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

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UNITED STATES OF AMERICA,

Plaintiff,

v.

06 Civ. 0263 (GLS)
ECF Case

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.

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UNITED STATES OF AMERICA,

Plaintiff,

v.

THE NASSAU COUNTY BOARD OF ELECTIONS and THE NASSAU COUNTY LEGISLATURE

Defendants-Intervenors.

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MEMORANDUM OF LAW IN SUPPORT OF INTERVENTION

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Preliminary Statement

Proposed Defendant-Intervenors the Nassau County Board of Elections ("NCBOE") and the Nassau County Legislature (the "Intervenors") submit this memorandum of law in support of their motion for leave to intervene as defendants in this action. The Intervenors represent the interests of the County of Nassau ("Nassau County" or the "County"), the Nassau County municipal government, and, by extension, more than 1.3 million Nassau County residents, including approximately 860,000 Nassau County voters.

The Intervenors' interests necessarily will be affected by the outcome of this case, which seeks to compel the State of New York to comply with its obligations under the Help America Vote Act of 2002 ("HAVA"). Indeed, the Intervenors' interests already have been impaired by this Court's June 2, 2006 Remedial Order, which sets a deadline of September 2007 for deployment of HAVA-compliant voting machines. Under New York State law, it is the counties, through their local boards of elections, that are responsible for compliance with this deadline. Yet, the State has made compliance impossible by failing to certify a list of approved voting systems in sufficient time for local boards to undertake all the necessary preparations for an orderly transition to the new machines. As a result of the State's inaction, Nassau County now faces the loss of some $15,642,749.92 in federal HAVA funds allocated to the Nassau County Board of Elections (the "NCBOE") – funds intended to replace lever voting machines as mandated by HAVA and state law. Moreover, the County also faces the prospect of electoral chaos, in the event the NCBOE is not permitted adequate time to complete the essential preliminary steps of properly selecting, testing, purchasing and securing a HAVA-compliant voting system, including the training or re-training of thousands of election personnel.

Without the proposed intervention, the current parties to this matter likely will agree to additional ill-considered timetables that fail to take into account the realities of new, non-lever machine deployment. The Intervenors do not seek to obstruct or resist introduction of the new voting machines, as mandated by state and federal law. Indeed, they fully support the laudable goal of improving the electoral process. However, these objectives should be accomplished in good order so as not to risk disruption of the coming elections, thereby causing the very problem the election reform laws were intended to remedy.

Only the Intervenors will adequately protect their aforementioned interests in this litigation. As will be shown, below, they amply satisfy all of the requirements for intervention pursuant to Fed. R. Civ. P. 24 – both as of right with respect to Fed. R. Civ. P. 24(a), or, in the alternative, with this Court's permission pursuant to Fed. R. Civ. P. 24(b).

Statement of the Facts

A.
Proposed Intervenors

The NCBOE exists, pursuant to New York Election Law § 3-200 et seq., to register voters, conduct primary, general and special elections, canvass the results, and certify the winners in Nassau County. It is funded by the County of Nassau. As noted in the accompanying declarations of NCBOE commissioners William T. Biamonte and John A. DeGrace (Biamonte-DeGrace Joint Decl., annexed hereto, at ¶ 18), the New York State Board of Elections ("SBOE") has stated that it will miss its deadlines for certification of non-lever voting machines that comply with HAVA. This, in turn, will prevent Nassau County from selecting, ordering and deploying such machines in comportment with HAVA, with this Court's June 2, 2006 Remedial Order ("Remedial Order"), and with the New York Election Law. If Nassau County is unable to order non-lever machines, it will lose its federal HAVA funding, which in turn will compel the

County to purchase new voting machines out of an already-overextended local budget. (Biamonte-DeGrace Joint Decl. at ¶ 26.) Finally, the NCBOE expects that the timelines and deadlines established by the current defendants will, at a minimum, result in disorderly elections. (Biamonte-DeGrace Joint Decl. at ¶ 23.) For all these reasons, the NCBOE seeks to intervene as a defendant in the instant case.

Nassau County is a municipal corporation duly organized and existing under the laws of the State of New York, with a population in excess of 1.3 million residents, including approximately 860,000 registered voters. The Nassau County Legislature is the legislative branch of the Nassau County government and must, among other things, approve the Nassau County budget. Pursuant to New York Election Law §§ 3-226 and 4-136, expenses of county boards of elections are to be paid as a charge against the county – in the instant case, expenses of the NCBOE are to be paid as a charge against Nassau County. Accordingly, and also because it represents the interests of the voters of Nassau County in the efficient and just conduct of elections, the Nassau County Legislature shares the concerns of the NCBOE, and seeks to intervene as a defendant for the same reasons.

The Intervenors have direct, substantial, and protectable interests in this matter, arising out of the SBOE's failure to certify non-lever, HAVA-compliant voting systems within sufficient time to allow the NCBOE to select, order, and deploy such systems by September 2007. Absent the Intervenors' participation in this action, there is every reason to believe that the current parties will continue to set unrealistic timelines and deadlines for HAVA compliance, with loss of federal funding and disorderly elections the likely result for Nassau County voters. The Intervenors further submit that their interests are inadequately represented by the current

parties to this action, that they share common questions of law and fact with the current parties, and that they will make a substantial contribution to the factual development of this case.

B.
Background

1.
HAVA Enacted, Deadlines Set

The United States Congress passed HAVA in response to the chaos which attended the 2000 presidential election, and it was signed into law by President George W. Bush on October 29, 2002. (See 42 U.S.C. § 15301 et seq.) HAVA set certain requirements for voting machine systems, required establishment of statewide voter registration databases, and authorized billions of dollars in federal funding to assist states in upgrading the aforesaid systems and establishing the abovementioned databases. (Id.)

While HAVA mandated that New York State meet certain standards, it was left to the states to decide how they would implement HAVA and what voting machine technology to use. (42 U.S.C. § 15485.) Compliance with the federal standards was a condition of federal funding, and New York State was required to comply with the requirements set forth by HAVA by January 1, 2006. (42 U.S.C. §§ 15481(d), 15483(d)(1)(B).) As set forth below, the story of New York State involvement with HAVA is a chronicle of foot-dragging, missed deadlines, and persistent noncompliance.

2.
New York State Misses the Initial HAVA Deadline

New York State had more than three years to completely overhaul its voting machine technology. Yet far from promptly fulfilling the federal mandate, the New York State Legislature's first step in implementing HAVA was to engage in a protracted, two and a half year-long debate on the matter. (See "The County Dilemma, The Impact of the Help America

Vote Act on New York State," October 31, 2006, annexed hereto as Exhibit A.) Ultimately, on July 12, 2005, New York State Governor George Pataki signed the Election Reform and Modernization Act of 2005 ("ERMA") into law. (See Session Laws of New York, 2005, Chapter 181.)

Though, by its terms, ERMA provided that the SBOE would implement the various HAVA mandates in accordance with the federal deadlines and set forth a process for implementation, subsequent public hearings caused New York State to exceed the January 1, 2006 HAVA compliance deadline. (See Exhibit A, at p. 4; 42 U.S.C. § 15302(a)(3)(B)).

3.

The United States Files Suit, Seeks Refund of HAVA Grant

Finally, frustrated by the state's delinquency, by a complaint filed on March 1, 2006 (the "Complaint"), the Voting Section of the U.S. Department of Justice ("DOJ") brought the instant suit against the SBOE, its executive directors, and New York State to compel observance of the HAVA requirements. The Complaint alleged, inter alia, that the SBOE failed to 1) approve any voting systems; 2) comply with the rules or regulations relating to voting systems; and 3) obtain any voting systems that comply with the requirements of HAVA.

The Complaint also pointed out that New York State accepted approximately $221 million in federal funds pursuant to HAVA, including almost $50 million earmarked for the replacement of punchcard or lever voting machines with HAVA-compliant systems. (Complaint at p. 6.) Of this latter sum, $15,642,749.92 was allocated to replace lever machines in Nassau County – monies which currently are in the custody of the New York State Comptroller. (ERMA §§ 10, 12.) The Complaint demanded that these funds be returned to the federal government in the event that New York State fails to meet the HAVA deadline for HAVA-compliant voting machine implementation – originally, September 2006. (Complaint at pp. 6-7.)

4.

Preliminary Settlement Reached, New HAVA Deadline Set

Negotiations ensued, based upon a Plan for Compliance with HAVA submitted to this Court by the SBOE on April 10, 2006 (the Plan for Compliance subsequently was modified on April 20, 2006, May 15, 2006, and May 16, 2006) ("Plan for Compliance"). (See generally, Plan for Compliance; United States' Response to State of New York's HAVA Remedial Plan, April 28, 2006.) These negotiations eventually led to this Court's Remedial Order, issued on June 2, 2006, which required implementation of the Plan for Compliance, subject to certain modifications. The thrust of the Remedial Order was to require New York State to 1) implement voting machines accessible to disabled persons in time for the 2006 federal elections; 2) submit a schedule for implementation of non-lever, HAVA-compliant voting machines in every polling place by September 2007; 3) submit proposed implementation regulations for a statewide voter registration list; and 4) supply regular reports to this Court regarding progress in the implementation of the Remedial Order. As noted, supra, the instant request for intervention mainly concerns the implementation of non-lever, HAVA-compliant voting machines in every polling place by September 2007.

Though the instant intervention is sought to protect Intervenors' interests with respect to non-lever machine implementation in 2007, it is should be to noted that the NCBOE made a conscientious effort to meet the Remedial Order's terms as they applied to the 2006 election. For instance, the NCBOE proposed and successfully implemented the most ambitious plan of any local board of elections to provide accessible ballot marking devices to voters with disabilities. The NCBOE 1) surveyed all 6,035 permanent absentee voters about their needs with regard to voting and the new machines; 2) developed and implemented an educational outreach plan to teach voters with disabilities about the new devices; 3) purchased 26 ballot marking devices and

installed them in 12 different County locations; and 4) provided Election Day workers with disability etiquette training. (Biamonte-DeGrace Joint Decl. at ¶ 12.)

Regrettably, in contrast to 2006, the State's failure to certify an approved list of voting machines has made local compliance with the September 2007 deadline impossible, thus necessitating this motion to intervene.

5.

The SBOE Plan for Meeting the New HAVA Deadline

With respect to 2007 compliance, in accordance with this Court's Remedial Order, on August 15, 2006 the SBOE submitted a Detailed Plan for the Replacement of Voting Machines in 2007 ("Plan for Replacement"), which it supplemented on September 7, 2006. The Plan for Replacement envisaged that the SBOE would certify a list of replacement voting machines by December 27, 2006, though it also provided that counties could order voting machines on a pre-certification basis on October 31, 2006.[12] It must be stressed that under the New York Election Law, county boards neither can select nor implement non-lever voting machines until they have been certified by the SBOE. (N.Y. Election Law § 7-200(1); ERMA at Section 12.) Therefore, county boards, including the NCBOE, cannot begin to comply with HAVA until such time as the SBOE certifies replacement voting machines pursuant to the Plan for Replacement. (Biamonte-DeGrace Joint Decl. at ¶¶ 2, 13.)

[1] It is significant that the December 27, 2006 certification deadline and October 31, 2006 order date themselves represented departures from the deadline earlier propounded by the SBOE to county boards of elections. At a conference on May 1, 2006, the SBOE announced that it would approve new voting systems by August 2006. (Biamonte-DeGrace Joint Decl. at ¶ 15.)

[2] Though subsequent events have rendered the issue moot, were counties to select HAVA-compliant voting machines prior to their certification by the SBOE, this would represent a violation of Section 12 of ERMA, which requires certification to precede selection.

6.
Challenges Posed by New HAVA Deadline

Once HAVA-compliant, non-lever voting machines are certified by the SBOE, it still will take the NCBOE a significant amount of time to complete the necessary steps to make them functional. Once the machines are certified, the NCBOE must take the following measures:

1. System Selection – although the NCBOE has already met with vendors to begin the process of research and evaluation, the lack of a certified list of machines has obviously limits the progress that it can make in assessing non-lever voting technologies. Moreover, since it is they who will the end-users of the new voting technology and since their voting rights are directly affected, Nassau County voters must be afforded a voice in the selection process through public hearings. Moreover, to make the hearing process meaningful, there must be some degree of preliminary voter education with respect to the relative merits of each proposed non-lever voting machine. The NCBOE expects the system selection process to take a minimum of three months from the date of SBOE certification. (Biamonte-DeGrace Joint Decl. at ¶ 22.)
2. System Purchase – although, pursuant to the New York State Election Law, the SBOE will itself negotiate the price of the non-lever, HAVA-compliant voting machines, the NCBOE will be responsible for negotiating the terms of related requirements such as training, service, and a warranty. Because Nassau County is one of the most populous counties in the state, it will have be particularly careful to choose a system that can be manufactured in large numbers by September 2007. This will involve coordinating with other local boards of elections, in order to ensure that the manufacturer can produce sufficient machines to meet all of our needs. Altogether, the NCBOE expects this process to take at least one month. (Id. at ¶ 22.)

3. Storage Procurement – until SBOE certification and NCBOE selection, it is impossible to arrange for proper voting machine storage because: 1) the NCBOE does not know the size of the system and its particular storage requirements; and 2) the NCBOE does not know how many such systems will be required. The identification of storage needs, and the procurement of commensurate storage facilities, will require between three to six months of NCBOE effort. (Id. at ¶ 22.)
4. Transportation Procurement – the NCBOE will have to procure a new trucking contractor to transport the voting machines from storage to the polling places on Primary and Election Day. The NCBOE cannot issue a request for proposals ("RFP") for the contractor until the SBOE certifies the systems and determines the maximum number of voters per system, because the number of voting machines could vary depending on system type. Moreover, the trucking contractor that currently transports the lever machines is not climate-controlled, and is not capable of transporting sensitive electronic equipment. This process will require between three to six months. (Id. at ¶ 22.)
5. Security System Implementation – due to the risk of hacking, which has been the subject of extensive media reportage, the NCBOE's current security for the lever machines will most likely be inadequate for the non-lever machines. Until the NCBOE can ascertain the new storage requirements (see paragraph 3, above) the NCBOE cannot develop a new security system or prepare an RFP for a security contractor. This process will take approximately three to six months. (Id. at ¶ 22.)
6. Machine Programming – because the NCBOE serves approximately 860,000 voters in 11 Assembly districts and 1162 Election Districts, there are thousands of different ballot

combinations that must be programmed into the systems, in both English and Spanish. This process will require at least one to two months, post-certification and selection. (Id. at ¶ 22.)

7. Voter Education – as noted above, Nassau County has used lever machines for the past century. Accordingly, Nassau County voters must be educated in the use of the new, non-lever, HAVA-compliant machines. Voter education is intrinsic to the right to vote, and the NCBOE anticipates that it will require 10 months, post-certification and selection, to ensure that voters properly are able to utilize the new technology. (Id. at ¶ 22.)

8. Acceptance Testing – the NCBOE also must test each new machine to ensure that it functions properly. In NCBOE's experience with the ballot marking devices in 2006, two out of 26 machines did not work when they were delivered from the SBOE to Nassau County. Accordingly, the NCBOE will require approximately one month to test the incoming, HAVA-compliant, non-lever voting machines for quality assurance purposes. (Id. at ¶ 22.)

9. Polling Place Survey and Modifications – the SBOE's regulations provide that the voting machine vendors must survey the present polling places with the local boards of elections and "[i]f any polling places are not compatible, the vendor shall advise the jurisdiction purchasing the voting system or equipment on the methods or procedures that the said jurisdiction may use to remedy any such problem." (9 NYCRR 6209.9(A)(3)). Nassau County has 397 polling places. Even assuming that the selected vendor and the NCBOE can accomplish the feat of surveying 10 polling places per business day, it will take approximately two months to complete the site surveys. The extent of the modifications to the polling places that Nassau County will have to make is unclear at this point, though the NCBOE anticipates that this process will require between two and six months. (Id. at ¶ 22.)

For obvious reasons, these processes cannot commence until NCBOE receives the SBOE-certified list of approved systems. The NCBOE anticipates that this process will require, in total, between 10 to 14 months to complete. (Id. at ¶ 22.)

7.

The SBOE Abandons Timeline for Compliance With the New HAVA Deadline

Had the SBOE fulfilled its obligations pursuant to the Remedial Order and the Plan for Replacement, and certified HAVA-compliant machines for selection by December 2006, the NCBOE conceivably could have implemented such machines in time for the September 2007 elections. The NCBOE had every reason to believe that the SBOE would, in fact, meet its commitments. In fact, the SBOE reiterated its commitment to meet its certification deadline in a September 20, 2006 letter to the county boards of elections. (See September 20, 2006 SBOE Letter, annexed to the Biamonte-DeGrace Joint Decl. as Exhibit A, and submitted herewith.) In that letter, SBOE co-executive directors Stanley L. Zalen and Peter S. Kosinski stated that "testing should be completed by December 4th and the State Board is now contemplating county selection by December 21st."[3]

Accordingly, the NCBOE planned to stretch its resources to the limit, in order to implement HAVA-compliant machines pursuant to a December 2006 SBOE certification. (Biamonte-DeGrace Joint Decl. at ¶ 17.) The SBOE, however, then made an abrupt about-face, and announced that it would not, in fact, meet its December certification deadline. By letter to the county boards of elections dated November 4, 2006, the SBOE stated that security testing – a prerequisite for certification – would not be completed until February 2007. (See November 4,

[3] Notably, while the December 2006 selection date referenced in the September 20, 2006 letter itself represented a departure from the September 2006 selection date earlier propounded by the SBOE, the December 2006 certification date was consistent with the Plan for Replacement timeline. It is unclear how the SBOE planned to reconcile local selection of new machines prior to their certification (as set forth in the Plan for Replacement) with the apparent requirements of Chapter 181, Section 12 of the New York Session Laws of 2005 (the "Election Reform and Modernization Act"), which appears to require SBOE certification of HAVA-compliant machines before they may be selected by the counties.

2006 SBOE Letter, annexed to the Biamonte-DeGrace Joint Decl. as Exhibit B, and submitted herewith.) Considering that, in the Plan for Replacement, security testing preceded certification by more than three weeks, it now seems likely that certification will not occur until some point in late February or early March 2006 , at the earliest. (Plan for Replacement, at pp. 1-2.) As noted, supra, New York Election Law requires the SBOE certify HAVA-compliant machines before they may be selected by the county boards of elections. (ERMA at § 12.) Therefore, as things now stand, the NCBOE will be required to complete the full transition to certified, non-lever, HAVA-compliant voting systems across Nassau County in the six months remaining between a February 2007 certification and the September 2007 elections. (Biamonte-DeGrace Joint Decl. at ¶ 22.) Given the extensive preliminary steps which must precede this transition, such a timetable is completely unrealistic.

Furthermore, folded within the abbreviated, six-month deployment timeline advanced by the current defendants, the SBOE has set forth an impossible timeline in which the county boards of elections must select the machines that they will use. Despite its concession that it will be unable to promulgate a list of certified machines until February 2007, at the earliest, the SBOE is demanding that local boards make their selections by March 7, 2007. (See line 119 of the SBOE's November 22, 2006 Voting Machine Replacement Project Task List Revised, annexed as Exhibit D to the Biamonte-DeGrace Joint Decl., and submitted herewith.) If they fail to do so, the SBOE will make the selection for them. This would allow less than one month for the complex process of selection, public participation and testing described at length, supra. (Biamonte-DeGrace Joint Decl. at ¶ 21.)

The SBOE has been severely criticized for its failure to meet various deadlines set forth by HAVA, which in turn has imperiled federal funding for costly HAVA implementation in

New York State. In the November 15, 2006 edition of Newsday, New York City Mayor Michael Bloomberg stated that:

> The perpetual foot-dragging at the state Board of Elections has resulted in a situation where, five years after the federal government passed the Help America Vote Act, the state Board of Elections has only just begun to test and certify machines ... This process is not expected to be completed until February 2007 ... As a result, the city Board of Elections will not be able to select and purchase new voting machines until February or March, only six months before the September 2007 primary ... That will make it all but impossible to acquire, test, and deploy machines - as well as train workers and educate New Yorkers - in time for the 2007 elections. (See, "Bloomberg Slams Board of Elections," Newsday, November 15, 2006 at p. A19, annexed hereto as Exhibit B.)

Likewise, in a November 18, 2006 letter to the Editor of The New York Times, New York City Corporation Counsel Michael Cardozo noted that:

> The State Board of Elections recently postponed again the target date for completing testing and certification of new voting machines, thus casting grave doubt on the city's ability to replace its voting machines by next year's elections and putting at risk approximately $20 million that New York City would otherwise receive in federal funds. (See, The New York Times, November 18, 2006 at p. A16, annexed hereto as Exhibit C.)

The proposed Intervenors share these concerns. Because they bear the primary responsibility to ensure the smooth functioning of the democratic process in Nassau County, they request leave to intervene based upon the facts cited, supra, and on the law cited infra.

Argument

A.
Intervention as of Right is Appropriate in the Instant Case

As demonstrated below, Intervenors' motion should be granted because they clearly qualify for intervention as of right under the Federal Rules of Civil Procedure. Pursuant to Fed. R. Civ. P. 24(a)(2), intervention as of right is appropriate in cases where 1) the application to intervene is timely; 2) the applicant shows an interest in the action; 3) this interest may be impaired by the disposition of the action; and 4) the applicant's interest is not adequately

protected and represented by the current parties to the action. (See Brennan v. New York City Bd. of Educ., 260 F.3d 123, 128-29 (2d Cir. 2001); Catanzano by Catanzano v. Wing, 103 F.3d 223, 232 (2d Cir. 1996); Hoblock v. Albany County Bd. of Elections, 223 F.R.D. 95 (N.D.N.Y. 2005) (granting intervention in election litigation)).

No single one of the aforementioned components is alone determinative on an intervention motion. Rather, "application of the Rule requires that its components be read not discretely, but together." (United States v. Hooker Chems. & Plastics Corp., 749 F.2d 968, 983 (7th Cir. 1984)). Thus, a "showing that a very strong interest exists may warrant intervention upon a lesser showing of impairment or inadequacy of representation. Similarly, where representation is clearly inadequate, a lesser interest may suffice." (Id.)

Federal courts, including those in the Second Circuit, construe the requirements of Rule 24 flexibly and liberally in favor of intervention. (See generally Turn Key Gaming, Inc. v. Ogala Sioux Tribe, 164 F.3d 1080, 1081 (8th Cir. 1999) ("Rule 24 should be construed liberally, and doubts resolved in favor of the proposed intervenor"); German v. Federal Home Loan Mortgage Corp., 899 F. Supp. 1155, 1166 (S.D.N.Y. 1995) (applying "liberal construction" of intervention requirements)). The Intervenors amply satisfy each of the requirements of Rule 24(a)(2).

1.
This Intervention Motion is Timely

First, with respect to timeliness, this Court has noted that timeliness of a motion for intervention is a factual determination, and is dependent on the circumstances of each particular case. (Brooks v. Sussex County State Bank, 167 F.R.D. 347 (N.D.N.Y. 1996)). Furthermore, this Court has adopted the following four factors in considering whether a motion to intervene is timely: 1) how long the applicant had notice of the interest before it made the motion to

intervene; 2) whether existing parties will be prejudiced by any delay in making the motion to intervene; 3) prejudice to the applicant if the motion is denied; and 4) any unusual circumstances militating for or against a finding of timeliness. Id. at 350.

By all of these metrics, the Intervenors' motion is timely. The Intervenors only had notice of their interests, set forth below, when the County received the SBOE's November 4, 2006 communication stating that a list of certified, HAVA-compliant voting machines would not be promulgated until at least February 2007. Only then did it become clear that the SBOE would not certify the machines in sufficient time for their deployment by county boards before the September 2007 elections. (Biamonte-DeGrace Joint Decl. at ¶ 18.) The existing parties, far from being prejudiced by any delay in this motion to intervene, indeed will profit from the involvement of the Intervenors, who can provide essential insight to the Court with respect to the logistical practicalities of local HAVA compliance. This insight has been sorely lacking from the SBOE's erstwhile promises to this Court.

Moreover, in contrast to the existing parties, who clearly will not be prejudiced by intervention at this time, the Intervenors will suffer extreme prejudice if their motion to intervene is denied. They are the ones who will have to implement HAVA-compliant, non-lever voting machines by September 2007, pursuant to this Court's Remedial Order and the New York Election Law. Yet, because of the current defendants' lackadaisical approach to certification – which only became clear on November 4, 2006 – such implementation is a practical impossibility without a potentially dire impact on Intervenors and the voters they represent. (Biamonte-DeGrace Joint Decl. at ¶¶ 23-26.) Accordingly, this motion is timely.

2.

The Intervenors Have Direct, Substantial, and Protectable Interests in this Matter

With respect to the requirement that a party seeking intervention have an "interest" in the matter, Intervenors submit that they have undeniable interests of the highest public importance.

The Second Circuit has held that the term "interest" when used in this context defies a simple definition. (Restor-A-Dent Dental Laboratories, Inc. v. Certified Alloy Products, Inc., 725 F.2d 871, 874 (2d Cir. 1984)). The interest, however, must be "significantly protectable." (Id.) It also must be "sufficiently direct or immediate to justify [the intervenor's] entry as a matter of right." (Id.) Moreover, it must be "direct, as opposed to remote or contingent." (Id.) (See also United States v. New York, 99 F.R.D. 130, 133 (N.D.N.Y. 1983) ("interest must be direct, substantial and significantly protectable."))

By any reasonable definition, Intervenors indisputably have direct, substantial, and significantly protectable interests in the instant case. First, they have an enormous financial interest, inasmuch as they stand to lose $15,642,749.92 in federal HAVA funding earmarked for the NCBOE's purchase of HAVA-compliant, non-lever voting machines. (See 42 U.S.C. 15302.) Economic interest has been found to be a ground for intervention. (See generally Brooks v. Flagg Bros., Inc., 63 F.R.D. 409 (S.D.N.Y. 1974.); Cascade Natural Gas Corp. v. El Paso Natural Gas Co., 386 U.S. 129 (1967)).

The Intervenors also have a direct, substantial, significantly protectable interest in the additional funds they undoubtedly will have to expend if they are forced to attempt to deploy new machines in time for the September 2007 elections, if that deadline is allowed to stand. As discussed supra, the State is solely responsible for the delay in certification of voting machines for use by the counties of New York State, because the State alone bears the responsibility for

certification pursuant to N.Y. Election Law § 7-201 and ERMA § 12. As a result of this delay, the County necessarily will face increased costs with respect to voting machine procurement because of the compressed timeframe for negotiation, delivery and acceptance of the machines. Project management costs will increase because the intensity of effort necessarily will increase. Moreover, associated contracts – including consultancy and transportation contracts – may have to be executed with only limited competition, resulting in additional increased costs to Nassau County. The County also must hire poll workers, technicians, educate voters and conduct training on an expedited basis, a situation that will increase costs as well. (Biamonte-DeGrace Joint Decl. at ¶ 24.)

Furthermore, the Intervenors have a direct, substantial, significantly protectable interest in their duty to properly and fairly administer elections in Nassau County, as required by New York law. Among their various statutory duties, the local boards of elections and their employees are responsible for: 1) ensuring the proper preparation and repair of voting machines (N.Y. Election Law § 3-302(1)); 2) carrying out the elections including development of an action plan to increase voter registration, particularly for those groups of persons who are historically underrepresented at the polls (see N.Y. Election Law § 3-212(4)(b)); 3) coordinating voter education programs (see id.); 4) preserving good order around the polling places and places of registration (N.Y. Election Law § 3-402(3)); and 5) teaching poll workers the rights of voters at the polls and their obligation "to maintain the integrity of the franchise" (N.Y. Election Law § 3-412(1-a)). All of these duties necessarily are impacted by the SBOE's delay in new voting machine certification, either directly or by the NCBOE's need to divert funding toward expedited post-certification implementation of the new machines. (Biamonte-DeGrace Joint Decl. at ¶¶ 4-5, 24-26.)

Finally, the Intervenors have an interest in being able to select their own voting machines from the SBOE's certified list. As it currently stands, New York State law permits the SBOE to strip away that choice if local boards do not make their selection by March 7, 2007. (N.Y. Election Law § 7-203.) However, through its inaction, the SBOE itself has made it impossible for local boards to comply with this deadline, thereby virtually guaranteeing that local boards, including the NCBOE, will be deprived of their right to choose. Intervention is necessary to permit Intervenors to protect this right from usurpation by the State under the guise of complying with this Court's Remedial Order.

3.

The Intervenors' Interests Will be Affected by the Outcome of This Matter

It is clear that the Intervenors' interests will be impacted by the outcome of the instant case. As a prerequisite for intervention by right, Rule 24(a)(2) requires, by its terms, that the disposition of the action "as a practical matter impair or impede the applicant's ability to protect" his interest. The Second Circuit has interpreted this terminology to mean that the harm to the interest in question "must be attributable to the court's disposition of the suit in which intervention is sought." (United States v. City of New York, 198 F.3d 360, 366 (2d Cir. 1999)). The issue to be considered is "simply the degree to which the applicant may be practically harmed by a judgment in [the] pending action." (Home Ins. Co. v. Lib. Mut. Ins. Co., 1990 U.S. Dist. LEXIS 15762 at *13 (S.D.N.Y. 1990)).

The Intervenors face a very practical harm, indeed, insofar as they stand either to lose more than $15 million in federal funding (in the event of non-compliance beyond September 2007), or to lose the funds that they will have to expend in a hurried effort to implement HAVA-compliant voting machines within a compressed, six-month timeframe.

Moreover, in the event that this Court does not modify its Remedial Order to reflect the SBOE's failure to meet its certification deadlines, then the Intervenors will be unable to meet their responsibility to properly and fairly administer elections in Nassau County. The NCBOE is responsible for protecting the integrity of the new voting systems and ensuring that votes are recorded in Nassau County. (N.Y. Election Law § 3-302(1).) The new voting systems, however, will be more vulnerable to malfunction than the lever machines due to the relative fragility of the devices and the NCBOE's inexperience with them. (See generally, Lawrence Norden, The Machinery of Democracy: Protecting Elections in an Electronic World, 2 (Brennan Center Task Force on Voting System Security, 2006), available at http://www.brennancenter.org/dynamic/subpages/download_file_39288.pdf). Indeed, in the NCBOE's limited experience with non-lever, electronic voting systems in 2006, two of the 48 ballot marking devices that had been previously accepted by the SBOE did not function properly and were unusable upon arrival in Nassau County.

Furthermore, as has been reported extensively by voting rights advocates and the news media, electronic voting machines are vulnerable to attack from computer hackers and "[v]otes have been miscounted or lost as a result of defective firmware, faulty machine software, defective tally server software, election programming errors, machine breakdowns, malfunctioning input devices, and poll worker error." (Id. at p. 7, internal citations omitted.) Without adequate time for solid threat analysis, the NCBOE will be unable to take the proper precautions to ensure that the new voting systems accurately record votes. Accordingly, the Intervenors' interests in fair and proper election administration – and the fulfillment of their legal duties to provide the same – doubtless will be affected by the outcome of this matter.

These injuries will, in fact, necessarily be attributable to this Court's disposition of the instant case, primarily through the enforcement of the Remedial Order deadline. In addition, as noted, supra, the DOJ seeks in its Complaint the return of New York State – and, by extension, Nassau County – HAVA funding. Whether the DOJ succeeds or fails in its effort to recover this funding lies within the sound discretion of this Court.

4.

The Intervenors' Interests are Not Protected or Represented by the Current Parties

Fourth, the Intervenors' interests manifestly are not adequately protected and represented by the current parties to this action. Though an applicant for intervention has the burden of showing that representation is inadequate, "the burden should be treated as minimal." (United States Postal Service v. Brennan, 579 F.2d 188, 189 (2d Cir. 1978) (internal quotations omitted)). More specifically, the burden upon the movant is only to show that current representation "may be" inadequate. (Brooks v. Sussex County State Bank, 167 F.R.D. 347, 35 1 (N.D.N.Y. 1996)). In considering whether this burden has been met, this Court favorably has cited the formulation of the Southern District of Florida, to the effect that "representation is adequate if 1) no collusion exists between the representative and an opposing party; 2) the representative does not have or represent an interest adverse to the proposed intervenor; and if 3) the representative does not fail in the fulfillment of its duty." (Id., citing South Dade Land Corp. v. Sullivan, 155 F.R.D. 694 (S.D. Florida 1994)).

In the instant case, while Intervenors do not suggest any collusion between the SBOE and the DOJ, the SBOE manifestly has failed in the fulfillment of its duties to the county boards of elections and to Nassau County voters. Specifically, the SBOE had a duty to take local HAVA implementation logistics into account in its defense of the instant action and in its communications with this Court. Instead, it agreed to unrealistic machine deployment timelines

and then missed its own deadlines within those timelines, thus placing the Intervenors' federal HAVA funding at risk. Moreover, the SBOE's interests are, at this point, adverse to those of the Intervenors. While the SBOE has an interest in HAVA compliance, they appear to define their interest without regard to fair and orderly administration of elections in Nassau County; the Intervenors, however, have an independent duty to properly administer elections in accordance with New York Election Law.

Even in cases where there is some identity of interest between a current party to an action and a proposed intervenor, resulting perhaps in a presumption of adequacy, the Second Circuit has noted that 1) evidence of collusion; 2) adversity of interest; 3) nonfeasance; or 4) incompetence may suffice to overcome the presumption. (Butler, Fitzgerald & Potter v. Sequa Corp., 250 F.3d 171, 180 (2d Cir. 2001); see also Hoblock v. Albany County Bd. of Elections, supra, 233 F.R.D. at 98-99. 2005 U.S. Dist. LEXIS 33579 at **11). In the instant case, the Intervenors can show at least three of the four disjunctive requirements. There is the aforementioned adversity of interest. There is also the nonfeasance by the SBOE with respect to inclusion of local considerations in its defense of this action, and with respect to its laissez-faire approach to HAVA-compliant, non-lever machine certification. Finally, there is the SBOE's mishandling of this matter, as evidenced by its failure to communicate the realities of HAVA compliance to this Court, its agreement to wholly unrealistic compliance timelines, and its failure to execute on its certification responsibilities within the context of those timelines.

Accordingly, the Intervenors respectfully submit that they are entitled to intervene as of right in the instant case, pursuant to Rule 24(a)(2).

B.

Permissive Intervention is Appropriate in the Instant Case

In the alternative, the Intervenors seek this Court's permission to intervene in the instant case pursuant to Fed. R. Civ. P. 24(b)(2), which provides that "[u]pon timely application a party may be permitted to intervene in an action ... (2) when an applicant's claim or defense and the main action have a question of law or fact in common" and the intervention will not "unduly delay or prejudice the adjudication of the rights of the original parties." (Stringfellow v. Concerned Neighbors in Action, 480 U.S. 370, 380 (1987); United States v. Yonkers Bd. of Educ., 518 F.Supp. 191, 202-03 (S.D.N.Y. 1981) (granting permissive intervention when timely application made on behalf of parties directly interested in litigation) aff'd 742 F.2d 111 (2d Cir. 1984)).

Rule 24(b)(2) "is to be liberally construed." (See, e.g., New York v. Reilly, 143 F.R.D. 487, 490 (N.D.N.Y. 1992)). As this Court has noted, "The principal consideration for the court in determining whether or not to allow intervention is whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties. In exercising its discretion, the court may also consider other relevant factors including the nature and extent of the intervenors' interests, whether their interests are adequately represented by the other parties, and whether parties seeking intervention will significantly contribute to full development of the underlying factual issues in the suit and to the just and equitable adjudication of the legal questions presented." (Id. Internal citations omitted.) The Intervenors meet each of these standards.

1.

Intervention Will Not Delay or Prejudice the Current Parties

First, as noted supra, intervention will not in any way prejudice adjudication of the rights of the original parties. By the very terms of its Complaint, the DOJ seeks to compel New York State to come into full compliance with HAVA. (Complaint at p. 1.) Rather than prejudice the right of the DOJ to seek this end, the Intervenors will, in their defense of this action, supply a realistic and rational approach to its ultimate implementation. Similarly, the Intervenors will not prejudice the rights of the current defendants, but rather will supplement their defense with the practical, local view of HAVA implementation that has, as yet, failed to come before this Court.

Moreover, intervention will not delay adjudication of this matter. Quite to the contrary – without intervention, the current defendants will continue to supply unrealistic timelines for HAVA implementation and stipulate to unworkable formulae which, in turn, will only serve to prolong this litigation when the defendants' compliance proves impossible. The Intervenors submit that their participation will enable this Court to render informed judgments, thereby expediting the ultimate resolution of this case.

2.

The Intervenors Have a Substantial Interest in the Instant Litigation

The substantial nature and extent of the Intervenors' interests in the instant case have already been discussed at length, supra.

3.

The Intervenors' Interests are Not Protected or Represented by the Current Parties

For the reasons described supra, the Intervenors' interests are not adequately represented by the current defendants. Rather, the current defendants have seriously prejudiced the Intervenors' interests by chronic underrepresentation of local HAVA implementation realities.

4.

The Intervenors Will Contribute Significantly to Factual Development in this Case

Fourth, the Intervenors will significantly contribute both to full development of the underlying factual issues in the suit, and to the just and equitable adjudication of the legal questions presented. It is patently obvious that the underlying factual issues in this suit have not fully been developed by the current parties. The result has been an unrealistic 2007 timeline for implementation of HAVA-compliant, non-lever voting machines; missed deadlines within the context of that timeline; and a lack of understanding with respect to what the county boards of elections must do between certification and implementation. Intervention will remedy the factual deficits that underpin this lamentable situation, and will lead to a just, fair, and commonsense resolution of this matter.

5.

The Intervenors Share Common Questions of Law and Fact With the Parties

Finally, the Intervenors' defenses share common question of law and fact with both the current plaintiff's claims and the current defendants' defenses. It is worthwhile to note that Rule 24(b)(2) is satisfied "where a single common question of law or fact is involved, despite factual differences between the parties." (McNeill v. New York City Housing Authority, 719 F. Supp. 233, 250 (S.D.N.Y. 1989)).

Common questions of law include: 1) how HAVA must be implemented by the SBOE, considering that, pursuant to New York Election Law, it acts through county boards of elections such as the NCBOE; and 2) to what extent, if any, does the New York Election Law bear upon HAVA implementation in New York. Common questions of fact include: 1) whether county boards of elections such as the NCBOE have the actual capability to implement HAVA-compliant, non-lever voting machines in time for the September 2007 elections; and 2) what the

impact of such implementation, under the present circumstances, will be upon voting rights in New York State and Nassau County.

It should be noted that, with respect to the requirement that the proposed intervenors' "claim" or "defense" share a common question of law or fact with those of the main action, the words "claim" or "defense" are "not to be read in a technical sense, but only require some interest on the part of the applicant." (Dow Jones & Co. v. United States Dep't of Justice, 161 F.R.D. 247, 254 (S.D.N.Y. 1995) (finding intervention appropriate where the intervenor had an interest in the suit which would finally be determined by the suit's outcome, and where the intervention would not cause undue prejudice or delay)). As noted, supra, the Intervenors' interests – both economic with respect to federal HAVA funding, and legal with respect to the execution of their duties under the New York Election Law – are inextricably bound up in the outcome of this case.

For the foregoing reasons, permissive intervention is appropriate in the instant matter pursuant to Rule 24(b).

Conclusion

For all of the foregoing reasons, and for the reasons set forth in the attached declarations, Intervenors ask that their motion to intervene be granted in toto, together with such other and further relief as this Court deems just and proper.

Dated: December 21, 2006
Mineola, New York

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