

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

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 v.)
)
 NEW YORK STATE BOARD OF)
 ELECTIONS; PETER S. KOSINSKI)
 and STANLEY L. ZALEN, Co-Executive)
 Directors of the New York State Board of)
 Elections, in their official capacities; and,)
 STATE OF NEW YORK;)
)
 Defendants.)
 _____)

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

**MEMORANDUM OF LAW IN SUPPORT OF
UNITED STATES' MOTION FOR A PRELIMINARY INJUNCTION**

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On March 1, 2006, the United States filed its Complaint in this action, alleging that Defendants have failed to comply with the Help America Vote Act of 2002 ("HAVA"), 42 U.S.C. § 15301 et seq. Specifically, the United States alleges that Defendants have failed, in elections for Federal office, to ensure that voting systems meet the standards set forth in Section 301 of HAVA, 42 U.S.C. § 15481, and have failed to create a computerized statewide voter registration database, as required by Section 303(a) of HAVA, 42 U.S.C. § 15483(a).

The United States now seeks a preliminary injunction because the evidence, which includes admissions of non-compliance with HAVA by New York State officials, clearly establishes that the United States will prevail on the merits of its claims, and because, in the absence of immediate injunctive relief, irreparable injury will occur to New York voters, and to the federal election process. In support of its Motion, the United States relies on this Memorandum of Law, the attached affidavits and documents, and on testimony to be presented at a hearing. The United States seeks an order which 1) enjoins Defendants from failing to comply with HAVA, and 2) requires Defendants to promptly present a plan to this Court for how they will comply with HAVA.

I. STATEMENT OF FACTS

A. The Help America Vote Act of 2002

After the 2000 presidential election, a bipartisan majority in Congress enacted, and the President signed into law on October 29, 2002, the Help America Vote Act. 42 U.S.C. §§ 15301-15545. HAVA was designed to improve the administration of elections for federal office in the United States. HAVA applies to the 50 states, the District of Columbia, Puerto Rico, Guam, American Samoa, and the U.S. Virgin Islands. See 42 U.S.C. § 15541. HAVA was enacted pursuant to Congress' plenary power to regulate elections for Federal office pursuant to Article I, Section 4 (the "Elections Clause") of the United States Constitution. See H.R. Rep. No. 107-329, Pt. 1, at 57 (2001). Title III of HAVA, containing Sections 301 to 303 of the

statute, includes certain “uniform and nondiscriminatory election technology and administration requirements” which apply in elections for Federal office. 42 U.S.C. §§ 15481-15483.

Section 301 of HAVA, entitled “Voting Systems Standards,” contains requirements that “[e]ach voting system used in an election for Federal office” must meet. Section 301 applies to all States. 42 U.S.C. § 15481. Among other things, Section 301 of HAVA requires that voting systems used in an election for Federal office must:

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

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

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

(d) provide for accessibility, consistent with the requirements of the Voting Rights Act of 1965, 42 U.S.C. § 1973 *et seq.*, for voters with alternative language needs, 42 U.S.C. § 15481(a)(4);

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

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

Section 303(a) of HAVA, entitled “Computerized Statewide Voter Registration List Requirements,” requires that “each State, acting through the chief State election official, shall implement in a uniform and nondiscriminatory manner, a single, uniform, official, centralized, interactive computerized statewide voter registration list defined, maintained, and administered

at the State level". Section 303(a) applies to all States that require voter registration for elections for Federal office. 42 U.S.C. § 15483(a). Among the requirements of Section 303(a) of HAVA for the statewide voter registration list are the following:

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

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

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

(d) Any election official in the State, including any local election official, must be able to obtain immediate electronic access to the information contained in the list, and all voter registration information obtained by any local election official must be electronically entered into the computerized list on an expedited basis at the time the information is provided to the local official, 42 U.S.C. §§ 15483(a)(1)(A)(v)-(vi);

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

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

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

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

(i) The State must ensure that the name of each registered voter appears on the list, only voters who are not registered or not eligible are removed from the list, duplicate

names are eliminated from the list, and eligible voters are not removed from the list in error, 42 U.S.C. §§ 15483(a)(2)(B) and 15483(a)(4);

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

(k) The State must enter into agreements to match information from the list against the State motor vehicle authority database and the federal social security number database, 42 U.S.C. § 15483(a)(5)(B).

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

B. New York's Receipt of HAVA Funding

While States must comply with HAVA irrespective of whether they chose to accept federal funding, Congress has for the first time in our Nation's history provided federal funding in HAVA to state governments to assist in the conduct of elections for Federal office. New York has so far received more than 221 million dollars (\$221,422,932) in federal funds under HAVA. This funding includes the following:

(a) \$16,494,325 under Section 101 of HAVA, 42 U.S.C. § 15301, an "early money" program for activities to improve the administration of elections;

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

(b) \$49,603,917 under Section 102 of HAVA, 42 U.S.C. § 15302, for the replacement of punchcard or lever voting machines;

(c) \$153,414,430 under Section 251 of HAVA (FY03-FY04), 42 U.S.C. § 15401, for meeting the requirements of Title III of HAVA;

(d) \$1,910,259 under Section 261 of HAVA (FY03-FY05), 42 U.S.C. § 15421, for assuring access to the voting process for individuals with disabilities.

See Ex. A. The total amount received by New York under HAVA is second only to the State of California among the 55 states and territories covered by HAVA. Id. New York received the funding under Sections 101 and 102 in May and June 2003. Id. New York was second to last among the states to begin receiving funds under Section 251 of HAVA, in June 2005, because it failed to enact an administrative compliant procedure required by HAVA until May 2005, in 2005 N.Y. Sess. Laws, c. 23 (McKinney's). Id.

Pursuant to Section 102(d) of HAVA, if the State of New York fails to replace some or all of the punchcard or lever voting machines in the State in time for its first election for Federal office in 2006, namely the primary election on September 12, 2006, HAVA contemplates that the State must return some or all of the \$49,603,917 in federal funding received pursuant to Section 102, to the extent it fails to replace such machines. 42 U.S.C. § 15302(d); Ex. A.

C. New York State HAVA Legislation

Clearly, much of the blame for why New York is not now in compliance with HAVA's requirements lies with the state legislature. For more than two and a half years after HAVA's enactment, New York did not adopt state legislation defining how it would implement HAVA's voting systems and statewide database requirements. Only in the summer of 2005, years later than most states and mere months prior to the January 1, 2006 HAVA deadlines, did New York finally enact legislation designed to carry out the requirements of Sections 301 and 303(a) of HAVA.

New York enacted its HAVA implementation legislation authorizing acquisition of new voting systems and setting forth the standards for such systems on July 12, 2005. See 2005 N.Y. Sess. Laws, c. 181 (McKinney's). This law requires that the New York State Board of Elections (SBOE): 1) approve voting machines and systems to be used by local election boards; 2) create an election modernization advisory subcommittee to assess and recommend voting machines and systems that are compliant with state and federal law; 3) review the voting machines selected by local boards of elections; 4) issue regulations regarding the manner in which contracts are written; 5) approve and/or negotiate and enter contracts for the purchase of voting machines and systems; 6) determine the percentage of federal HAVA funds that are to be allocated to each local election board for the purchase of voting machines or systems; 7) assist in the administration of the federal HAVA funds; 8) promulgate regulations for manual audits of the voter verifiable audit records; 9) promulgate guidelines for a public education campaign regarding voting changes that must be in place at least 60 days before the primary election; and 10) develop a core curriculum for training poll workers.

New York enacted its HAVA implementation legislation authorizing development of a computerized statewide voter registration list, and defining standards for that list, on May 3, 2005, and July 12, 2005. See 2005 N.Y. Sess. Laws, c. 24, c. 179 (McKinney's). These laws requires the SBOE to create, administer and maintain an interactive, statewide, computerized voter registration list. These laws further require the SBOE to: 1) promulgate rules and regulations for a computerized record keeping system which would maintain the list in a computerized database, facilitate the sharing of information between the local election boards and regulate the entry, correction and removal of data; 2) enter into an agreement with state agencies including the state Department of Motor Vehicles (DMV) to obtain information that will assist in verifying a voter's identity; 3) obtain certified copies of voter registration lists from each local election board; and 4) establish a hot line for voters to obtain information regarding their voter registration. Consistent with HAVA, these acts require the DMV, not the SBOE, to

enter into an agreement with the federal Social Security Administration for matching the last four digits of social security numbers on registration applications.

D. The State of New York is not in compliance with Sections 301 and 303(a) of HAVA

Defendants' current practices and procedures violate both Sections 301 and 303(a) of HAVA. First, the voting system predominant throughout the State for use in elections for federal office - lever voting machines - does not comply with Section 301 in several respects, including but not limited to, the requirement that, by January 1, 2006, voting systems provide accessibility for persons with disabilities and the requirement that voting systems produce a permanent paper record with a manual audit capacity. Second, despite the requirements of both federal and state law, New York has wholly failed to comply with Section 303(a) – both as of the January 1, 2006 effective date, and as of now, there is no computerized statewide voter registration list consistent with the requirements of HAVA in the State.

On multiple occasions, Defendants have conceded publicly that their current election practices and procedures do not comply with Sections 301 and 303(a) of HAVA. As recently as last month, the spokesman for the SBOE, Lee K. Daghljan, admitted the State's non-compliance with these two HAVA requirements. See Ex. B, Michael Cooper, New York: US threatens to sue Albany over voting, New York Times, Jan. 12, 2006.² In another more pointed example, during a December 20, 2005, public hearing concerning proposed State voting system regulations, Defendant Peter Kosinski, Co-Executive Director of the SBOE, admitted that the current lever machine voting system does not comply with Section 301 requirements for accessibility to individuals with disabilities. As Mr. Kosinski stated:

Lever machines simply do not accommodate disabled voters. There is simply no way to equip a lever machine with, for example, a hearing device that would allow a blind person to come in and vote all by themselves [sic]. And so lever machines, in essence, were out as far as – there's only a couple of states that use

² New York's non-compliance with HAVA is well known throughout the election community in the United States. See Ex. C, electionline.org, Election Reform: What's Changed, What Hasn't and Why 2000-2006, Feb. 7, 2006, at 63.

them anyway. But they were out as far as they could be used in this country because they do not accommodate disabled voters.

See Ex. D, Transcript of Record, New York State Board of Elections Public Hearing: Voting Systems Regulations (Dec. 20, 2005) (except at 199). In addition, in a recent report from the State Attorney General's Office, the State Attorney General also conceded that New York's election procedures and practices do not comply with Section 301 to the extent that they failed to provide access for individuals with disabilities. See Ex. E., Voting Matters II, No Time to Waste, A Report from the New York State Attorney General's Office ("AG Report") at 4, Feb. 7, 2005.

Voting machines in New York do not produce a permanent paper record with a manual audit capacity required by Section 301, 42 U.S.C. § 15481(a)(2). This provision was enacted to allow for a manual recount in a contested election:

Each voting system must produce a permanent paper record for the voting system that can be manually audited. Such record must be available as an official record for recounts, however, there is no intent to mandate that the paper record serve as the official record. Whether this record becomes the official record is left to the discretion of the States. As the Chairman of the Rules Committee, let me advise my colleagues of the importance of this feature in the unlikely event that a petition of election contest is filed with the Senate. Often, in order to resolve such contests, the Rules Committee must have access to an audit trail in order to determine which candidate received the most votes. This standard will ensure that the Senate and the House will have access to reliable records in the case of election contests.

148 Cong. Rec. S10488-02, 10506-07 (daily ed. Oct. 16, 2002) (statement of Sen. Dodd). The State of New York has recognized that it must replace its lever machines with machines capable of providing for a permanent paper record with a manual audit capacity. See Ex. E, at 4.

Without an audit capacity, New York State voters are not protected by having a permanent paper record for use in the case of a contested federal election.

In the same report, the State Attorney General also acknowledged that, although the State was required to do so by Section 303(a) of HAVA, New York still had not yet created a statewide registration list that meets the HAVA requirements. See Ex. E, at 4, 8. The State has acknowledged that "[i]n 2004, as in 2000, some New Yorkers who believed they had registered [at state agencies] found that their names did not appear on registration records when they went

to the polls" and that a previous 2001AG Report recommended that "the [SBOE] should evaluate these concerns and address them, including improving data entry and expediting information transmittal to boards of elections." See Ex. E, at 7. The State further recognizes the benefit a HAVA compliant database would bring to State voters since it will "enable a voter's registration status to be verified at the polls, and also provide the ongoing opportunity for corrections and updates...In addition, such a database would avoid the recurrent problem of registered voters being turned away or being required to vote by affidavit ballot because their name is not on the local poll worker's list, when the real problem is that they are at the wrong election district. The poll worker should be able immediately to access the statewide computerized list, ascertain the correct district and direct the voter to it." See Ex. E, at 8-9. These remarks reflect the benefits Congress gave to all voters in federal elections when it required the statewide registration list:

This bill will require each State to develop a Statewide registration system. These systems will modernize, centralize and improve current methods for ensuring the accuracy of registration lists. The current system in many States creates inefficiencies and duplications, as voters often move from one jurisdiction to another within a State without notifying the jurisdiction that they used to live in before they made the move. The result is that a single individual may appear on more than one registration list in a State. These Statewide systems will make it possible for States to more effectively maintain voter registration information, as they should. States will have more accurate systems to protect voters from being mistakenly removed from the list, while ensuring that costly duplicates that invite voter fraud are quickly removed. The lists maintained by the State will be the official list used to determine who is registered to vote on Election Day. Uniformity and integrity in the system will be assured as local election jurisdictions will no longer be able to maintain separate lists.

148 Cong. Rec. H7836-04, 7836-37 (daily ed. Oct. 10, 2002) (statement of Rep. Ney).

If necessary, the United States is prepared to call as witnesses at a hearing on its preliminary injunction motion, staff members from the SBOE to demonstrate the extent of the State's non-compliance with Sections 301 and 303(a) of HAVA. These witnesses would include, but are not limited to: Peter Kosinski, the Co-Executive Director of the SBOE, who as the chief state election official could testify in detail regarding the State's non-compliance with each of these provisions; George Stanton, the Chief Information Officer for the SBOE, who could testify in detail on the State's non-compliance with HAVA's statewide voter registration

list requirements; and Anna Svizzero, an SBOE staff member, who could testify in detail on the State's non-compliance with HAVA's voting system standards.

E. Absent a preliminary injunction, New York will fail to implement election procedures that comply with Sections 301 and 303(a) in time for the 2006 federal election cycle

In order to comply with Section 301, under State law, the SBOE must take certain specific actions, including: promulgating and adopting final regulations regarding voting systems; examining and approving voting systems; contracting for acquisition of voting systems; reviewing the voting systems chosen by local jurisdictions; calculating the distribution of federal funds under HAVA for purchase of voting systems; and notifying the state comptroller to release funds for payment of purchase contracts for voting systems. Thus far, the SBOE has either failed to take or failed to complete all of these actions. Unless required to change course by this Court, the SBOE's inaction will result inevitably in continued non-compliance with the requirements of Section 301 through, at the very least, the 2006 federal election cycle, and in all likelihood well beyond.

In order to develop and implement a statewide voter registration list that complies with Section 303(a), under State law, the SBOE must take additional actions. Those actions include: publishing rules and regulations governing the implementation and operation of the statewide voter registration list; issuing the request for proposals (RFP) or other documents necessary for contracting with an entity or entities to develop and implement a statewide voter registration list; establishing the technical requirements, and building the technical infrastructure, necessary for implementation of the statewide voter registration list; and entering into an agreement with the federal Social Security Administration and establishing the necessary infrastructure to match information from the statewide voter registration list against the federal social security number database as required by HAVA. To date, the SBOE has either not taken or failed to complete any of these actions. Unless required to change course by this Court, the SBOE's inaction will

inevitably result in continued non-compliance with the requirements of Section 303(a) through, at the very least, the 2006 federal election cycle.

The Defendants are aware that their inaction has prevented timely compliance with Sections 301 and 303(a). In February 2005, the State's chief law enforcement officer recognized that immediate action was necessary if it was to meet the HAVA deadlines for implementation of the required voting systems and statewide computerized registration list. See Ex. E, at 3-4. Nonetheless, no immediate action was taken, and state legislation defining the requirements for the statewide voter registration list and voting systems was not enacted until May and July of 2005. Moreover, as set forth immediately above, numerous actions remain to be taken by the defendants in order even to begin approaching compliance with HAVA's mandates as to both voting systems and the statewide voter registration list.

The Defendants' failure to comply with the requirements of Sections 301 and 303(a) of HAVA have occurred despite federal monetary incentives found in HAVA and extensive contact between the United States and the State concerning the State's lack of progress in meeting HAVA's clear requirements. Defendants received \$221 million in federal funds under HAVA. Of those funds, more than \$49 million was granted pursuant to Section 102 of HAVA, 42 U.S.C. § 15302, for the replacement of punchcard or lever voting machines. This grant was conditioned specifically' on defendants replacing New York's punchcard or lever voting machines in time for the September 2006 federal primary. If New York does not meet this specific condition, HAVA provides that the State will lose some or all of these funds, to the extent of non-compliance. 42 U.S.C. § 15302(d).

The remaining approximately \$171 million which New York has received under HAVA is also at risk because it is comprised of several different grants, each of which was conditioned on the funds being spent or allocated for their intended purpose in compliance with HAVA's terms. Those terms include the specific deadline for compliance with HAVA's voting systems and statewide voter registration list requirements - January 1, 2006 - set forth in the statute.

In addition, as detailed in the attached affidavit of Brian F. Heffernan, an attorney with the U.S. Department of Justice, the United States has had extensive contact with SBOE officials over the course of the past two years concerning the status of the State's HAVA compliance efforts. See Ex. F. These contacts included personal visits to SBOE offices by Department of Justice attorneys, frequent phone contacts with SBOE officials and letters from the Department expressing concern over the lack of progress by New York in moving toward full HAVA compliance. See Ex. F-H. In the course of these contacts, the State was advised that its failure to act could result in litigation and the possible loss of federal funds. Despite the specific January 1, 2006 deadline contained in the federal statute, federal funding incentives and constant contact with the Department, the SBOE has not taken the actions necessary for Defendants to comply with Sections 301 and 303(a) of HAVA. At this late date, with the federal primary election in New York a scant six months away, only injunctive relief can secure compliance with Sections 301 and 303(a) of HAVA in time for coming federal elections.

F. **New York's failure to comply with HAVA in time for upcoming federal elections inevitably will result in significant harm to thousands of voters and to the integrity of the federal election process in the State.**

A failure to bring New York into compliance with the requirements of Sections 301 and 303(a) of HAVA in time for upcoming federal elections inevitably will harm a significant number of New York voters. First, thousands of voters with disabilities will be prevented from casting their ballots on election day independently and in privacy, as HAVA provides. The mandate that disabled voters be afforded the privacy and independence of non-disabled voters is evident from the text of the statute and the Congressional Record:

The accessibility standard for individuals with disabilities is perhaps one of the 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 jurisdiction. With 21st century technology, this is simply unacceptable. The Senate Rules Committee received a great deal of disturbing testimony regarding the disenfranchisement of Americans with disabilities. Mr. James Dickson, Vice President of the American Association of People with Disabilities, testified that our nation has a ". . . crisis of access to the polling places." Twenty-one million Americans with disabilities did not vote in the last election—the single largest demographic groups of non-voters. To statutorily address this "crisis of access," the conference report contains the provisions of the Senate-passed bill requiring

that by the Federal elections of 2006, all voting systems must be accessible for individuals with disabilities, including nonvisual accessibility for the blind and visually impaired. Most importantly, that accommodation must be provided in a manner that provides the same opportunity for access and participation, including privacy and independence, as for other voters. Accessibility is required for individuals with all disabilities, not just physical disabilities..... 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. S10488-02, 10507 (daily ed. Oct. 16, 2002) (statement of Sen. Dodd). As conceded by the State, the lever machines that would be used in the State on election day are inaccessible to voters with significant visual impairments and to wheelchair bound voters. The actual difficulties faced by voters with disabilities in using - in actuality, in not being able to use at all - lever voting machines and the harm suffered by such voters is spelled out in detail in attached declarations from Michael Godino, Diane Cordry Golden, Charles Reichardt and Sharon Shapiro. See Ex. I-L. Of New York's roughly 11.6 million registered voters, thousands have either significant visual impairments and/or are wheelchair bound. If the State proceeds on its current course, these voters will be prevented from exercising their right to vote in the manner guaranteed to them by HAVA.

Second, the absence of a statewide computerized voter registration list in compliance with Section 303(a) imparts its own set of harms to voters and the voting process. The failure of New York to develop and implement such a list will result in many registered voters being unnecessarily prevented from voting or being required to vote by affidavit ballot. This inevitably will happen, in large part, because in the absence of a statewide computerized registration list available to all poll workers, most poll workers in New York's upcoming federal elections will only have access to registration lists for their own election districts and will not be able to redirect voters attempting to vote in the wrong election district. See Ex. E, at 8-9. Harm to voters will also occur because the State's current system does not provide for expedited entry

of voter registration information onto local voter registration lists as required by HAVA, and there is no system in place for transmitting any local voter registration information to a statewide list on an expedited or real time, computerized basis. As a consequence, names of new voters may not appear on registration lists on election day, and certain voters who change residences within the state may not be listed within the correct county.

If Defendants are allowed to continue on their current course, in addition to harming thousands of individual voters, they will also do harm to the integrity of upcoming federal elections in New York. First, the ongoing absence of the statewide computerized registration list mandated by Section 303(a) will result in many voters appearing on more than one local registration list in the state. This is because, currently, there is no efficient or electronic mechanism for election officials in one local jurisdiction to determine if a new applicant for registration is also registered in another local jurisdiction. The voter registration lists for each local jurisdiction are maintained by each local jurisdiction and there is no current mechanism for these lists to be joined into one statewide list accessible to and searchable by all local jurisdictions. This type of duplicate registration increases the likelihood of voter fraud by enhancing the ability of voters to vote more than once in any given election, thereby compromising the integrity of federal elections. As indicated above, it is exactly this type of situation that HAVA's statewide voter registration list requirement was enacted by Congress to prevent. Moreover, Defendants have not yet secured agreements with the Social Security Administration or completed the process necessary for verifying identification information of registration applicants as required by HAVA. The lack of such verification ability again makes fraud in the election process more difficult to detect.

A failure to bring New York State into compliance with the requirements of Sections 301 and 303(a) in the very near future will also harm New York's residents/tax payers to the extent that any significant ongoing non-compliance may require the State of New York to return millions of dollars to the federal government, as set forth above.

II. ARGUMENT

A. Plaintiff Satisfies the Standard for Granting a Preliminary Injunction

Where an injunction will alter rather than maintain the status quo or provide the movant with substantially all the relief sought, and that relief cannot be undone even if defendant prevails at trial on the merits, the movant must establish: (1) a clear or substantial likelihood of success on the merits, and (2) irreparable harm. Koppell v. New York State Board of Election, 153 F.3d 95, 95-96 (2d Cir.1998); Jolly v. Coughlin, 76 F.3d 468, 473 (2d Cir 1996); Bery v. City of New York, 97 F.3d 689, 693-94 (2d Cir. 1996).

1. Likelihood of Success on the Merits

To show a likelihood of success on the merits, a movant "need only make a showing that the probability of his prevailing is better than fifty percent." Securities and Exchange Commission v. Unifund Sal, 910 F.2d 1028, 1039 (2d Cir. 1990) (citation omitted); Romm Art Creations Ltd. v. Simcha, Int'l, Inc., 786 F. Supp. 1126, 1133 (E.D.N.Y. 1992). Here, the likelihood of plaintiff's success on the merits is so high that it is difficult to imagine what Defendants can argue in opposition. HAVA unambiguously requires Defendants to comply with Sections 301 and 303(a) by January 1, 2006. See 42 U.S.C. §§ 15481(d), 15483(d)(1)(B). As discussed in the Statement of Facts above, the evidence, which includes public admissions of non-compliance with HAVA by Defendants, clearly establishes that Defendants have violated federal law. The United States will succeed on the merits.

2. Irreparable Harm

Irreparable harm is defined as "injury that is neither remote nor speculative, but actual and imminent and that cannot be remedied by an award of monetary damages." Shapiro v. Cadman Towers, Inc., 51 F.3d 328, 332 (2d Cir. 1995) (internal quotation marks omitted). Forest City Daly Housing, Inc., v. Town of North Hempstead, 175 F.3d 144, 149-50 (2d. Cir. 1999).

The United States submits that such actual, imminent injuries will occur in the absence of immediate injunctive relief requiring Defendants to comply with the requirements of Sections 301 and 303(a) of HAVA. We have outlined most of those injuries in detail in the Statement of Facts above. To summarize, in the absence of injunctive relief, in the upcoming federal elections, thousands of voters with disabilities will be injured to the extent that they will not be able to vote independently and privately, or at all, on election day; voters will be injured when they encounter unnecessary problems in the course of attempting to register to vote shortly before federal elections; and other voters will be injured either when they are prevented from voting or when they are forced to vote by affidavit ballot. In the absence of injunctive relief, the integrity of federal elections in New York will be harmed by the absence of voting machines producing a paper record for a manual recount, by having many voters appearing on more than one local registration list, and by the State's inability to cross-reference its voter registration list with information provided by other entities/agencies and thereby verify the legitimacy of the voter rolls.

Furthermore, New York's residents/tax payers will be injured when the State of New York has to return millions of dollars to the federal treasury for failing to comply with HAVA's requirements.³ The injuries discussed above are not just imminent. They began January 1, 2006 and continue at this time. Since January 1, 2006 (and unless and until this Court compels the Defendants to comply with HAVA), the names of voters attempting to register in the time period leading up to the federal election are not being entered on an expedited basis into a computerized statewide voter registration list, thus increasing the chance for last minute voter registration

³ Defendants' continued non-compliance with Sections 301 and 303(a) of HAVA would also cause irreparable harm to Congress's authority under the United States Constitution's Elections Clause to determine the manner in which federal elections are conducted. In this instance, the Defendants are seeking to ignore a statute, enacted pursuant to the Elections Clause, in order to regulate upcoming federal elections in a manner of their own choosing; in essence, usurping Congress's Elections Clause power for themselves. Such continued open defiance of the mandates of Congress in an area reserved for its regulation would undermine and cause great harm to Congressional authority and the constitutional order of government.

errors; duplicate entries in registration lists are being created and are not being found, thus increasing the potential for election fraud; and agencies are failing to coordinate information relating to registrants to assure the integrity of the federal electoral process.

Further, with each passing day, the State of New York drifts further away from being able to conduct in 2006, federal elections that approach compliance with HAVA. As discussed in the Statement of Facts above, there are numerous actions the Defendants have not taken and need to take to bring New York into compliance with Sections 301 and 303(a) of HAVA, including developing voting machine and statewide voter registration list regulations, completing development and implementation of the statewide voter registration list, reviewing and entering into voting system contracts, ordering and distributing voting systems, and training personnel and educating voters. Because the harm to the United States, to the voters of New York, to the integrity of federal elections in New York, and to New York residents/taxpayers is current and ongoing, the United States cannot wait for the outcome of litigation, and immediate injunctive relief is necessary.

In this case there would appear to be no alternative to the injunctive relief requested to ensure the Defendants' compliance with Sections 301 and 303(a) of HAVA. HAVA has provided Defendants with over three years to achieve compliance. The U.S. Department of Justice has had numerous contacts with Defendants in the past two years to impress upon them the need to come into compliance in a timely manner. HAVA itself has provided an incentive to New York to comply with Sections 301 and 303(a) of HAVA by providing New York with roughly 221 million dollars. Unfortunately, three years, extensive and repeated contacts and warnings, and unprecedented federal funding have not moved Defendants to take the actions necessary to comply with Sections 301 and 303(a) of HAVA. HAVA contemplates that in enforcing its mandates, the United States may need resort to immediate injunctive relief. Section 401 of HAVA specifically provides that:

[t]he Attorney General may bring a civil action against any State or jurisdiction in an appropriate United States District Court for such declaratory and injunctive relief

(including a temporary restraining order, a permanent or temporary injunction, or other order) as may be necessary to carry out the uniform and nondiscriminatory election technology and administration requirements under sections 301, 302, and 303.

42 U.S.C. § 15511 (emphasis supplied). In this instance, the United States submits that there is no other effective way to ensure that Defendants comply with HAVA.

Finally, the United States submits that it is appropriate in this case for the State of New York to have the first opportunity to craft and present to the Court a remedy for the demonstrated violations of Sections 301 and 303(a) of HAVA. The United States does not pre-judge at this moment what such a remedial plan would entail. The Department of Justice has had extensive contact with counsel for the State and the SBOE and is confident that a resolution can be reached which meets the needs of all parties both for compliance with federal law and for the operation of an orderly election process. While the United States does not expect the impossible, it does expect that what the State can reasonably do in the time before the 2006 elections should be done, including appropriate provision for accessible voting.

III. CONCLUSION

For the foregoing reasons, the United States asks that this Court grant preliminary relief which: 1) enjoins Defendants from failing to comply with Sections 301 and 303(a) of HAVA, and 2) orders Defendants to present promptly a plan to this Court for how they will bring the State of New York into compliance with Sections 301 and 303(a) of HAVA.

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Respectfully submitted,

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/s/

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