UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

Plaintiff,

-against-

CV 06 0263 (GLS)

NEW YORK STATE BOARD OF ELECTIONS; PETER S. KOSINSKI and STANLEY S. ZALEN, Co-Executive Directors of the New York State Board of Elections, in their official capacities; and STATE OF NEW YORK,

Defendants.

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UNITED STATES OF AMERICA,

Plaintiff,

-against-

THE NASSAU COUNTY BOARD OF ELECTIONS and THE NASSAU COUNTY LEGISLATURE

Defendants-Intervenors.

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UNITED STATES OF AMERICA,

Plaintiff,

-against-

THE COUNTY OF SUFFOLK,

Defendant-Intervenor.

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MEMORANDUM OF LAW IN SUPPORT OF INTERVENTION

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March 30, 2007

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PRELIMINARY STATEMENT

This Memorandum of Law is submitted on behalf of the proposed Defendant-Intervenor, the County of Suffolk, in support of the within motion for an Order pursuant to Fed.R.Civ.P. 24(a), permitting the proposed Defendant-Intervenor to intervene as of right in the above-entitled action or, in the alternative, pursuant to Fed.R.Civ.P. 24(b), permitting the proposed Defendant-Intervenor to intervene by permission in the above-entitled action.

The Federal Government enacted the Help America Vote Act (HAVA), in 2002, which sets certain standards for voting systems. New York State's response to HAVA, and attempt to comply with HAVA, was the passage of the Electoral Reform and Modernization Act (ERMA) in 2005.

The State of New York takes the position that HAVA and the state legislation mandate the complete abandonment and replacement of all lever-style voting machines. The County of Suffolk disagrees with the State's interpretation of its enactment and is challenging the same in a separate proceeding under Article 78 of the New York C.P.L.R. entitled County of Suffolk against New York State and 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 the Supreme Court, Albany County, under index number 6833-06. In that proceeding, the County of Suffolk seeks a declaration that it may retain and continue to use its stellar lever voting machines. The County of Suffolk moves to intervene here with the same ultimate objective. The more immediate goal, however, is to insure that the State of New York does not permit the 2007 elections, and subsequent elections as well, to be disrupted or compromised in the process of complying with HAVA. The interests of the County of Suffolk, which is directly responsible for

administering the elections, and consequently, the interests of Suffolk's voters, numbering nearly one million, are presently not adequately represented by the parties in this action.

The interests of the County of Suffolk and its voters have already been compromised by the commitments made by the State in the Remedial Order entered in this Court on or about June 2, 2006, wherein the State agreed to preside over the elimination of lever voting machines by September 1, 2007. Even now, nine months later, no replacement machines have been certified by the State. The unrealistic and ever-changing timelines developed by the State make compliance by the County Boards of Elections impossible.

What is truly needed is a step back and an overall re-evaluation of the entire process, not simply a rush to have new devices in place for the 2007 elections. It is clear that, at the very least, the deadline of September 1, 2007, established in the Remedial Order, should be modified to reflect the realities of New York's experience. Accordingly, the County of Suffolk should be allowed to intervene in this action.

POINT I

INTERVENTION AS OF RIGHT IS APPROPRIATE

A. THE INSTANT MOTION IS TIMELY

Fed. R. Civ. P. 24 (a) provides:

> "Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties."

It has been held that the elements set forth in this section are to be read together and not separately, as no single one is determinative. United States v. Hooker Chemicals & Plastics Corp., 749 F.2d 968 (2d Cir. 1984).

The proposed Defendant-Intervenor, County of Suffolk, satisfies each of the criteria contained in this section. First, the motion is timely. It should be noted that this motion has been noticed to be heard simultaneously with the motion by the County of Nassau for the same relief. Both counties are in the same position of recently learning that the State is still not going to meet its own timetable, but has not modified the deadline imposed upon the counties in its attempt to persuade the United States government that it is complying with HAVA. The counties have been lulled into a false sense of security by the State's practice of moving its timetable back gradually, leading the counties to believe that the State's plan would actually be implemented sufficiently in advance of the September 1, 2007 deadline to enable the counties to prepare. Instead, the projected February and March dates have passed, while the process continues.

For example, the Albany Times-Union reported on December 19, 2006 that "Board of Elections officials, at a meeting of county election commissioners from across the state, said they

probably wouldn't make the February deadline because of the slow pace of testing. As a result, the machines won't be in place by September, when local primaries take place." A reprint of the article is annexed to the accompanying Declaration as Exhibit "A."

In a further illustration of the dysfunction of the selection and approval process, the New York Times reported, on January 4, 2007, that Ciber, Inc., a major testing laboratory and "the largest tester of the nation's voting machine software," has been temporarily barred from approving new machines as a result of inconsistencies discovered by federal officials in Ciber's quality-control procedures. Ciber, Inc. is currently under contract with the State to test proposed systems and is "haggl[ing] over the scope of the security testing." The article distills the issue thus: "Experts on voting systems say the Ciber problems underscore longstanding worries about lax inspections in the secretive world of voting-machine testing. The action by the Federal Election Assistance Commission seems certain to fan growing concerns about the reliability and security of the devices." A reprint of the article is annexed to the accompanying Declaration as Exhibit "B."

It is now clear that, even if the State completes its certification process soon, which appears unlikely, the manner in which the State Board of Elections will proceed from that point is still unknown and leaves the counties and local boards in a state of uncertainty. Even though discussions continue between the current parties and with the County of Nassau, as indicated in the letter of February 21, 2007 from the United States Department of Justice to this Court, and the letter of February 22, 2007 from the County of Nassau to this Court, copies of which are annexed to the accompanying declaration as Exhibits "E" and "F," respectively, the uncertainty remains. The divergence of the State's interests from those of the counties has now fully ripened and necessitates intervention by the County of Suffolk in this litigation. Under the standards

enunciated by this Court in Brooks v. Sussex County State Bank**,** 167 F.R.D. 347 (N.D.N.Y. 1996), the instant motion is timely. In addition to the application being made promptly after obtaining notice of the interest, intervention of the County of Suffolk will not prejudice any current party to the action. The County of Suffolk, would, however, be severely prejudiced if intervention is denied, as discussed more fully below.

B. THE COUNTY OF SUFFOLK HAS A CLEARLY IDENTIFIABLE INTEREST IN THE SUBJECT MATTER OF THIS ACTION

The County of Suffolk, through its Board of Elections, constituted in accordance with N.Y. Election Law § 3-200, is charged with the duty and responsibility of administering elections. The nature and scope of the duties are defined in the N.Y. Election Law. For example, the statute charges the local boards with the duties to repair and maintain the voting machines (N.Y. Election Law § 3-302), to administer the elections and voter registration N.Y. Election Law § 3-212), to preserve order around the polling places (N.Y. Election Law § 3-402) and instructing poll workers to "maintain the integrity of the franchise" (N.Y. Election Law § 3-412).

The County of Suffolk has an identifiable and substantial interest in protecting its ability to discharge its lawful duty to administer the election process in such a way as to maintain its fairness, reliability and integrity.

C. THE COUNTY OF SUFFOLK'S INTERESTS MAY BE SIGNIFICANTLY IMPAIRED BY THE DISPOSITION OF THIS ACTION

It has now become abundantly clear that, if the County of Suffolk is forced to honor the September 1, 2007 deadline imposed by the State, it will likely be faced with having its Board of Elections thrown into chaos and resulting in wholesale disenfranchisement of its voters, in direct violation of their right to vote, as guaranteed by Article I § 1 of the New York State Constitution.

The counties and local boards have been led to believe that, as the State continually moved its target dates back, a month or two at a time, the release of a definitive plan was imminent and the local boards would, at least, know what was expected of them. However, the State has not modified its September 1, 2007 deadline applicable to the local boards. Under State law, no voting machine may be used in the State unless it has been certified by the New York State Board of Elections. N.Y. Election Law § 7-200. If local boards do not choose new systems, the State Board of Elections can make the selection, thereby depriving the local board of its right to choose. N.Y. Election Law § 7-203. The County of Suffolk is, therefore, placed in the untenable position of not knowing what the State expects it to do, but being directed to have it done by September 1, 2007.

Voting should not and cannot be this complicated or controversial. Lever machines are not complicated or controversial. They are fairly simple mechanical devices that are not vulnerable to the kind of manipulation as are electronic devices. There is no secret software and there are no computers to hack. They are reliable and trustworthy. These are two characteristics that we must insist upon in the machinery of our electoral process. The local boards should not be compelled to discard their stellar, time-tested and proven systems unless and until there are equally reliable and trustworthy systems to take their place. So far, there are no such systems.

D. THE INTERESTS OF THE COUNTY OF SUFFOLK ARE NOT REPRESENTED BY ANY PARTY IN THIS ACTION

Not only has the State failed to represent the interests of the County of Suffolk, the State's position has become adverse to that of the County of Suffolk. The State's only attempt to accommodate the local boards has been to move its own target dates for certification of new machines, with each new date being no less arbitrary than the previous one.

The State definitively departs from protecting the interests of the County of Suffolk in its interpretation of HAVA as mandating the complete abandonment and replacement of lever voting machines, while dismissing the public debate, the experiences of other states, and the many independent studies revealing the flaws and vulnerabilities of the technologies being proposed. *See, e.g.*, The Machinery of Democracy: Protecting Elections in an Electronic World, Brennan Center for Justice at NYU School of Law, 2006, available at http://www.brennancenter.org/dynamic/subpages/download_file_39288.pdf.

Annexed to the accompanying Declaration as Exhibit "C" is a copy of a report entitled "The County Dilemma, The Impact of the Help America Vote Act on New York State," issued by the Albany County Board of Elections on October 31, 2006. At page 3, the report notes:

> "Shortly after HAVA was signed into Federal law, the Federal Government allocated funds to each state to help offset the financial burden that otherwise would be shouldered by the states, counties and municipalities for the purchase of new voting machines. In New York State, a lever-style machine has been in use for decades with few problems. The majority of problems encountered didn't actually include the lever machines, but involved fraud as it relates to paper ballots used by absentee voters, including alteration and substitution of ballots. It appears that little consideration was given to the idea of keeping the lever machines and adding a handicap compliant voting machine at each polling location…By accepting the Federal funding available, New York committed itself to abandoning the lever machines for new, largely unproven style of voting machines."

The report acknowledges the Brennan Center report, cited above, and recognizes the vulnerabilities in both types of electronic machines under consideration, noting, at page 5, "an attacker, if given enough time, could reconfigure an optical scan machine…." It goes on, at page 6, to quote from the Brennan Center Report: "Nothing in our research or analysis has shown that a Trojan Horse or other Software Attack Program would be more difficult against Optical Scan systems than they are against DRE's" (p.77). The report concludes, at page 12:

> "By waiting another election cycle to fully implement the machines, voters and workers will have more time to become acquainted with the new technology and manufacturers will have enough time to address any problems that will inevitably arise. Based upon the successful implementation of Plan B, New York State should consider keeping this plan in effect for the 2007 elections, allowing adequate time for Plan A to be properly implemented. Counties may need new legislative intervention in order to move forward toward full HAVA implementation, but jeopardizing the integrity of the 2007 elections is at stake and that is at the very core of our democracy."

The County of Suffolk concurs with this conclusion. Being forced to continue on the present course does seriously jeopardize the 2007 elections, which are of particular importance to its voters. This is not an "off-year" to the voters of Suffolk County, who will be called upon to elect the County Executive, eighteen (18) County Legislators, and Town Board Members and Supervisors. With nineteen (19) out of twenty-four (24) County government officials up for election in 2007, this is a most inopportune year in which to experiment with the fundamentals of the electoral process.

POINT II

PERMISSIVE INTERVENTION IS APPROPRIATE

Fed.R.Civ.P. 24 (b) provides:

> "Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties."

In the alternative, the proposed Defendant-Intervenor, County of Suffolk, requests this Court's permission to intervene in this action pursuant to the above-cited subsection, which this Court has held "is to be liberally construed…and that its requirements are satisfied where a single question of law or fact exists despite factual differences between the parties." New York v. Reilly, 143 F.R.D. 487, 490 (citations omitted).

As discussed fully above, intervention by the County of Suffolk will not delay the action or prejudice any current party. Its presence in this action will add to the factual development by bringing in the local perspective, which is currently absent from this action, and, particularly, the perspective of the County of Suffolk, as described above. The defenses of the County of Suffolk present common questions of law and fact with the parties in this action, particularly, the interplay between HAVA and the New York Election Law and the lack of coordination and communication between the State Board of Elections and the County Boards of Elections that has resulted in the establishment of unrealistic schedules and timelines. For the reasons set forth above, permissive intervention is appropriate in this action.

CONCLUSION

In view of the foregoing, it is respectfully submitted that the proposed Defendant-Intervenor, County of Suffolk, has amply demonstrated that intervention should be granted and the instant motion should, therefore, be granted in its entirety.

Dated: Hauppauge, New York
March 30, 2007

Respectfully submitted,

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