

Honorable Gary L. Sharpe  
United States District Court  
for the Northern District of New York  
James T. Foley U.S. Courthouse  
445 Broadway, Room 441  
Albany, NY 12207-2924

December 18, 2007

Honorable Glenn T. Suddaby  
United States Attorney  
James T. Foley U.S. Courthouse  
445 Broadway, Room 218  
Albany, NY 12207-2924

**Re:     *Civil Action NYS 06-CV-0263 (GLS)***  
***United States v. NYS Board of Elections et al***

Dear Judge Sharpe and U.S. Attorney Suddaby:

We write to you as amicus curiae with respect to the enforcement motion of the United States Department of Justice in the action to enforce implementation of HAVA in New York State (06-CV-0263) GLS.

Collectively we are twelve Commissioners of County Boards of Elections who believe full or graduated compliance with HAVA is possible in 2008 provided certain issues preventing County Boards from compliance are addressed. Moreover we believe entering into compliance with HAVA is far preferable than simply ordering a ballot marking device (“BMD”) for each poll site which is a temporary fix that still leaves New York out of compliance with HAVA’s requirements. While full HAVA compliance may not be possible everywhere, there are a number of counties for whom at least graduated HAVA compliance is possible in 2008. A graduated roll out could provide for one or more HAVA-compliant voting systems in every poll site in 2008 instead of a BMD.

**I.     Full HAVA Compliance Possible In Many County Jurisdictions**

County Boards of Elections have been unable to comply with HAVA because the State Board of Elections has not certified a new voting machine for purchase. As the parties’ papers attest the cause of this delay is complex, owing among other things to late statutory intervention by the State Legislature imposing more rigorous state standards for certification than required by federal law such as the software escrow requirement, difficulty in the contracting process and unforeseen problems finding an independent testing authority.

All of this notwithstanding, the fact is if the State Board of Elections certified a new voting system(s) for New York which is available for purchase, many County Boards of Elections could comply with HAVA for the September 2008 Primary Election.

A full or graduated roll out of HAVA compliance in 2008 would also have the added benefit of allowing voting machine vendors to provide better support to the more circumscribed number of County Jurisdictions enacting HAVA compliance.

## **II. BMD Solution Is Inadequate Because It Does Not Result In Full HAVA Compliance, Sets Stage For State To Use Three Election Systems in Three Years And Wastes Compliance Resources**

The BMD plan costs a great deal of money without resulting in full HAVA compliance in a single county. A more constructive and HAVA-compliant solution is to use resources to move to a permanent HAVA-compliant voting system without further half-measures that serve no purpose other than to squander limited resources and complicate election administration.

A BMD in each poll site *putatively* accomplishes the mandate of HAVA to provide an accessible voting device. A BMD does not address the lever machine's inability to produce a permanent paper record with manual audit capacity required by HAVA 301 (a) (2). Accordingly a BMD solution is not HAVA compliant and does not address the problems associated with our aging fleet of lever machines.

As a *practical* matter BMDs are also inadequate as an adjunct to lever machines in providing accessibility. In many counties despite free assistive transportation and notices mailed to every voter, there were few or no persons utilizing centralized BMDs. While BMDs are an appropriate and useful tool in making a paper-based voting system compliant with HAVA, these devices as an afterthought to lever machines are a disaster. As our recent experience with BMDs shows, there is simply no interest among persons with disabilities in segregated voting.

Administering an election using BMDs and lever machines means Boards of Election will need to go through two massive transition processes on the path to implement the final plan "A" voting machines. For voters and poll workers at poll sites it means three voting systems and three sets of procedures in three years: 2007 -- lever machines only; 2008 -- lever machines plus widespread BMDs; and 2009 -- a final voting machine plan that may or may not include BMDs.

## **III. The Time To Comply Is Indeed Now**

To date the State Board of Elections has not certified a voting system (a prerequisite to any county purchase) and has held back federal funds for this purpose. We simply need to be permitted to purchase voting machines that will comply with HAVA.

### ***A. Full compliance in 2008 is possible and preferable in many jurisdictions.***

We believe full compliance with HAVA avoids voter confusion, poll worker training problems and issues associated with running elections on multiple machine types which will occur if we waste time and resources on noncompliant half-measures like implementing BMDs followed by yet another voting system a year later.

There is considerable successful experience with new voting technologies throughout the country. This experience in other jurisdictions which New York has studied and learned from, we believe, makes it more possible for New York to select one or more voting systems that will measure up.

### ***B. What Counties Need to Comply***

We ask the court to issue an order directing the State Board of Elections, notwithstanding any state election law to the contrary, to immediately certify one or more available HAVA compliant voting systems for counties to purchase or appoint a Special Master to achieve this. We further ask that the court order that counties' allocated share of HAVA funds already determined by the State Board of Elections be made available or released to counties for that purpose.

**C.     *Exceptions to Full Compliance***

We suggest that the court permit any County Board of Elections the right to appear before the court, magistrate or special master if a Board of Elections believes it can prove compliance is *impossible*.

**IV.    **Conclusion****

If a certified HAVA compliant voting system is made available immediately, many county jurisdictions are capable of rolling out that new system(s) successfully in 2008. The alternative of fielding BMDs fails to make even a single jurisdiction HAVA compliant and unnecessarily complicates and needlessly increases the cost of election administration during the transition to a final voting system.

Respectfully submitted,

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cc:     Stanley Zalen, Co-Executive Director, NYS Board of Elections  
       Peter Kosinski, Co-Executive Director, NYS Board of Elections