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 OF LAW IN SUPPORT OF UNITED STATES' OPPOSITION TO MOTION OF STATE BOARD OF ELECTIONS TO JOIN COUNTY BOARDS OF ELECTION

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It is over one and one-half years since this Court found the State defendants in violation of the Help America Vote Act ("HAVA"). Almost four months since raising the instant issue of the State's non-compliance with the Court at the August 29, 2007 chambers conference, just days before this Court's scheduled December 20, 2007 hearing on the United States' Motion to Enforce the Court's Remedial Order, and with time of the extreme essence in carrying out the remedy in this litigation, the defendants now move to add as necessary parties all county boards of elections in New York. This Court should deny defendants' motion to join, as joinder is not required by Rule 19, joinder is inconsistent with New York election law and existing state and federal case law, and joinder will make this litigation virtually unmanageable.

I. BACKGROUND

The complete background of this litigation has been set forth most recently in the pending Motion of the United States to Enforce this Court's June 2, 2006 Remedial Order (Docket #134), and it will not be repeated here. Since the filing of the United States' Motion, defendants have filed a Response thereto on December 14, 2007 (Docket ## 145, 151, 153-157), and this Court has scheduled an oral hearing on the Motion to Enforce on December 20, 2007 (Docket #139). On December 14, 2007, the New York State Board of Elections ("SBOE") filed a Motion to Join, pursuant to Rule 19, Fed. R. Civ. P. (Docket #160), seeking the joinder in this litigation of all county boards of elections in the State, arguing that they are necessary parties for securing complete relief in this action.[1]

[1] On December 13, 2007, Nassau County filed a renewed Motion to Intervene in this action (Docket #144), pursuant to Rule 24 Fed. R. Civ. P, asking this Court to reconsider its July 20, 2007 order denying intervention. The United States opposes this Motion, and is responding to the Motion in a separate filing today. As indicated below, however, the instant Motion for Joinder is intimately related to Nassau County's renewed motion to intervene.

II. LEGAL STANDARDS

Federal Rule of Civil Procedure 19 provides in pertinent part:[2]

> (a) Persons Required to Be Joined if Feasible.
>
> > (1) Required Party. A person who is subject to service of process and whose joinder will not deprive the court of subject matter jurisdiction must be joined as a party if:
> >
> > > (A) in that person's absence, the court cannot accord complete relief among existing parties; or
> > >
> > > (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:
> > >
> > > > (i) as a practical matter impair or impede the person's ability to protect the interest; or
> > > >
> > > > (ii) leave an existing party subject to a substantial risk of incurring double, multiple or otherwise inconsistent obligations because of the interest.
> >
> > (2) Joinder by Court Order. If a person has not been joined as required, the court must order that the person be made a party....

Under Second Circuit law, the circumstances where a party should be joined pursuant to Rule 19 are: 1) if in the absent party's absence the court cannot grant complete relief among the parties; 2) the absent party claims an interest related to the action and is so situated that disposition of the action without that party may impair its ability to protect its interests; or 3) failing to join the absent party subjects parties already in the litigation to a substantial risk of

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[2] Effective December 1, 2007, the Federal Rules of Civil Procedure were amended to read in, for lack of a better term, "plain English." The amendment to Rule 19 makes no substantive change to the previous Rule.

double liability or otherwise inconsistent obligations. Master Card Intern., Inc. v. VISA Intern. Service Ass'n, Inc., 471 F.3d 377, 385 (2d Cir. 2006); Arkwright-Boston Manufacturers Mutual Insurance Company v. City of New York, 762 F.2d 205, 208 (2d Cir. 1985); Pelman v. McDonalds Corporation, 215 F.R.D. 96, 99 (S.D.N.Y. 2003).

III. ARGUMENT

The Court should deny the SBOE's motion for failure to satisfy the factors for joinder under Rule 19. The SBOE's motion is almost totally devoid of legal support, and in fact ignores the only relevant federal caselaw in this Circuit that happens to undercut fatally its argument.

Under Rule 19, a party is necessary when that party's absence will prevent complete relief from being granted among the parties to the action, "not as between a party and the absent person whose joinder is sought." Master Card Intern., supra; Pelman, supra, 215 F.R.D. at 99, citing Arkwright, supra. Not only does New York State Election Law place the State Board of Elections in charge of elections in New York, it also gives the SBOE both the power and the obligation to oversee the local boards of election. New York Election Law §3-102 grants the SBOE the power to issue instructions, promulgate rules and regulations relating to the administration of the election process, and "perform such other acts as may be necessary to carry out the purposes of" the election law. State Election Law §3-104, among other things, makes the SBOE responsible for the execution and enforcement of statutes governing elections and related procedures. With specific regard to voting systems: county boards of election may only utilize voting systems certified for use by the SBOE (§7-200(1)); the SBOE can authorize the use of previously unapproved voting machines or systems on an experimental basis (as has been done previously in this litigation with regard to so-called "Plan B" accessible ballot marking devices)

(§7-201(4)); the SBOE can enter into voting machine contracts for specific counties where a county has not made a choice of machine and properly contracted for machine purchase and can distribute voting machines to local boards of elections free of charge (§7-203(3)); and the SBOE can purchase voting machines for use in demonstration and as extra machines within a county (§7-203(4)).

Thus, it is clear that under New York State law, the SBOE stands in the primary position of implementing the voting systems in the State, and it is not necessary for county boards of elections to be parties to this litigation in order for the defendants to carry out the duties and responsibilities that State law (and federal law) requires the SBOE to carry out. Federal courts in this Circuit agree. In State Committee of the Independence Party of New York v. Berman, 294 F. Supp. 2d 518 (S.D.N.Y. 2003), the New York State Independence Party filed a constitutional challenge to a New York statute that restricted who could vote in that party's primary election. In support of its argument against requiring the adjustment of voting machines in certain local jurisdictions to accommodate the plaintiff's claims, the State Board argued that the relief sought - adjustment of the machines - could not be granted in the absence of the various county boards of election, who the State argued were indispensable parties. The district court disagreed, stating that "while plaintiffs might have chosen to add the county boards as parties, see Schulz v. Williams, 44 F.3d 48, 61 n.13 (2d Cir. 1994), their presence is not necessary, let alone indispensable....This is because New York law vests in the State Board both the power and the obligation to oversee the local boards." 294 F. Supp. 2d at 520 (citing to §§3-102 and 3-104(1) of State Election Law). See also Green Party of New York State v. New York State Board of Elections, 267 F. Supp. 2d 342, 348 n.7 (E.D.N.Y. 2003) ("[t]o the extent that the State Board

has argued that the Green Party's complaint is fatally flawed for failing to name as defendants all the local boards of elections and their commissioners, I find that the State Board has sufficient authority over the local boards' execution of New York's voter enrollment scheme by virtue of N.Y. Elec. Law §§3-102, 3-104 for purposes of this case....), aff'd, 389 F.3d 411 (2d. Cir. 2004); New Alliance Party v. New York State Board of Elections, 1990 WL 155590, p. 3 (S.D.N.Y. 1990) ("The only interest the county boards of elections have in this action is that they may be asked to print new ballots. As long as the [State] Board of Elections has the authority to order them to print new ballots, complete relief can be granted in this case without their being joined.") Moreover, as found by the Court in Green Party, supra, to bring in all county boards of elections at this point will "needlessly complicate these proceedings and is not required by Second Circuit precedent." 267 F. Supp. 2d at 348 n. 7 (citing Schulz v. Williams, supra).[3]

As for protecting the interests, whatever they may be, of the counties in this case, the State stands in primary stead under state law. The counties are creatures of the State and must act in accordance with State election law, including following the lawful mandates of the State

[3] Given the above-cited State law and decisions in federal litigation - to which the SBOE was a party - the SBOE's statement on page 3 of its Motion to Join, that its Co-Executive Directors have "no direct statutory authority to act to implement any voting system" and that "[w]ithout the county boards, they are unable to meet the Court's prior order to implement HAVA in New York State," (Docket #160) is puzzling indeed. If the statement is meant to indicate that it is the SBOE, and not defendants Zalen and Kosinski, that is authorized to act by New York statute, the Board is a party to this action and can require action by its employees. If the statement is meant to indicate that the SBOE itself is not authorized to act, then it is in apparent disregard or ignorance of State law and federal caselaw. Moreover, the position of the SBOE that they cannot carry out the Order of this Court to comply with HAVA, over 18 months since it was ordered to do so, strains credulity. In the end, is the SBOE really arguing that, if any county refuses to carry out an election in accordance with State law, the State is powerless to force compliance? If so, such an argument appears to fly in the face of State election law and could lead to absurd results.

Board. With rare exception, they cannot challenge the "sovereign," either directly or through a State Board carrying out State law. As the New York Court of Appeals stated in City of New York v. State of New York, 86 N.Y. 2d 286 (N.Y. 1995), "A municipal corporation [including counties] is simply a political subdivision of the State, and exists by virtue of the exercise of the power of the State through its legislative department....The City is the creature of the State.... New York has long followed the Federal rationale for finding that municipalities lack the capacity to bring suit to invalidate State legislation.... Municipal officials and members of municipal administrative or legislative boards suffer the same lack of capacity to sue the State with the municipal corporate bodies they represent." (Citations omitted and clarifying parenthetical added). Thus, the counties have no interest separate and apart from the State's interest here, and must follow the direction of the SBOE as it carries out its duties under State law, and also federal law. Finally, not joining the county boards does not leave the defendants subject to inconsistent obligations or other liability.

Needless to say, it is obvious that the addition of all county boards of elections in the State as parties would as a practical matter render this litigation all but unmanageable. Of course, this Court, and the parties as well, are not unaware of the counties' views in this matter. First, both the SBOE and the United States have met with the county board representatives on a number of occasions to discuss the remedial aspects of this litigation. Second, the SBOE's remedial plans submitted to the Court on October 2, 2007 (Docket ## 130, 133), both appended a copy of the county boards' submission to the State Board concerning the remedial process. Finally, as suggested by the United States, the Election Commissioners Association of the State of New York has moved to file an amicus submission (Docket # 163) that the Court can take into

account as it determines the plaintiff's motion to enforce the Remedial Order.

Thus, joinder of the county boards of elections is not appropriate and the SBOE's motion should be denied.

IV. CONCLUSION

For the above stated reasons, the SBOE's motion for joinder should be denied.

Dated: December 18, 2007

MICHAEL B. MUKASEY
Attorney General

GLENN T. SUDDABY
United States Attorney

GRACE CHUNG BECKER
Acting Assistant Attorney General
Civil Rights Division

CHRISTOPHER COATES
Acting Chief, Voting Section

By:

/s/

BARBARA D. COTTRELL
Assistant United States Attorney
James T. Foley U.S. Courthouse
445 Broadway, Room 218
Albany, NY 12207-2924
(518) 431-0247 (telephone)
(518) 431-0429 (facsimile)
Bar Roll No. 101411

T. CHRISTIAN HERREN JR
BRIAN F. HEFFERNAN
Bar Roll No. 513721
Room 7254--NWB
Voting Section
Civil Rights Division
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530
(202) 514-4755 (telephone)
(202) 307-3961 (facsimile)