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

UNITED STATES OF AMERICA, Plaintiff, v. NEW YORK STATE BOARD OF ELECTIONS; PETER S. KOSINSKI and STANLEY L. ZALEN, Co-Executive Directors of the New York State Board of Elections, in their official capacities; and, STATE OF NEW YORK; Defendants.	)	Civil Action No. 06-CV-0263 (GLS)

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

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The issue that the United States brings before this Court is a simple one. In October 2002, Congress enacted the Help America Vote Act ("HAVA"), 42 U.S.C. 15301 et seq. Of pertinence here, this federal law has required every state in the nation, as of January 1, 2006, to meet certain minimal standards for voting systems used in federal elections. With the glaring exception of New York, every state has met these requirements and implemented HAVA-compliant voting systems for use in federal elections.[1] However, because New York failed to meet these federal mandates, on March 1, 2006, the United States filed this action. On June 2, 2006, having found the defendants in violation of federal law, this Court ordered that the defendants take specific action toward full HAVA compliance.

Today, there can be no dispute that defendants have failed substantially to comply with this Court's Remedial Order and continue to operate in violation of the voting systems requirements of HAVA. Moreover, in what can only be viewed as symptomatic of New York's inability to function in this regard, the State Board of Elections ("SBOE") has proven incapable of complying with this Court's August 29, 2007 order that defendants propose yet another plan for much-belated compliance with the requirements of federal law. Rather, the commissioners of the SBOE have proposed two separate plans for review, apparently unable to move this remedial process even a slight bit forward through agreement. Not surprisingly, each plan attempts to paint an overly complicated picture of compliance mired for the most part in State law and procedure, apparently aimed at excusing in some manner the SBOE's inability to carry out its federal law obligations to date. But this action is not one to enforce State-imposed requirements on New York's voting systems. Rather, in the end, the issue here remains a simple one of non-

[1] See Electionline Report, Voting Systems 2007 (updated 9/18/07) (Exhibit A). Link found at http://www.electionline.org/Default.aspx?tabid=1099.

compliance with clear federal statutory requirements.

The United States submits that both proposed October 2, 2007 SBOE plans fail to comply with federal law and should be rejected by this Court. Moreover, further definitive action by this Court is necessary to ensure fulfillment of the defendants' remedial obligations. But as we set forth below, in taking such action, this 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.

Pursuant to this Court's equitable authority to enforce its own lawful orders and Section 401 of HAVA, 42 U.S.C. 15511, the United States respectfully moves this Court for an Order finding defendants in violation of the June 2, 2006 Remedial Order entered in this action, and in continuing violation of Section 301 of HAVA, and enjoining defendants to take immediate and specific steps to carry out their extant obligations under that Order and HAVA.[2] In support of this Motion, the United States submits the following Memorandum.

I. BACKGROUND

The United States filed its Complaint in this action on March 1, 2006, alleging that Defendants failed to comply with HAVA. Docket #1. In relevant part, the United States alleged that, in federal elections, Defendants failed to ensure that voting systems in New York meet the standards set forth in Section 301 of HAVA, 42 U.S.C. 15481.[3]

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[2] As we note below, if defendants are unable and/or unwilling to make immediate progress in meeting their obligations, the Court may have to consider taking compliance out of the hands of the State and placing it in the hands of others appointed by the Court to achieve compliance with federal law. See United States v. State of Alabama, (M.D. Ala. July 21 & Aug. 8, 2006) (Exhibits K & L).

[3] The United States also alleged, and this Court found, that the State had failed to create a computerized statewide voter registration list, as required by Section 303(a) of HAVA, 42 U.S.C. 15483(a). The Remedial Order requires the defendants to take actions to comply with the statewide registration list requirements of Section 303(a). This Motion does not involve this aspect of the defendants' compliance obligations.

On March 6, 2006, the United States filed a Motion for a Preliminary Injunction, seeking *inter alia* an order for the State to come into compliance with Section 301 and to produce a plan specifying how the State will achieve such compliance. Docket #18. On March 23, 2006, the Court granted the United States' Motion for Preliminary Injunction, finding the SBOE in non-compliance with Section 301 and ordering the SBOE to file with the Court a plan for HAVA compliance. Docket #38. On June 2, 2006, this Court entered its Remedial Order resolving the issues between the parties and specifically retaining the Court's jurisdiction to enforce its terms. Docket #77.

In significant part, the Remedial Order requires the State to implement HAVA-compliant voting systems throughout the State in time for the September 2007 elections. To that end, the State, on September 7, 2006, filed with the Court a proposed schedule for voting systems implementation (Docket # 96). This schedule dealt with the various components of the state's voting systems implementation plan, most significantly: 1) procurement of the services of an independent testing laboratory ("ITA") to test voting systems, development of a certification protocol for testing voting systems to State certification standards, and actual certification testing of voting systems; and 2) submission of voting systems by private vendors for certification testing, and subsequent actions to procure certified systems chosen by counties and provide for delivery, local testing and training on such systems for use in federal elections.

A. <u>HAVA Compliance</u>

The United States' relevant claim in this action is that the existing aged lever voting machines used throughout the State of New York fail to comply with at least two key requirements set forth in Section 301 of HAVA for federal elections. First, these lever machines do not meet the requirement that at least one voting system in each polling place meet the

disability accessibility requirements set forth in Section 301(a)(3) of HAVA, 42 U.S.C. 15481(a)(3). Second, these lever voting machines do not meet the requirement of producing a permanent paper record with manual audit capacity set forth in Section 301(a)(2) of HAVA, 42 U.S.C. 15481(a)(2).[4]

Pursuant to the June 2, 2006 order, in the 2006 federal elections in New York, in September and November of that year, the State implemented a very limited plan for starting to come into compliance with the accessibility standards of HAVA set forth in Section 301(a)(3), by certifying and procuring at least one accessible voting system *per county* under the State's so-called "Plan B" for disabled-accessible ballot marking devices. A few counties provided more than one such accessible voting system per county, but no county provided more than a small number of such systems relative to county size, and no county came close to meeting HAVA's requirement that there be one accessible system *per polling place*. In the 2006 federal elections, the state did not replace any of its existing lever voting machines with new HAVA-compliant voting systems under its so-called "Plan A" and thus the state did not achieve any level of compliance with the manual audit capacity requirement in Section 301(a)(2) of HAVA. As set forth below, because of delays in the state's HAVA compliance efforts and because of the inability of a majority of the SBOE to agree on a compliance plan going forward, it seems clear that absent Court intervention the State will not achieve any additional improvement in HAVA compliance for voting systems in the 2008 federal elections (in February, September and November of next year) than it did in 2006.

[4] For a complete description of the United States' claims in this action, background on HAVA and the State's inaction in complying with this statute, see pp. 1-9 of the United States' Memorandum in Support of Motion for Preliminary Injunction (Docket #18).

B. Certification Delays

Under State law, the prerequisite to any rollout of a new voting system in New York is certification of the system as compliant with State voting systems standards. NY Election Law §7-200. The schedule submitted by the SBOE to the Court on September 7, 2006, provided for such certification to be completed by December 27, 2006 (Voting Machine Replacement Plan, page 2, line 189 - Docket #96). However, circumstances that arose in the fall of 2006 allegedly caused delay in the State's ability to meet this deadline. Initially, testing issues involving the State's ITA, CIBER, caused the SBOE to extend the proposed certification date to the end of February 2007.[5] Then, in early January 2007, the SBOE began an investigation of CIBER's testing efforts for New York and suspended CIBER's work for the State. At that time, the SBOE advised the United States that the certification completion date had been pushed back to March 29, 2007.[6]

As the parties advised the Court in correspondence dated February 21, 2007 (Docket #108), and in the February 21, 2007 chambers conference, the issues with CIBER appeared to make it infeasible for the State to meet the September 2007 deadline for voting systems implementation contained in the Remedial Order. In light of this, the parties engaged in extensive discussions aimed at putting the remedial process back on course and devising a new timeline for compliance with the Remedial Order. Although those discussions appeared initially to result in some progress, that progress has disappeared in recent months, as deadlines have come and gone without finalized action and the certification process has now been moved back

[5] See November 9, 2006 and December 8, 2006 Status Reports of NYSBOE to USDOJ (Attachments excluded) (Exhibit B).

[6] See January 5, 2007 Status Report of NYSBOE to USDOJ (Attachments excluded) (Exhibit B).

to a point at least 21 months past the State's initial deadline.

As a result of the circumstances involving CIBER, the SBOE determined to seek a new ITA to carry out its voting systems certification process. On March 19, 2007, the State published a notice requesting bids for certification testing of new voting systems for compliance with New York State voting system standards.[7] Consistent with this publication, the SBOE developed a Request for Proposals (RFP) for certification testing, dated April 5, 2007, which estimated a contract award date of July 9, 2007.[8] Following the receipt of two responses to this RFP, the SBOE staff conducted a review of each submission, including on-site visits to each ITA, and, in late July 2007, made a recommendation to the SBOE for approval of an ITA. This recommendation was approved by the SBOE Co-Executive Directors, who then sought the preliminary approval by the State Comptroller in order for SBOE staff to begin contract negotiations with the chosen vendor. However, the Comptroller rejected the SBOE's choice.[9] Thus, rather than moving forward to negotiate a contract with the SBOE's ITA choice, the SBOE reissued another RFP, dated September 4, 2007, and the ITA procurement process has begun again. The most recent estimated date of ITA contract award is December 7, 2007.[10] Thus, today, more than ten months past the point initially projected by the State for full certification of HAVA-compliant voting systems, and more than nine months after the SBOE was on notice of serious problems with its initial ITA, the SBOE has no ITA under contract, and efforts at certification testing remain suspended. Based on the projections included in the two October 2,

[7] Found at www.nyscr.org (subscription required). The text of the publication is found in Exhibit C.

[8] The RFP was originally published at www.ogs.state.ny.us/purchase/biddocument/1337-TM40_51.PDF.

[9] See Minutes of August 16, 2007 SBOE Meeting (Exhibit I).

[10] The RFP can be found at http://www.ogs.state.ny.us/purchase/biddocument/1396-TM40_60.PDF.

2007 SBOE plans, it is clear that actual certification of voting systems, if any, will not occur until close to two years past the State's initial deadline.

C. Voting Systems

In April 2006, the SBOE published a set of new voting systems standards to which all voting systems submitted to the State for certification would be tested. These standards reflected the SBOE's interpretation of the state law requirements for voting systems used in elections in the State, most recently enacted in July 2005 by the State legislature in response to the requirements of HAVA. Ch. 181, 2005 NYS Laws. Following public comment and revision, the State's Voting Systems Standards, found in Subtitle V, Part 6209 of State of New York Regulations, were finalized and became effective June 6, 2006. On June 19, 2006, the State published a RFP seeking submission by private vendors of voting systems for use in New York, slated to replace lever voting machines throughout the State (which at that time under State law could no longer be used after September 2007.)[11] This RFP specified contract as well as other conditions for vendors that wished to submit voting systems for testing. Following publication of the RFP, a total of six private vendors submitted eleven voting systems for certification testing.[12] As of October, 12, 2006, five of these eleven systems were prepared to undergo the first round of certification testing.[13] However, allegedly due to problems that the State was experiencing with CIBER, at that time there was no testing protocol that had been developed and

[11] See June 27, 2006 SBOE Report to DOJ (Exhibit B). In light of the fact that there would be no newly-certified machines available on September 1, 2007 to replace lever machines, the New York legislature recently amended State law to push back the date for lever machine replacement to an undetermined future date when the SBOE will have completed its certification duties. Governor Spitzer signed the amendment into law on August 6, 2007. Chapter 506, 2007 NY Laws.

[12] See August 3, 2006 SBOE Report to DOJ (Exhibit B).

[13] See October 12, 2006 Letter of SBOE (Exhibit D).

testing could not begin. Subsequently, due to the other issues - set forth above - concerning CIBER and the State's decision to seek another testing laboratory, testing was further delayed and to this date has not begun.

Even though the SBOE had issued the June 19, 2006 RFP, seemingly carefully developed over time and which had elicited numerous bids from voting systems vendors, the SBOE subsequently engaged in continual conversations with counties and other State agencies concerning the revision of language for contracts between counties and vendors. These discussions, which lasted over a period of several months, eventually resulted in vast revision to the contract requirements contained in the original RFP, leading the SBOE recently to decide to publish a new RFP and to ask voting system vendors to rebid.[14] The new RFP seeks bids to provide the State with both new "Plan B" ballot marking devices for use in the fall 2008 elections in New York, as well as new "Plan A" full voting systems for use in 2009. The anticipated bid-opening date is November 19, 2007.[15] Thus, at present, there are no voting systems pending before the SBOE for certification (assuming testing could even be conducted by an ITA), and new submissions of voting systems are now anticipated over one year past the original voting systems submissions in the summer and fall of 2006.

D. Source Code

[14] Despite the extant obligations placed upon the defendants by this Court's Remedial Order and HAVA and the need for prompt continuing action, neither the State's Office of General Services (OGS) nor anyone at the SBOE apparently paid any attention to alleged problems with the original voting systems contract until December 2006, when, according to Commissioner Kellner, he raised concerns and the SBOE staff and OGS and counties got together to discuss the contract issues. See Video of October 16, 2007 SBOE meeting - discussion beginning generally at approximately 1:34:30 of meeting video, and especially statements of Commissioner Kellner beginning at 1:38:45 and 1:48:45 of meeting. Video can be found on SBOE website at http://www.elections.state.ny.us/portal/page?_pageid =35,1,35_8534:35_62319&_dad=portal&_schema=PORTAL . This again demonstrates the lack of attention and urgency attached to these issues by the defendants.

[15] The RFP can be found at http://www.ogs.state.ny.us/purchase/biddocument/2230021231CRB.PDF.

There is one other requirement of State law which, even if the voting system certification and procurement issues set out above are resolved, at present apparently will prevent *any* voting systems - including new "Plan B" ballot marking devices - from being certified in New York for use in future elections.

Section 7-208 of the New York State Election Code, enacted in July 2005, requires voting system and equipment manufacturers and vendors to place into escrow a copy of the software source code[16] used by the voting system and equipment, and also requires a waiver of intellectual property rights and trade secrets in any court hearing a challenge to the results of any election in order to conduct system testing. The SBOE interprets this statute to mean that *all* source code found in a voting system - including commercial off the shelf ("COTS") software such as Microsoft's Windows operating system and Microsoft's Office products like Word and Excel - must be escrowed with the State, not just proprietary source code of the particular voting system manufacturer (like Sequoia or Diebold) designed for election-related purposes.

This interpretation is evident in an April 13, 2007 e-mail message from the SBOE to voting system vendors that submitted new voting systems to the State for certification testing in the fall of 2006.[17] In that message, the SBOE advised vendors that Microsoft Corporation, a third-party that apparently produces some components of each of the voting systems then pending before the State for testing, had refused to escrow source code for such components. The SBOE apparently deems this to be in noncompliance with the above-cited State law source code requirements. In light of Microsoft's actions, the SBOE advised the vendors in the email to

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[16] Source code is human-readable computer language (e.g., "if x, then y"). Source code is translated into "compiled code" (e.g., 010101010) for purposes of running computer programs.

[17] See Exhibit E.

take "necessary" actions to comply with State law. It is our understanding that such necessary action would have required elimination of Microsoft source code from all of the voting systems under consideration by the State, in effect requiring design and construction of new voting systems. See Exhibits E and F.

At about the time of the SBOE's e-mail to the vendors, several vendors submitted to the SBOE documents concerning the State's source code requirements.[18] A review of those documents indicates vendor consensus that, in the absence of some type of resolution of the Microsoft source code problem, no vendor would be able to provide New York with a voting system that meets State requirements. To the best of our knowledge, meetings between the SBOE, voting system vendors, Microsoft officials and even New York legislative staff failed to produce a resolution of this issue, and there is little prospect for any resolution on this issue in the near future.

Thus, meeting the State's source code requirement at this point - which in some cases would mean replacing the entire operating system for some voting systems - is not only impracticable but may be impossible. It certainly means that state certification will not be granted to any of the voting systems that will be resubmitted to the SBOE upon publication of the new voting systems RFP (see above). Moreover, since the new RFP seeks bids for new Plan B ballot marking devices that are consistent with existing State law, it would appear that the source code requirement may indeed prevent approval of any new ballot marking devices for use under both of the SBOE's October 2 proposed plans.

E. Proposed Plans

[18] See Exhibit F for the positions of Sequoia Voting Systems, Avante International Technology, Inc., Liberty Elections Systems, and Precise Voting, LLC.

On August 29, 2007, this Court conducted a conference of the parties at the United States' request. At that conference, the United States expressed its view that the defendants had not complied with this Court's Remedial Order and requested, pursuant to the terms of that Order, that defendants be required to provide the United States with a proposal for curing noncompliance with the Order and HAVA. The Court that day ordered the SBOE to submit such a proposal to the United States by September 28, 2007 (later extended by the Court to October 2, 2007 upon agreement of all parties).

As indicated above, on October 2, 2007, the SBOE was unable to comply with this Court's directive to submit a compliance plan. Rather, on the Democratic side of the SBOE, Commissioners Kellner and Aquila and Co-Executive Director Zalen submitted one proposal (Docket # 133), and on the Republican side of the SBOE, Commissioners Kelleher and Donahue and Co-Executive Director Kosinski submitted a separate proposal (Docket # 130). Neither proposal has the support of the majority of the commissioners of the SBOE needed to move a plan forward to implementation. Although the two submissions are similar, there are distinct differences:

1. <u>Kellner/Aquila/Zalen Proposal ("Zalen proposal")</u>

This plan provides for partial HAVA compliance in 2008, and ultimate full HAVA compliance in 2009. The plan provides for the use of new so-called "Plan B" ballot marking devices accessible to persons with disabilities at every polling place in the State for the fall 2008 federal elections.[19] In order to achieve such implementation, the plan proposes State certification

[19] This expands on the interim Plan B utilized in 2006, pursuant to the Remedial Order, placing a limited number of accessible voting devices in each county in the State for use in the fall 2006 elections. New York Election Code §7-200 allows for such implementation.

of such devices by on or about January 15, 2008, and sets forth a detailed timetable for actions leading up to and following such certification. With regard to implementation of new "Plan A" full voting systems that will replace the State's lever voting machines, the plan calls for continuation of the current process for securing a new ITA, issuance of a new RFP for submission of voting systems by private vendors for certification testing, the completion of certification testing by November 2008 and implementation of new systems chosen by counties in 2009.

This plan does not provide for the replacement of lever voting machines for any elections in 2008. The plan also does not provide for any compliance with HAVA for the next federal election in New York (the February 5, 2008 presidential preference primary) beyond that provided by the original limited "Plan B", as implemented in September 2006.

2. Kelleher/Donahue/Kosinski Proposal ("Kosinski proposal")

This proposal - made 16 months after entry of this Court's Remedial Order - is best defined as a non-specific concept rather than a plan. As does the Zalen proposal, it proposes the use of Plan B devices for the fall 2008 federal elections, but does not propose their use at all polling places in the State at that time, specifies no number of such devices to be utilized, and specifies no timeline for their use.[20] With regard to Plan A systems, the proposal is similarly non-specific. While calling for replacement of lever machines in 2009, the proposal contains no timeline for action.

Consistent with the Zalen proposal, this proposal does not provide for the replacement of

[20] This proposal's citation to (and attachment of) a so-called supportive "plan" submitted to the SBOE by "a disability group" is misleading. The proposal fails to mention that the SBOE has received a formal proposal from a number of disability groups supporting the placement of fully-accessible voting devices in each polling place in the State for the fall 2008 federal elections. See Exhibit G.

lever voting machines for any elections in 2008 and eschews any further compliance with HAVA beyond that of Plan B, as carried out in September 2006, for the February 5, 2008 presidential preference primary.

II. ARGUMENT

> All New Yorkers have a stake in the fairness and effectiveness of the voting process. Unfortunately, New York's current electoral process needs to be upgraded, and the State must act expeditiously or risk losing substantial federal funds. The time to act is now.

These words of then Attorney General, now Governor Eliot Spitzer in his February 7, 2005 Report on the voting process in New York,[21] are as true today as they were over two and one-half years ago. Moreover, as was also the case in 2005, the "simple answer" to the question of what New York has done in response to the voting system mandates of federal law is : "very little."[22]

As the Spitzer Report makes clear, it is voters - in this case the voters of New York - who are the ultimate beneficiaries of needed improvements in the voting process. To that end, HAVA's voting systems provisions were intended by Congress to ensure equality and fairness of the vote for all voters. In the words of Senator Christopher Dodd, HAVA "does justice to the American voter." 148 Cong. Rec. S10413 (October 15, 2002). Moreover, and of special significance here, HAVA was intended to ensure persons with disabilities the right to cast a vote on an equal basis with all other voters. As Senator Dodd, one of the chief sponsors of HAVA, stated:

The accessibility standards for individuals with disabilities is perhaps one of the

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[21] Voting Matters II: No Time To Waste, A Report from the New York State Attorney General's Office, February 7, 2005, p.19 (Exhibit H). See http://www.oag.state.ny.us/press/reports/voting_matters_2005.pdf.

[22] Id., at p. 1.

> most important provisions of this legislation. Ten million blind voters did not vote in the 2000 elections in part because they cannot read the ballots used in their jurisdictions. With 21st century technology, this is simply unacceptable....It has been suggested that this may be a wasteful requirement for jurisdictions that have no known disabled voters. Let me make clear that the purpose of this requirement is to ensure that the disabled have an equal opportunity to cast a vote and have that vote counted, just as all other non-disabled Americans, with privacy and independence. It is simply not acceptable that individuals with disabilities should have to hide in their homes and not participate with other Americans on election day simply because no one knows that they exist. It is equally unacceptable to suggest that individuals with disabilities must come forward and declare their disability in order to participate in democracy through the polling place.

148 Cong. Rec. S10507 (Oct. 16, 2002). At this late date, there exists serious noncompliance by defendants with both federal law and this Court's June 2, 2006 Remedial Order, and that too is unacceptable. This Court has inherent authority to enforce its lawful orders and has retained the jurisdiction to do so. It must do so now.

A. Defendants Stand in Clear Non-Compliance with HAVA and This Court's Remedial Order

There can be no serious dispute that the defendants are in noncompliance with federal law. As is clear from the parties' statements to the Court, from the SBOE's recent issuance of Requests for Proposals for testing laboratories and for voting systems, and most recently from the proposed "compliance" plans submitted to the United States and Court on October 2, 2007, the State is not close to achieving compliance with HAVA's mandates for voting systems to be used in federal elections. The State's plan to continue use of lever machines in the federal elections scheduled for 2008 in effect ignores both federal legislation that mandated compliance with voting systems requirements in January 2006, and this Court's Order to comply fully with HAVA by September 2007.

The SBOE's competing proposals for federal elections in 2008 are deficient in numerous

respects. First, the plans do not provide for fully HAVA-compliant voting systems to be used in New York for any federal elections in 2008. New York plans to use its ancient lever voting machines in all polling places in the State in the spring and fall federal elections in 2008, despite the clear failure of lever machines to meet HAVA's voting systems requirements - at the least, the machines are not accessible as required by Section 301(a)(3) of HAVA, and are not capable of producing a permanent paper record with a manual audit capacity, as required by Section 301(a)(2) of HAVA.[23] Second, and significantly, the plans do not provide for accessible voting systems in all polling places in the State in time for the presidential preference primary in February 2008. Rather, it appears that the State will require counties to provide accessible voting systems only to the extent provided in the State's Plan B accessible voting systems plan implemented pursuant to this Court's Remedial Order in the fall 2006 federal elections. In other words, to improve accessibility at the State's polling locations for the February 2008 federal election, the State can do no better than it did over a year ago, despite extant obligations under both federal law and this Court's Order. Third, with regard to the Kosinski proposal, there is not even a plan for full HAVA voting system accessibility for persons with disabilities for the fall 2008 federal elections. Rather, there is a vague discussion of attempting to come up with some unspecified number of accessible machines for next fall.[24]

Of course, with regard to either proposal, it should be noted that nowhere has any of the

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[23] See also, Spitzer Report (Exhibit H) at p. 4.

[24] To the extent that the Zalen proposal envisions accessible voting devices at all polling places in the State for the fall 2008 elections, it is closer to HAVA-compliant than the Kosinski proposal. However, one must question whether that proposal is being set up to fail, given the words of warning contained in the last paragraph of the plan, in effect placing the burden on both the United States and the Court to move immediately to "approve" the proposal before it is too late to carry it out. Given where we are in this oft-delayed process, and the inability of the defendants to show more than a modicum of HAVA compliance, it would indeed be brazen to attempt to shift blame for a possibly failed plan onto the United States and/or the Court.

defendants claimed compliance with federal mandates, nor could they.

B. New York Cannot Place Stricter State Voting Systems Standards in the Way of Compliance with Federal Law

Despite its noncompliance now, the State may argue that, because HAVA allows states to implement voting systems requirements that are stricter than the minimum requirements of Section 301 of HAVA, its late-enacted State law (in July 2005), imposing voting systems requirements allegedly more stringent than those of federal law, excuses its dilatory compliance with HAVA and, even more, counsels for continued non-compliance until State voting systems certification standards are met. Such an argument is seriously flawed.

Section 304 of HAVA, 42 U.S.C. 15484, provides:

> The requirements established by this title are minimum requirements and nothing in this title shall be construed to prevent a State from establishing election technology and administration requirements that are more strict than the requirements established under this title so long as such State requirements are not inconsistent with the Federal requirements under this title or any law described in section 906.

The United States does not dispute that HAVA allows New York to impose voting systems requirements that go beyond the specific requirements found in Section 301. Thus, to the extent that New York's state laws impose stricter security, accessibility or other requirements on voting systems than federal law mandates, HAVA does not preclude such requirements. However, as Section 304 states, such requirements cannot be "inconsistent" with the voting systems requirements found in Title III of HAVA, including Section 301's effective date of January 1, 2006. 42 U.S.C. 15481(d). Thus, New York is free to impose whatever requirements it views as desirable for voting systems, and it may take however long it wishes to procure voting systems that may someday meet its state standards – even though such systems at the present time do not appear to even exist. However, in the meantime, the State cannot continue to

operate federal elections utilizing voting systems that do not meet federal law requirements – the State must put HAVA-compliant systems in place for federal elections.[25] To view this scenario otherwise would allow a state to ignore with impunity HAVA's minimal federal voting systems requirements for however long it pleases, as long as it claims to be progressing toward a voting system that might ultimately meet the requirements of both state and federal law. In the case of New York, this is exactly where the State is heading, since it appears that, as detailed above, there currently are *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. Certainly at this point - over 21 months past HAVA's voting systems deadline - compliance with federal law cannot be postponed further until either state law is changed or some type of resolution of state certification issues are worked out.

Congress enacted HAVA pursuant to its authority found in the Elections Clause of the United States Constitution. Article 1, Section 4. The Supremacy Clause of the Constitution prevents State law from impeding compliance with HAVA's federal law mandates. Article VI, Clause 2. An actual conflict between a state and federal law exists when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." International Paper Co. v. Ouellette, 479 U.S. 481, 492 (1987), quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941); In Re WTC Disaster Site, 414 F. 3d 352, 372 (2d Cir. 2005); Clean Air Markets Group v. Pataki, 338 F. 3d 82, 87 (2d Cir. 2003). In determining whether a state law stands as such an obstacle, "it is not enough to say that the ultimate goal of both federal and state

[25] The State cannot claim that its current lever voting machines meet either newly-enacted State or HAVA requirements. Certainly, use of federally-compliant voting systems in place of lever machines is more compliant with the new State voting systems standards than continued use of the old system. NY Election Law §7-202.

law is [the same]." Ouellette, supra, at 494; Pataki, supra. "Even where federal and state statutes have a common goal, a state law will be preempted 'if it interferes with the methods by which the federal statute was designed to reach this goal.'" Id., quoting Ouellette, supra. (Emphasis omitted). At this point, the State's attempts to comply with the voting systems requirements of New York state law are preventing compliance with the federal law voting systems requirements of HAVA. Until such time as actual compliance with both State and federal law can be achieved, State law must give way to federal requirements.[26]

C. The State Has Federal Funding to Procure HAVA-Compliant Voting Systems

The State has no one to blame but itself for the position it finds itself in today. As has been set forth previously in the record of this case, despite the fact that HAVA, with its clear voting systems requirements, was enacted in October 2002, it was not until July 2005 that the New York State legislature enacted legislation to facilitate attempted compliance with HAVA's requirements. Since that time, the SBOE has literally crawled toward compliance with HAVA, and despite the filing of this action in March 2006, and this Court's June 2006 Remedial Order with its clear requirements, we find ourselves today not much further down the road than we were over a year ago, in terms of certifying and procuring voting systems for use in the upcoming federal elections. Over sixteen months since entry of the Remedial Order, the State does not have a testing laboratory to test voting systems, there currently are no voting systems before the State for testing, and even if there were, there apparently are no systems that can meet the requirements of State law.

[26] In an analogous context, federal courts in National Voter Registration Act cases have found state laws and regulations pre-empted by federal law. Cf. Assoc. of Community Org. for Reform Now v. Miller, 912 F. Supp. 976, 984 (W.D. Mich. 1995); Virginia v. United States, 1995 WL 928433 (E.D. Va. Oct. 18, 1995) (Exhibit M).

Despite all this, the State may argue that interim compliance with federal voting systems requirements, prior to full implementation of *state-compliant and* federally-compliant voting systems, will expend funds now better used later for such full implementation. However, such funds - in the form of almost $220 million in federal HAVA funds - were given to the State upon its application to comply with HAVA's federal requirements. These federal funds have not been provided to New York to pay for whatever system(s) the State ultimately decides upon no matter how long that process might take. In the end, Congress in HAVA gave states federal funds to, among other things, put into place on a specific timeline, voting systems meeting certain minimal requirements for use in federal elections.[27] The State thus has substantial federal funding available for this purpose.[28]

III. Remedial Options

As is set forth in the two SBOE proposals, the State will not have certified State and federally compliant voting systems in time for use in any 2008 federal elections. However, consistent with our argument above, there are options the State can pursue to put in place federally-compliant voting systems in time for all federal elections in 2008.

A. Accessible Voting Devices

The State should be required to provide for the use of accessible voting devices in polling places for the February 5, 2008 presidential preference primary and for the September 9, 2008

[27] As set forth above, every other state has implemented voting systems to comply with HAVA's requirements. The SBOE is aware of its "unique" status among states in this regard. See Video of September 20, 2007 SBOE meeting - statement of Commissioner Aquila at 1:12:30 and following. Video can be found at http://www.elections.state.ny.us/portal/page?_pageid=35,1,35_8534:35_62319&_dad=portal&_schema=PORTAL .

[28] According to the July 2007 Report to Congress on State Governments' Expenditures of Help America Vote Act Funds, prepared by the U.S. Election Assistance Commission, New York has only spent slightly over $3 million of its almost $220 million in HAVA funds as of late 2006, or 1.43% of its available funding. This is the lowest level of expenditure of any State. Report found at http://www.eac.gov/clearinghouse/reports-on-state-expenditures-of-hava-funds-1.

federal primary election and November 4, 2008 federal general election.[29]

1. February 2008 Presidential Preference Primary

At the least, the State should provide for the use of so-called Plan B devices on a much greater scale than was the case for the fall 2006 elections. At that time, there was at least one such device in use in each county in the State, with several counties (including the five counties in New York City) providing more than one such device (See Docket #83). Moreover, counties were able to implement these devices over a four month time frame that began in May 2006 with the State certification of several such devices for county choice.[30] As indicated above, the State has been under continuing compliance obligations since that time, under both HAVA and this Court's Order, yet the recently submitted competing SBOE plans propose to do no more in February 2008 than defendants were able to do in September 2006. This is unacceptable. The numbers of Plan B ballot marking devices used in February 2008 should be enhanced greatly to improve the accessibility of the voting process to persons with disabilities who for too long have been denied the benefits of HAVA in New York. Based on the fact that counties already have experience with the devices previously used in September and November 2006 federal elections and also in the September 2007 state elections (see Board Plans), such enhancement clearly should be possible in the period of time between now and February 2008.

2. September/November 2008 Federal Elections

Consistent (in part) with the Zalen proposal, there should be in use in each polling place

[29] While we propose deployment of accessible voting devices/systems, the Court should be mindful of other actions that the State should take to provide outreach, education and training with regard to such voting devices. We support the suggestions by the New York State disability organizations as set forth in their letter of September 20, 2007 to the SBOE regarding such actions. See Exhibit G.

[30] See Minutes of May 22, 2006 SBOE meeting (Exhibit J).

in the State for the fall 2008 federal elections, at least one voting device accessible to persons with disabilities (either ballot marking device or fully HAVA-compliant voting system (see B. below)).[31]

B. HAVA-compliant voting systems

As indicated above, there is no dispute among the parties over the State's ability to promulgate State voting system certification standards that are more stringent than the standards found in Section 301 of HAVA. However, such standards cannot be the cause of non-compliance with federal law. Thus, until such time as the State has been able to complete development of its certification testing regimen and there are actual voting systems in existence that can be certified pursuant to all State standards, the State must provide voting systems for use in federal elections that meet all HAVA standards, to replace its existing lever voting systems. These new fully HAVA-compliant "Plan A" full voting systems can be used in conjunction with the "Plan B" accessible ballot marking devices that the Zalen proposal proposes to use in all polling places in the State and that the Kosinski proposal proposes to use in unspecified numbers (or in place of such "Plan B" devices, to the extent such "Plan A" full systems are also accessible).[32]

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[31] As indicated above, the October 19, 2007 State solicitation of bids for "Plan B" ballot marking devices would appear to require full compliance with the State's source code requirements, thus raising the specter of no such machines that would be certifiable under State standards. However, the State has previously authorized the use of other Plan B devices in the 2006 and 2007 elections, and we are aware of no reason why such devices could not be used in fully-compliant numbers in the fall 2008 elections if the most recent RFP does not produce certifiable machines according to the State's new standards. If these devices were able to be used in 2006 and 2007, and in the February 2008 presidential preference primary (as proposed in both SBOE plans), they can be used in greater numbers in the fall of 2008.

[32] Of course, HAVA does not require any state to utilize only a mechanical voting system, and the state would be free to utilize a perhaps less expensive paper ballot system, in conjunction with at least one accessible voting device in each polling place in the State, as long as the system otherwise met the requirements of Section 301 of HAVA, 42 U.S.C. 15481(c).

As things stand today, it would appear infeasible to replace all lever voting machines in the State with all fully HAVA-compliant systems for use in the February 2008 primary. However, such systems should be required in all polling places for the fall 2008 federal elections. As we have stated above, there are currently in use in every other state in this country such voting systems, and the State has ample federal funds to purchase or lease such systems in time for use in the upcoming fall 2008 election cycle. At 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. Until such time, if it ever comes, the State must comply with federal law.

C. <u>County Involvement in the Remedial Process</u>

Both the Zalen and Kosinski October 2 proposals contain, as an attachment, a September 19, 2007 letter from the Election Commissioners' Association of the State of New York to the SBOE. This letter expresses the views of the Association on what was apparently then believed to be a consensus SBOE proposal (as opposed to Zalen/Democratic SBOE proposal) to place accessible voting devices in all polling places in the State for the fall 2008 elections. Attached to this Association letter are the results of a survey of County Boards of Elections conducted by the Association seeking those boards' views on such a proposal. In the letter, the Association expresses an opinion in opposition to the full accessibility proposal for the fall 2008 elections.

The United States is well aware that it is the counties that must implement ultimately in large part the State's HAVA plan, and we understand their apparent frustration at the delays that have occurred in the State's compliance with HAVA. As is evidenced in both the letter and the survey, compliance with at least the accessibility provisions of HAVA in time for the 2008 elections will take a considerable amount of time, effort and resources. However, at this late

point, that is exactly what is needed to bring the State (and the counties) into compliance with federal law.

At least with regard to accessible voting devices, the counties have already had some experience in using such devices during the 2006 federal elections and, very recently, 2007 state elections. In 2006, the State and counties had to put together and carry out a limited accessibility plan in a period of four to five months. Having carried out a limited Plan B three times already, in our view, that Plan can be enhanced, in terms of numbers of accessible machines, for use in the 2008 presidential preference primary, without the same amount of expenditure of time and resources as might be required with use of a totally new voting system. In this regard, there is some experience under the counties' belts. As for the fall 2008 elections, the Zalen proposal contains a detailed timeline for actions to be taken to enable full accessibility implementation in the fall of 2008 - eleven months from now. While the counties express concern about the potential cost of full accessibility for next fall, as set forth above, the State has the federal funds to carry out such a plan. Moreover, as is also set forth in the Zalen proposal, counties might have available to them choices of accessible voting devices that could serve the counties in the future far beyond the fall 2008 elections.

While the counties' views are currently before the Court in the form of the attachment to the SBOE October 2 plans, we would welcome a further filing from the Association on behalf of the counties, as the Court has suggested in conference, in the form of an *amicus curiae* filing, in response to our filing today. Moreover, to the extent that the counties desire a meeting with plaintiff's counsel to express their views on this matter, counsel is prepared to participate in such a meeting.

IV. CONCLUSION

It is more true than ever, as then Attorney General Spitzer stated in 2005, that the time to act is now. New York has proven itself to date either unwilling or incapable of following federal law and Court mandates. This Court must act forcefully to require the State promptly to carry out these mandates with specific required action taken according to a strict timeline.

The State of New York had just over 26 months between the enactment of HAVA and the January 1, 2006 deadline for compliance with its voting system standards. The State has now had more than 21 additional months after the deadline set forth in HAVA to come into compliance with the Act's voting system standards. After a total of 47 months, the State has made little headway towards voting system compliance. Likewise, the State has spent very little of the nearly 220 million dollars that Congress provided to it to assist it in coming into compliance with HAVA.

The fact that the defendants continue their noncompliance with the mandates of this Court and federal law is unacceptable. Of perhaps more significance, however, the abject inability of the State Board of Elections today to present to the United States and this Court one plan to comply with the mandates of federal law is extremely troubling, and raises the specter of the SBOE's continuing inability to function in the context of this litigation to achieve compliance with federal law.

This prospect for continuing noncompliance is perhaps best illustrated by the August 29, 2007 "status" filing of the State Board of Elections with this Court. Docket #124. In that letter to the Court, the State accepts no responsibility for the delay in its compliance with HAVA and this Court's Order, instead placing blame on the federal government for changes in voluntary voting systems standards - standards which have not prevented any other state in the nation from

achieving HAVA compliance. Indeed, the SBOE states that "[i]t is unrealistic to expect the State to deploy systems before the federal government sets standards." If that is the case, one must wonder indeed if the SBOE's proposed plans for compliance are anything more than a smokescreen, and if the SBOE views today's remedial issues as anything more than an annoyance which it expects will go away.

In the absence of evidence of the demonstrated ability and willingness of the SBOE itself to make immediate progress toward these goals as reflected in new and/or existing Court mandates, the Court may have to consider taking compliance out of the hands of the State and placing it in the hands of the Court or others appointed by the Court to achieve compliance with federal law.

Dated: November 5, 2007

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