSIBLE TO COMPLY WITH THE COURT'S REMEDIAL ORDER, BUT ITS EFFORTS HAVE BEEN HINDERED BY CIRCUMSTANCES OUTSIDE OF ITS CONTROL, INCLUDING THE EAC'S DELAY IN ISSUING VOTING SYSTEM STANDARDS AND THE FAILURE TO DISCLOSE FINDINGS THAT RESULTED IN ITS DENYING CERTIFICATION TO THE STATE'S TESTING AGENT.

SBOE has moved diligently and expeditiously to comply with HAVA's voting system requirements and with the Court's June 2, 2006 remedial order. In accordance with that order, on August 15, 2006 the Board submitted a plan for replacement of the lever voting machines by Fall

2007 (Docket No. 92). The State further complied with the Court's directive that at least one disabled accessible voting machine be placed in each county for the 2006 election – with a number of counties using multiple devices (Zalen Aff. ¶ 58; Kosinski Aff., ¶ 8). In addition, New York has fully met HAVA's requirements for a statewide voter registration database, which were also a subject of the Court's order but are not a subject of this motion (Zalen Affidavit, ¶7). However, as a result of factors outside of the Board's control, it proved impossible to replace New York's lever machines in time for the Fall 2007 elections.

In asserting that "[t]he state has no one to blame but itself for the position it finds itself in today (Plaintiff's memorandum of law, p.18)," the federal government ignores the vital role of the federal Election Assistance Commission (EAC) in setting back New York's compliance efforts. Indeed, any delay in implementing HAVA in New York is largely attributable to postponements by the EAC in issuing standards for new voting systems and to the EAC's failure to provide accurate and timely information regarding the certification status of CIBER, the voting systems testing company retained by New York.

The EAC is a federal bipartisan agency established pursuant to section 201 of HAVA and is charged, among other things, with providing guidance to states regarding HAVA requirements; adopting voluntary voting systems guidelines; serving as a national clearinghouse for election information; accrediting and testing labs; and certifying voting machines.

Although the EAC was to have issued new voting systems standards – to replace the original 2002 standards – by January 1, 2004, it did not release even a draft for public comment until June 24, 2005. (Zalen Affidavit, ¶ 8, Exhibit B; Kosinski Affidavit, ¶ 30).[2] The EAC stated at that time

[2] Unless otherwise indicated, the exhibits referred to are those annexed to the Zalen Affidavit.

it "proposes that the guidelines become effective 24 months after final adoption, which is anticipated to take place in October 2005 (Id.)." Final Adoption however did not actually occur until December 13, 2005, with publication not posted until January 12, 2006 (Id.).

The 2005 Voluntary Voting System Guidelines (2005 EAC Standards), while voluntary, provide nationally recognized testing standards for voting machines and significantly increase security requirements for voting systems and expand access, including opportunities to vote privately and independently, for individuals with disabilities. As the EAC put it: "These guidelines were created to ensure that voting systems will be accurate, reliable, secure and accessible to all voters . . . [the] EAC will also certify all voting systems to make certain that they meet these goals. The voluntary guidelines provide a set of specifications and requirements against which voting systems can be tested to determine if the systems provide all of the basic functionality, accessibility and security capabilities required of these systems. In addition, the guidelines establish evaluation criteria for the national certification of voting systems." (Zalen Affidavit, ¶25, exhibit I; Kosinski Affidavit, ¶31). The State Board, recognizing the merits of the new standards, adopted them for use in New York on June 6, 2006. 9 NYCRR 6209.2(a).

The failings of the EAC do not end with its delay in issuing voting systems standards. In addition, the agency withheld from New York damaging information regarding CIBER, the testing laboratory retained by the State. Had that information been disclosed in a timely fashion, New York could have terminated its relationship with CIBER and contracted with another firm many months before it was forced to do so when the EAC finally denied certification to CIBER.

A critical component of the implementation schedule set forth in the State Board's plan was the timely testing of new voting systems under consideration for certification. Unfortunately, at the

same time that New York was submitting its plan to the Court in August 2006, the Independent Testing Authority (ITA) with which it had contracted was – unbeknownst to the State – under EAC scrutiny for deficiencies in its performance.

HAVA requires that the EAC "provide for the testing, certification, decertification, and re-certification of voting system hardware and software by accredited laboratories." HAVA Section 231 (a)(2). Under HAVA, states are given the option of providing for the "testing, certification, decertification, and re-certification of its voting system hardware and software by "*laboratories accredited by the Commission*". HAVA Section 231(a)(2) (emphasis added).

In January 2006, New York contracted with CIBER, a lab that had been given interim certification (Zalen Affidavit, ¶ 14; Kosinski Affidavit, ¶ 39).[3] The EAC became aware of significant shortcomings in CIBER's performance as early as July of 2006, when it conducted an assessment which concluded that CIBER was deficient in its performance and required additional quality control management. The findings were such that another assessment was scheduled for 120 days later (Zalen Affidavit, ¶ 17, Exhibit E; Kosinski Affidavit, ¶ 41). For reasons known only to the EAC, this information was not shared with the State Board which continued to engage CIBER – unaware of the EAC's serious concerns regarding the laboratory's performance. Indeed, it was not until September 15, 2006 that the results of the July Assessment were conveyed to CIBER by a letter from Thomas R. Wilkey, the Executive Director of the EAC. In that letter, Mr. Wilkey directed CIBER to implement certain quality control practices and then apply for a new assessment of its qualifications to continue in the interim certification program (Zalen Affidavit, ¶ 18; Kosinski Affidavit, ¶42).

[3] ITAs were certified only on an interim basis (Zalen Affidavit, ¶¶ 10, 14).

Even without the benefit of the EAC's concerns, the Board, as a precaution, hired the New York State Technical Enterprise Corporation (NYSTEC) to conduct an independent review of CIBER's testing plan (Zalen Affidavit, ¶21). CIBER was required to complete a draft security master test plan by September14 2006, which was to include all required security regulations and tests. However, CIBER's draft plan was so deficient that NYSTEC recommended substantial additional security requirements (Id.). CIBER's next draft was submitted on October 9, 2006, but its inadequacies were such that at meetings between NYSTEC and CIBER in Albany on October 18 and 19, 2006, NYSTEC documented and discussed more than 200 security requirements that still needed to be added. Those revisions were not complete until January 2007 (Zalen Affidavit,¶22).

On December 6-8, 2006, the EAC conducted another Assessment of CIBER which resulted in a Report dated January 18, 2007 (Zalen Affidavit, ¶ 23; Kosinski Affidavit, ¶ 44). Remarkably, the findings of that Report were not shared with the State Board which, in reliance on the interim EAC certification, continued to engage CIBER as its ITA (Id.). It was not until January 4, 2007 that the CIBER infirmity became public through an article in the New York Times, and then only because CIBER had released it to a third party (Id..) The State Board first learned of the possibility that CIBER might lose its interim certification when the EAC voted to revoke that certification on June 11, 2007. In its June 13, 2007 rejection letter to CIBER, the Chair of the EAC, Donetta Davidson, stated:

> Finally, as you know, the EAC Commissioners voted to close the interim accreditation program under which you are seeking accreditation on February 8, 2007. This interim program served only to temporarily accredit test laboratories to conduct testing to the 2002 VVS. Ultimately, the EAC will cease certifying full voting systems to the 2002 VSS in December of this year, a mere six months from now. Continuing to utilize EAC's limited resources to accredit CIBER solely to a soon to be obsolete standard under a defunct interim accreditation program adds little value to EAC's certification program. This conclusion is made even more poignant

> when you consider that the EAC now has an established permanent accreditation program to accredit laboratories using NIST/National Voluntary Accreditation Program (NVLAP) as required by the Help America Vote Act.

(Zalen Affidavit, ¶ 24, Exhibit H; Kosinski Affidavit, ¶ 45).

Because of the problems with CIBER, New York had to retain a new testing service and initiate the procurement steps necessary to do so. That process, as discussed below, has just been completed. However, had the EAC kept New York informed of its findings regarding CIBER, the State would have been a position to begin looking for an ITA much sooner, and would likely already be well into the process of testing voting systems.[4]

Still, despite the various roadblocks that it has faced, the Board is on the verge of testing new voting systems to the 2005 standards. And the progress made by the Board in recent months belies the federal government's suggestion that New York intends to delay indefinitely the replacement of its lever machines. Rather, as set forth in the Zalen Affidavit and in both compliance plans submitted to the Court on October 2, 2007, the Board anticipates that new voting systems will be in place for the Fall 2009 elections (Zalen Affidavit, ¶58, Kosinski Plan, p. 9; Zalen Plan, p. 7) and is making every effort to achieve that goal (Zalen Affidavit, ¶¶ 30-36; Kosinski Affidavit, ¶¶ 54-56, 60).

The State just completed another RFP process for the engagement of a new ITA and has negotiated, executed, and received the requisite State approvals for a contract with Systest Labs, one of three EAC-accredited laboratories capable of certifying election systems to the 2002 and 2005 EAC standards (Zalen Affidavit, ¶ 34; Kosinski Affidavit, ¶ 49). On a parallel track, New York is

[4]The U.S. seems to suggest that the Board should somehow be held accountable for the fact that the New York State Comptroller's initially rejected SBOE's ITA choice during the second ITA procurement process (Plaintiff's Memorandum of Law, p. 6). The Board, however, had no control over the Comptroller's action, and had no choice but to follow state procurement process requirements.

currently engaged in a continuous recruitment for voting systems. To date, three (3) vendors – Avante, ES&S and Premier/Diebold have submitted proposals. Those responses will be evaluated and tested for compliance with the RFP by Systest Labs, New York's new ITA. If they pass the certification process, contracts for their purchase by the various counties will be negotiated by OGS. (Zalen Affidavit, ¶ 35; Kosinski Affidavit ¶ 56). Thus, the federal government's assertion that "there are currently no voting systems that have been submitted to the State, or for that matter *no* voting systems that now exist that can be submitted to the State, that will meet the state's certification standards[,](Plaintiff's memorandum of law, p. 17) (emphasis in original)" is no longer accurate, since three (3) vendors have submitted proposals for systems that they believe meet New York's certification standards.

POINT II

THE FEDERAL GOVERNMENT SEEKS RELIEF WHICH IS NEITHER IN THE PUBLIC INTEREST NOR CONSISTENT WITH THE PURPOSES OF, AND CONGRESSIONAL INTENT BEHIND, HAVA.

"The essence of a court's equity power lies in its inherent capacity to adjust remedies in a feasible and practical way to eliminate the conditions or redress the injuries caused by unlawful action. Equitable remedies must be flexible if these underlying principles are to be enforced with fairness and precision." Freeman v. Pitts, 503 U.S. 467, 487 (1992**)**. In exercising its equity powers, a district court "may exercise its discretion to give or withhold its mandate in furtherance of the public interest, including specifically the interest in effectuating the congressional objective incorporated in regulatory legislation." Natural Resources Defense Counsel Inc. v Train, 510 F.2d 692, 713 (D.C. Cir. 1974). Where serving the public interest implicates the authority of state and

local governments, courts must tread carefully. Indeed, "one of the most important considerations governing the exercise of equitable power is a proper respect for the integrity and function of local institutions." Missouri v. Jenkins, 495 U.S. 33, 54 (1990). To that end, "equitable relief is limited by considerations of federalism, and remedies that intrude unnecessarily on a state's governance of its own affairs should be avoided." Association of Surrogates and Supreme Court Reporters v. State of New York, 966 F.2d 75, 79 (2d Cir. 1992).

The Department of Justice's proposed shortcut to lever machine replacement is premised on its contention that New York State's voting systems requirements are an unnecessary impediment to HAVA implementation. To the contrary, however, those requirements serve the very purposes of HAVA by protecting the fundamental right to vote.

An order requiring New York to rush into the procurement, testing and training necessary to meet a September 2008 deadline – even if it forces New York to ignore its own, as well as the EAC's, standards for voting systems and to use machines that have not been certified to meet *any* standards – would plainly ill-serve the public interest in fair and accurate elections which protect the fundamental right to vote**.** Such relief would also contravene Congress's intent, in enacting HAVA, to promote the use of reliable and accurate voting technologies, and to leave the details of implementation to the states. Indeed, granting the relief sought by the U.S. would, as a practical matter, force New York State to abandon its comprehensive plan for modernizing and improving its election process – an outcome inconsistent with both the intent of HAVA and with the traditional role of the states in administering state and federal elections.[5]

[5] The federal government also seeks an order requiring New York to use disabled ballot marking devices on a "greater scale" in the February 2008 presidential primary – a mere ninety-two (92) days after the Department of Justice's Notice of Motion. The State Board is currently engaged in an orderly process for acquiring both disabled-accessible ballot marking devices for use in the Fall of 2008 and permanent lever machine replacements for 2009.

The Supreme Court has recognized the critical, indeed primary, role played by states in regulating elections:

> [T]he states have evolved comprehensive, an in many respects complex, election codes regulating in most substantial ways, with respect to both federal and state elections, the time, place and manner of holding primary and general elections, the registration and qualifications of voters, and the election and qualification of candidates.

Storer v. Brown, 415 U.S. 724, 730 (1974).

Recognizing this reality, Congress went out of its way in crafting HAVA to ensure that States would continue to exercise considerable authority in this area. Specifically, Congress provided that states may establish stricter standards than those set forth in HAVA (§ 304), and expressly left the specific methods for implementing HAVA's voting systems requirements to the states' discretion (§305). Congress's concern that states and localities maintain their control over the administration of elections is reflected in the comments of Representative Ney, one of the chief sponsors of HAVA:

> By necessity, elections must occur at the State and local level. One-size-fits all solutions do not work and only lead to inefficiencies. State and locales must retain the power and flexibility to tailor solutions to their own unique problems. This legislation will pose certain basic requirements that all jurisdictions will have to meet. But they will retain the flexibility to meet the requirements in the most effective manner.

148 Cong. Rec. H 7836 (October 10, 2002).

The New York State Legislature has enacted, and the Board is implementing, a sweeping reform of the voting process in New York that – as contemplated by Congress in enacting HAVA – also provides additional protection for voters against many of the sorts of problems experienced

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That process is well underway. However, New York simply cannot install massive numbers of ballot marking devices throughout the state in the less than two months left before the presidential primary. (Zalen Affidavit, ¶ 31; Kosinski Affidavit, n. 16).

by other states in adopting new voting systems pursuant to HAVA.

In this regard, New York has been a leader in the certification of voting systems throughout the United States. Its commitment to holding secure and accurate elections is evidenced by its being one of the first states to require a verifiable paper audit trail for direct recording electronic voting machines (now required under the 2005 EAC standards). Election Law § 7-202(1)(j). In addition, Election Law section 7-202(1)(p)(2) goes beyond HAVA in establishing requirements for making voting systems accessible to disabled voters, including tactile controls, audio voting and pneumatic voting controls (the "sip and puff" switch). The Department of Justice, however, urges the Court to nullify those efforts for the sake of replacing lever machines one year earlier than otherwise expected by New York.

Conspicuously absent from the federal government's moving papers is any concrete proposal as to how New York, in less than a year, can replace all its lever machines with systems that can be counted upon to perform reliably and accurately in the 2008 presidential elections. Instead, the U.S. blithely proffers that the "Court can bypass the numerous complications defendants try to place in the way of compliance, and focus on a simple remedy to ensure compliance with federal mandates."[6]

The "numerous complications" referenced by the federal government presumably include the myriad of steps required by New York law to ensure the functionality, accuracy and security of

[6] The Department of Justice's only 'practical' solution, the use of paper ballots (Plaintiff's memorandum of law, p. 21, nn. 32), is no solution at all. New York State has over 11 million registered voters with counties ranging in size from just over 5000 registered voters in Hamilton County, to over 4 million registered voters in New York City. For New York to go to an entirely paper ballot election would be to take a giant step backwards by eliminating machines, and having county boards perform the unwieldy and impractical task of counting over 6 million paper ballots. It would be massive undertaking to switch to hand counting paper ballots in a State that has not voted on a paper ballot system in 100 years (Kosinski Affidavit, n. 1).

the new voting systems. The U.S. gives short shrift to New York's added protections for voters, simply observing that, "to the extent that New York's state laws impose stricter security, accessibility or other requirements on voting systems than federal law mandates (Plaintiff's Memorandum of Law, p. 16)," those requirements must take a backseat to the zeal to have New York replace its lever machines in 2008. The annoying complications to which the federal government refers also apparently include New York's incorporation of the 2005 EAC voting system standards in its implementing regulations. Those standards, which the EAC issued in light of the states' experiences in implementing HAVA, "[s]ignificantly increase security requirements for voting systems and expand access, including opportunities to vote privately and independently, for individuals with disabilities (Zalen Affidavit, ¶ 25, Exhibit I; Kosinski Affidavit, ¶ 31)." Thus, the federal government would have this Court run roughshod not only over state standards, but over those established by the body created by HAVA to guide and assist states in implementing that statute's voting systems requirements.[7] The U.S. goes so far as to offer the remarkable suggestion that New York be directed to use machines that are not even certified (Plaintiff' Memorandum of Law, p.21).

This latter point bears emphasis, because if carried to its logical endpoint, the federal government's argument that HAVA should completely trump state law in order to have new voting systems in place by 2008 means that voters should be asked to use machines that have not been

[7] One alleged state law impediment to HAVA compliance that the U.S. posits is the requirement of Election Law §7-208 that all vendors to escrow the source code for their voting systems prior to being certified and available for purchase in New York State. Any such concern is premature. The escrow requirement is not related to whether a voting system can meet the standards for operating and is not an obstacle to testing. Any problem would only arise, if at all, after the testing process. Based upon the responses to the bids for voting system, to date, no vendor has raised this as an exception to the terms of the procurement. In addition, the State Board is having a consultant examine possible alternatives to the traditional escrow arrangements that also meet the need to preserve the entire voting system in the event of future election challenges (Kosinski Affidavit, ¶53).

tested against, or certified as meeting, any standards for functionality, reliability, accuracy or security. HAVA merely provides broad requirements for new voting systems, leaving to states the task of developing specific standards and processes for meeting those requirements. Should state statutory and regulatory requirements be bypassed, there will be nothing to fill the void. New York, it seems, will be left with no choice but to contract for, and have counties purchase, untested and uncertified machines for use in 2008 – a palpably absurd result.

Moreover, the experience of other states in implementing HAVA only highlights the need for setting exacting standards for, and conducting rigorous testing of new voting systems. Electronic voting systems deployed in Florida, North Carolina, Indiana, Ohio, Maryland and California, to name a few, have been plagued with certification questions, security concerns and questions about the reliability and accuracy of their paperless ballots (Zalen Affidavit, ¶ 42, Exhibit G, p. 9; Kosinski Affidavit, ¶ 22). Nearly half of the states missed one or more of HAVA's deadlines largely because questions remain about voting system reliability, security and accuracy (Zalen Affidavit ¶ 43, Exhibit G., p. 5; Kosinski Affidavit, ¶ 22). These are the kinds of devastating problems that New York is taking great care to avoid.

A recent report titled "The Help America Vote Act at 5," produced by electionline.org[8] in conjunction with The Pew Center on the States and its Make Voting Work initiative, provides perspective on the difficulties many states have experienced in their efforts to become HAVA-compliant. (Kosinski Affidavit, ¶ 23). The report cites "electronic voting system glitches, snafus and

[8] *electionline.org*, a project of the Pew Center on the States, is a self-described "nonpartisan, non-advocacy website providing up-to-the-minute news and analysis on election reform." Established by Pew after the November 2000 vote, *electionline* provides "a forum for learning about, discussing, and analyzing election reform issues. *electionline.org* also provides research on questions of interest to the election reform community and sponsors conferences where policymakers, journalists and other interested parties can gather to share ideas, successes and failures." http://www.electionline.org/AboutUs/tabid/102/Default.aspx

full-blown breakdowns" in states such as California, North Carolina and Maryland as contributing to an erosion of confidence in paperless systems. ("Help America Vote Act at 5", copy annexed, at p. 2, 15-18). It also cites "fears of manipulation of source codes on electronic voting machines and altering vote counts with election management software." (Id. at p. 13). The report acknowledges that New York's delay has allowed the state "to learn from other states' mistakes while collecting interest the HAVA funds," and notes that "[i]n contrast, some large South Florida counties will be using their third voting system in as many presidential election cycles . . ." (Id. at p. 10). In fact, during the 2002 primaries, two of Florida's most populous counties "were plagued with machine problems from the moment the polls opened (hours late in many locations) until closing. The meltdown was largely pinned on poll-worker inexperience with the new technology, but poor training and machine glitches played a large part." (Id. at p. 13).

Beyond the integrity of the voting system itself, the Court should consider the impact upon public confidence of a hastily configured procurement scheme. The lessons learned in New Jersey offer a cautionary tale in this regard. In New Jersey's haste to achieve full HAVA compliance, many counties went ahead and purchased new voting systems using HAVA funds – despite that State's Attorney General refusal to certify voting systems to the old 2002 EAC because of the anticipated promulgation of 2005 standards. The New Jersey State Commission on Investigation found that those systems were purchased without competitive bids but more importantly, that the certification process was through "independent" testing laboratories, *paid directly by the voting system vendor* (Zalen Affidavit, ¶ 75, Exhibit K at p. 4).

The New Jersey State Commission on Investigation praised the New York system of certification, wherein the state, rather than the vendor, contracts with the testing laboratory. It also

lauded the fact that New York had incorporated the 2005 EAC standards into its state certification process (Id., ¶ 76, Exhibit K at p. 5). These measures may have slowed New York's efforts to reach full HAVA compliance, but should instill confidence in its citizens that the State and its Board of Elections place the integrity of the voting process above all other considerations.

The Department of Justice's position that New York ought to disregard the 2005 EAC standards is puzzling to say the least. The Justice Department has been witness to numerous problems across the country – and is certainly aware of the potential for future difficulties – as states move to new voting technologies. The EAC considered the threat to the integrity of the election process to be such that it issued a completely new set of guidelines that offer safeguards against future voting systems failures. When DOJ opines that New York could readily replace its lever machines with the same devices employed in other states, it undoubtedly does so with the full knowledge that not a single system has been certified by the EAC or by any state as meeting the 2005 standards (Zalen Affidavit, ¶¶27-28; Kosinski Affidavit, ¶ 33). New York's insistence that it certify only those machines that meet the latest EAC standards may have delayed the certification process, but it is a delay fully justified in light of past experience. That the Justice Department thinks otherwise is incomprehensible.

It bears emphasis that hasty implementation of HAVA for federal elections would, as a practical matter, necessarily force New York to forgo implementing state voting system standards set forth in Ch. 181 with respect to its own state elections. Once having acquired new machines to satisfy DOJ's demand for lever replacement in 2008, New York and its counties would hardly be in a position to spend millions of dollars in a few years to purchase yet another set of voting machines that meet New York State and EAC standards. DOJ's suggestion that, "[a]t whatever

future time the State has available to it voting systems that meet its expanded State law requirements for certification, the State can implement the use of such systems (Plaintiff's Memorandum of Law, p. 22)" simply rings hollow.

Although the authority to regulate the times, places and manner of federal elections – which the U.S. Constitution vests in the states (Art. I, § 4, cl. 1) – is subject to the powers reserved by the federal government to regulate elections, elections for state office are not subject to such federal regulation. Granting the federal government the remedy it seeks would therefore not only override state regulation of elections, it could also result in the deployment of voting systems for both federal *and* state and elections that have yet to meet *any* objective standards.

It is particularly difficult to understand the federal government's push for full lever replacement in 2008 in light of the fact that lever machines provide a proven and reliable method of voting (Zalen Affidavit, ¶ 78 ; Kosinski Affidavit, ¶ 65). Notwithstanding the federal government's characterization of New York's lever machines as "ancient" (Plaintiff's memorandum of law, p. 15), it offers absolutely no basis for concluding that the temporary continued use of such machines will in any way impair the ability of New Yorkers to exercise their right to vote. In fact, these machines, which New Yorkers have used all their voting lives, have proven dependable and accurate during the many years that they have been in use (Zalen Affidavit, ¶52). And, to the extent that lever machines do not offer the accessibility features required by HAVA, the Board is working towards increasing the availability of such machines.

On the other hand, the hurried replacement of lever machines that the U.S. requests could result in confusion and chaos at the polls. As complex and involved as the certification process is, the herculean task faced by the counties in adopting new voting technologies may be even more

imposing. To ensure fair and orderly elections, it is imperative that local officials be given adequate time to complete that task.

The Federal government, while recognizing the daunting task that counties face in attempting to implement just the disabled-accessible requirements of HAVA for the 2008 Fall elections, dismisses any concerns in that regard by observing that hard work "is exactly what is needed to bring the State (and the counties) into compliance with federal law (Plaintiff's memorandum of law, p. 23)." If only things were so simple.

The challenges of converting to new voting systems are greater in New York than in most other states because of New York's size and demographic diversity. New York's sixty-two counties, which bear the lion's share of work in implementing HAVA's voting systems requirements, include densely populated urban areas, such as New York City, and largely rural regions in upstate New York. Selecting appropriate technologies that adequately accommodate disabled voters and meet multi-lingual needs for such diverse geographical areas and populations requires great care. Training poll workers and educating voters around the State requires developing entirely new curricula for new voting systems, training trainers, and ensuring that 60,000 part-time poll workers truly understand how the new voting systems work and know what to do when they do not. As previously stated, there is also the basic task of selecting, contracting for, awaiting the manufacture and delivery of, certifying, and installing thousands of new voting systems throughout the state (Zalen Affidavit, ¶ 44; Kosinski Affidavit, ¶ 66).[9] It will simply be impossible to complete this work within the time frame demanded by the Department of Justice (Zalen Affidavit, ¶30). Furthermore, adhering to that schedule would drain resources from the state and local boards of elections throughout the state that

[9] New York presently uses approximately 20,000 voting machines in over 8,400 different polling places.

are critical to New York's ability to ensure smooth and orderly elections next Fall (Kosinski affidavit, ¶66; Zalen Affidavit, ¶79).

There is more than a little irony in the federal government's demand that New York hasten to fully replace its voting systems in time for the 2008 presidential election. HAVA was Congress's response to the confusion and controversy surrounding the 2000 presidential voting. Forcing New York to bypass its certification process and authorize the purchase of voting systems that have not been tested to the current EAC standards, and asking the counties to scramble to deploy those systems, only invites a repeat of the 2000 Florida debacle.

Indeed, the Supreme Court decision which ultimately decided the 2000 election offers a glimpse of the possible fallout from a hasty conversion to new voting systems in New York. Pursuant to 3 U.S.C. §5, electoral college votes chosen by the states are conclusive, and insulated from congressional challenge, if all judicial and or administrative contests concerning the selection of electors are made at least six (6) days prior to the time fixed for the meeting of the electors, which is held on "the first Monday after the second Wednesday in December." See 3 U.S.C. §7. If New York's electoral college votes remain in doubt through mid-December – a distinct possibility given the litigation likely to arise from the accelerated replacement of lever machines – New York's Electoral College votes lose the safe harbor protection of 3 U.S.C. §5 and are subject to question and invalidation by Congress. The prospect that there was insufficient time to properly recount Florida's popular vote before the State's protection under 3 U.S.C. §5 would expire, led the Court to reverse the Florida Supreme Court's judgment ordering a recount to proceed. Bush v. Gore 531 U.S. 98, 110 (2000).

Conclusion

The circumstances under which the Court issued its June 2, 2006 Remedial Order have changed considerably over the last 18 months. As discussed above, New York's inability to meet the implementation deadline contained in the remedial order is attributable to a variety of factors outside the Board's control, including problems with CIBER and the EAC's failure to alert the Board as to those problems. But beyond the specific obstacles to New York's implementation of new voting systems, the continuing difficulties encountered by other states in adopting new voting technology has, quite rightly, caused the State Board to approach its task with particular caution. And just as the State should take those experiences into account as it moves ahead with HAVA compliance, so too should the Court take into account the potential problems revealed by HAVA implementation efforts across the country.

In effect, this Court is now being asked to modify its initial remedial order in light of the impossibility – as acknowledged by the Department of Justice – of meeting the original deadlines. The U.S. would have the Court, in fashioning a modification, simply ignore the legitimate reasons for delay, including those related to preserving the integrity of the voting process, and order immediate compliance. The Court should resist adopting such a drastic, simplistic and potentially disastrous solution. Instead, the Court should recognize and take into account the significant changes that have occurred in the elections process landscape since it issued its June 2006 Order.

Cases addressing the power of district court's to modify injunctive relief – either *sua sponte* or in ruling on a motion brought pursuant to Fed. R. Civ. P. 60(b) – are particularly instructive here. "The power of a court of equity to modify a decree of injunctive relief is long-established, broad and

flexible." NYS Association for Retarded Children, Inc. V. Carey, 706 F.2d 956, 967 (2d Cir. 1982). Moreover, it is well established that, in cases involving institutional reform, "judicially-imposed remedies must be open to adaptation when unforeseen obstacles present themselves present themselves, to improvement when a better understanding of the problem emerges, and to accommodation of a wider constellation of interests than is represented in the adversarial setting of the courtroom." Id. at 969 (2d Cir. 1982). And, as the Supreme Court has noted, "the public interest is a particularly significant reason for applying a flexible modification standard in institutional reform litigation because such decrees 'reach beyond the parties involved directly in the suit and impact on the public's right to the sound and efficient operation of its institutions.'" Rufo v. inmates of the Suffolk Co. Jail, 502 U.S. 367, 381 (1992), *quoting*, Heath v. De Courcy, 888 F. 2d 1105, 1109 (6th Cir. 1989).

There can be no argument that the complete overhaul of a state's elections process constitutes the type of government "institutional reform" which implicates a significant public interest. And it is beyond dispute that any modification to this Court's June 2006 decree will directly impact New Yorkers' right to "sound and efficient operation" of their elections, especially if the Court were to adopt wholesale the U.S.'s plan for full compliance by Fall 2008. Accordingly, the state of New York asks that the Court consider the unforeseen obstacles that have arisen during the Board's efforts to comply with the June 2006 Order; deny the federal government's motion; and modify the order in a manner consistent with the Board's submissions.

Dated: Albany, New York
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