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Catherine O'Hagan Wolfe, Clerk
United States Court of Appeals
for the Second Circuit
Daniel Patrick Moynihan U.S. Courthouse
500 Pearl Street
New York, New York 10007

Re: *United States* v. *New York State Board of Elections*, Case No. 07-4211-cv

Dear Ms. Wolfe,

On January 16, 2008, this Court entered an order denying Nassau County's motion for summary reversal, expedited this appeal, and ordered the filing of letter briefs addressing new facts raised by the County's amended notice appealing the district court's December 20, 2007, order denying intervention. This letter brief is filed pursuant to that directive. As explained herein, the district court's order should be affirmed.

BACKGROUND

A. County Moves To Renew Motion To Intervene

On December 13, 2007, the County moved to renew its motion to intervene. D.Ct. Docket No. 144.[1] This second motion to intervene was based on the motion filed by the United

[1] "D.Ct. Docket No. _" refers to items listed in the district court's docket sheet in this case. A copy of the district court's December 20, 2007, hearing transcript, D.Ct. Docket No. 176, is attached to the County's Reply Memorandum In Support Of Summary Reversal, which

(continued...)

States on November 5, 2007, to enforce the June 2006 Remedial Order and require the State to replace lever machines with fully HAVA-compliant voting systems for use in the fall 2008 elections. See D.Ct. Docket No. 134. The County argued in support of its renewed motion to intervene that it would not be able to comply with a requirement to replace all lever machines by the fall of 2008 because it needed "10 to 14 months" to introduce new voting machines. D.Ct. Docket No. 144 at 2. The United States opposed the renewed motion. D.Ct. Docket No. 161.

B. District Court's December 20, 2007, Hearing On The County's Renewed Motion To Intervene And United States' Motion To Enforce

Hearing on the motion to enforce and the renewed motion to intervene was held on December 20, 2007. Numerous entities and organizations filed *amicus* briefs on the enforcement issue, including 12 commissioners representing the Chemung County, Fulton County, Orange County, Schenectady County, Ulster County and Washington County Boards of Elections (12 County Commissioners) (D.Ct. Docket No. 173), six members of the New York State Assembly (D.Ct. Docket No. 169), and the Election Commissioners' Association for the State of New York (ECA) (D.Ct. Docket No. 163).

The 12 Commissioners argued that "full or graduated compliance with HAVA is possible in 2008 provided certain issues preventing County Boards from compliance are addressed." D.Ct. Docket No. 173 at 1. The six members of the New York State Assembly recommended that new voting systems be "implemented in two steps," with the "ballot markers available in the 2008 elections and paper ballots/precinct-based optical scanners available for the 2009

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[1](...continued)
was filed with this Court on January 10, 2008. Pages of the transcript are referred to as "Tr. __." Pages of the County's letter brief filed with this Court on January 24, 2008, are referred to as "Letter Br. __."

elections." D.Ct. Docket No. 169 at 1. The ECA filed an *amicus* brief opposing full HAVA compliance by the fall of 2008. D.Ct. Docket No. 163. The ECA brief included a declaration from commissioners with the Nassau County Board of Elections which stated that its elections would be "thrown into chaos" if forced to adopt a new voting system "without adequate preparation time," and that it would take the County "ten to fourteen months after certification is complete[d]" by the State to implement a new voting system. *Id.* at Exhibit 3, pp.1, 8-9. The declaration stated that the County implemented 24 ballot marking devices in 12 polling places that were used in the fall of 2007. Exhibit 3, p. 13.

The district court also admitted *amicus* briefs and numerous exhibits filed by various organizations including, *inter alia*, the Multiple Sclerosis Society, the Self-Advocacy Association of New York, and the United Spinal Association, *et al.* (D.Ct. Docket No. 174), New Yorkers for Verified Voting, League of Women Voters of New York State, and the New York Public Interest Research Group, *et al*. (D.Ct. Docket Nos. 147-149), ARISE, Coalition for Voting Integrity, and the New York Citizens for Clean Elections, *et al.* (D.Ct. Docket No. 158). The community groups fully supported implementation of accessible ballot marking devices for the fall of 2008.

1. During the hearing, the district court heard statements from the County's counsel on the County's renewed motion to intervene. Tr. 13. The court observed that there is some "dissent in the uniformity of the view" among the counties with respect to the feasibility of full HAVA compliance in 2008. Tr. 13-14. Counsel for the County responded that they are one of the larger counties in the state with a greater voter population, Tr. 14, and that, depending on what the SBOE agrees to do, the county will "be the ones who are subject to the chaos in our

county elections, we'll be the ones who stand to lose millions of dollars." Tr. 15. Counsel for the SBOE informed the court that the HAVA funds are "in the comptrollers, in an account, State of New York." Tr. 22. Counsel for the United States argued state law makes clear that the SBOE controls the conduct of elections in New York, and that funds that the State received under HAVA is "state money" and does not belong to the counties. Tr. 31-35. The court denied the County's motion to intervene. Tr. 36.

2. The court then heard argument from the State, SBOE, and United States on the United States' motion to enforce. Tr. 36. The court asked about the two plans submitted by the SBOE. Tr. 39. The State responded that both plans anticipate full compliance in 2009. Tr. 41. Counsel for the State explained that the "State of New York's primary interest here is in fair and orderly elections and ensuring that every vote is counted, every vote is counted accurately and every vote is counted as the voter intended." Tr. 43. During this discourse, the court stated that any enforcement order must "take into account the obligation by the counties and everybody in the State to implement HAVA[,]" and that "whatever plan we adopt to make sure we accommodate the concerns about implementation of that plan." Tr. 51-52. The State explained that while the SBOE must come up with the plan, "what the State wants to do is protect that right to vote, and that can't be done, that cannot be done fully and assuredly if * * * the Board is forced to fully implement in 2008." Tr. 53.

The district court questioned counsel for the United States on how the court should proceed, and counsel responded that while lever machines ultimately will "have to be replaced," counsel agreed that the delay in the State's certification process made it infeasible to replace them by the fall 2008 elections. Tr. 85. Counsel for the SBOE requested additional time to develop a final plan that included compliance time lines that would delay full HAVA compliance

until 2009. Tr. 87. The district court ordered the SBOE to develop a plan that would provide for a ballot-marking accessible voting machine in each polling place by the fall of 2008, and fully HAVA-compliant systems by the fall of 2009. Tr. 92-93.[2]

C. Supplemental Remedial Order

On January 4, 2008, the SBOE filed a revised HAVA compliance plan that followed the time frame the court discussed at the December 20, 2007, hearing; the SBOE filed a supplemental plan on January 11, 2008. See Attachments A and B. As discussed at the December 20 hearing, the Order calls for two time-lines for compliance. Plan A requires the replacement of lever voting machines throughout the State in time for the fall 2009 elections; it sets out time-line requirements to ensure that SBOE provides a list of certified voting machines to counties by no later than October 23, 2008. Attachment B at Line 36. Under this plan, the delivery of machines to the counties should be completed by no later than June 3, 2009. *Id*. at Line 65.

Plan B requires an accessible ballot marking device at each polling place in the State in

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[2] "Ballot marking devices" provide accessibility to the voting booth for people with disabilities and are used to mark paper ballots. A voter with a disability marks the paper ballot by, for example, pushing buttons that include braille, or a puff/air device for those voters with physical disabilities. These devices mark the voter's paper ballot which is counted with other paper ballots.

"Fully HAVA-compliant voting systems" refers to voting systems, or voting machines, that will replace the current lever machines. HAVA requires that these new voting machines, at minimum, (1) permit the voter to verify his/her vote before the ballot is cast and counted; (2) provide the voter with the opportunity to change or correct any error before the ballot is cast and counted; and (3) if the voter selects more than one candidate for a single office, notify the voter that he/she has selected more than one candidate before the ballot is cast and provide the voter with the opportunity to correct the ballot. 42 U.S.C. 15481(a)(1). HAVA further requires that voting systems produce a permanent paper record with a manual audit capacity, and be accessible to persons with disabilities. 42 U.S.C. 15481(a)(2) & (3).

time for the fall 2008 elections. See Attachment A. Under this plan, the SBOE is to provide a list of recommended ballot marking devices for purchase by the counties. *Id.* at Line 27. Counties will have provided their orders for such machines by February 8, and counties will have the machines delivered and ready by no later than July 31, 2008, so that the machines are ready for the election in September 2008. See Attachment B, Lines 38, 48-53.

On January 16, 2008, the district court entered a Supplemental Remedial Order adopting the SBOE's Plans A and B. Attachment C. The district court ordered that the SBOE submit detailed weekly reports on its progress and notify the district court and United States of any deviations from the schedule. *Id.* at 4.

DISCUSSION

The district court acted well within its discretion when it denied the County's intervention in the December 20, 2007, order. The undisputed facts fully support the district court's order.

A. The Facts Fail To Establish That The County Must Be Permitted To Intervene To Avoid "Electoral Chaos"

1. The County asserts (Letter Br. 4) that it should be granted intervention because the State will not give it sufficient time to implement the remedy and that this will cause "chaos" in the County's 2008 electoral process. These concerns stem from the County's speculative belief it would be required to replace all of its lever machines by the fall of 2008. As the district court noted, those concerns were and are unfounded.[3]

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[3] In view of the district court's order extending the deadlines for HAVA compliance, the County admits in its letter brief (Letter Br. 2 & n.2) that the "schedule for implementing HAVA has changed."

While the United States's motion to enforce, filed in November 2007, sought full HAVA compliance by the fall of 2008, that is not what the district court has ever ordered. At the time of the December 20, 2007, hearing on the County's renewed motion to intervene, the district court was not enforcing any time-table at all, much less a time-table for full compliance by the fall of 2008. While that deadline had been raised by the United States nearly two months before in its motion to enforce, the United States conceded at the December 2007 hearing that a 2008 deadline for full HAVA compliance was not feasible, given delays in the State's certification process. Tr. 85. The district court agreed, and did not adopt a 2008 deadline for full HAVA compliance. Thus, the County's concern, that it appears to again raise here, that it would not be able to implement fully HAVA compliant systems by the fall of 2008 had no basis in fact because no such requirement was ever, or will be, imposed. The district court made that clear to counsel for the County at the December 20 hearing. See Tr. 19-20.

Since the December 20 hearing, the district court has adopted the compliance time-lines it discussed at that hearing. The County has never claimed, and did not claim on December 20, 2007, that these deadlines will cause such "chaos" in the electoral process. The Supplemental Remedial Order contains two time-tables for compliance with HAVA. See pp. 5-6, *supra*. Plan B sets out the time-table for placing one ballot marking device accessible to persons with disabilities in each polling place; this is the *only* aspect of the remedy that must be completed by the fall of 2008.

While the County's concerns always have centered on the tasks associated with replacing all lever-voting machines by the fall 2008 elections, the requirement with respect to ballot marking devices is much more modest. The County has never indicated, either in its letter brief

to this Court or in any filing with the district court, that it would not be able to implement the limited plan of ordering, purchasing, and completing acceptance testing of a ballot marking device for each polling place so that the devices would be available for use in the September 2008 federal primary election.

The completion date for the SBOE's plan to replace all lever machines and accomplish full HAVA compliance, which has always been the focus of the County's attempts to intervene, has been pushed back a year to the fall of 2009. There are no facts in the record to suggest that the County cannot meet this new time-table, and in fact the County has not asserted in its letter brief to this Court, nor has it ever never asserted, that a fall 2009 deadline will cause problems. The County has repeatedly stated, and its intervention claim rests, on its concern that it needs 10 to 14 months after SBOE certification to implement a new voting system, and that it feared "electoral chaos" because it did not think that the court, or the State, would provide that much lead time. See County's Letter Br. 5; County's Motion For Summary Reversal (2d Cir.) (dated Nov. 21, 2007), Clines Declaration at 6; D.Ct. Docket No. 144, County's Renewed Motion To Intervene at 2 & Declaration of Scigliabou and DeGrace at 9; D.Ct. Docket No. 101, County's Motion To Intervene, Joint Declaration of Biamonte and DeGrace at ¶ 22.

The County's concern that it would not have 10 to 14 months to implement a new voting system has been fully accommodated even without its participation as a party. At the December 20 hearing, the district court agreed with the parties and *amici* that full-HAVA compliance should be extended to the fall of 2009 in order to avoid any electoral difficulties in 2008. Under this plan, the County will have at least 11 months (if not more) – from October 23, 2008 (the completion date for SBOE to certify non-lever machines) to September 2009 (the time of the

federal primary elections) – to completely replace its lever voting machines. This period of time is well within the 10 to 14 months that the County has repeatedly claimed it needs to fully implement a new HAVA-compliant voting system.

Given the record as of December 20, 2007, when the court decided, with the agreement of the State and the United States, that full compliance was not feasible for the fall of 2008, the County's argument that it will suffer electoral chaos was proven to be unfounded and its claim that intervention was necessary to permit it to protect its electoral process was effectively rebutted. Certainly, no party in this case is interested in causing electoral chaos, see p. 4, *supra*, and the district court's decision to adopt a plan for graduated compliance, rather than full compliance by the fall of 2008, fully illustrates that the County's concerns in that regard have no factual grounding, see p. 4-5, *supra* & Tr. 51-52. Indeed, the district court has consistently shown a solicitous interest in *avoiding* any electoral chaos; it has postponed compliance deadlines in 2006, 2007 and 2008, see Attachment D at 12, and the United States has agreed with all of these measures.

2. The County further contends (Letter Br. 4-5) that it should be permitted to intervene because otherwise it may lose HAVA funds. This contention is without merit. The Department has not sought such a sanction and the State's federal HAVA funds are not at issue in this case. See also Tr. 45 ("Court: The federal government * * * didn't bring a motion for contempt. * * * They are not anxious to drop a club on New York State. They want compliance with HAVA."). As recoupment of federal funds is not an issue here, the County cannot rely on a nonexistent threat of financial loss to intervene.

The County nonetheless attempts to buttress its concern over loss of funding by referring

to a statement that counsel for the United States made at the hearing concerning a recent amendment to Section 102(a)(3)(B) of HAVA, 42 U.S.C. 15302(a)(3)(B), that further extended the compliance deadline. Counsel for the United States stated that under this recent amendment to HAVA, compliance should be completed by September 2008. This claim does not further the County's argument. As stated above, there is no claim in this case about recouping HAVA funds, and no such claim could be made. Moreover, given that the district court's supplemental order promises compliance by September 2009, any suggestion that the County's HAVA funds ultimately may be at risk is speculative and factually unsupported. Under HAVA, any question of recoupment of funds would be within the jurisdiction of the United States Election Assistance Commission.

B. The Facts Show That The State's And County's Interests Are Aligned

The County argues (Letter Br. 6) that its interests with the State conflict because the State's repeated postponements in the certification deadline are a detriment to the County's interest in complying with HAVA. The County seems to speculate that further postponement is inevitable. The facts, however, do not support this allegation.

It is clear from the December 20 hearing that the State's and County's interests in avoiding electoral difficulties *are* aligned. Counsel for the State made clear not only that it wants to put into place voting systems that comply with HAVA, but also that "New York's primary interest here is in fair and orderly elections and ensuring that every vote is counted, every voted is counted accurately and every vote is counted as the voter intended." Tr. 43. There have been at least four elections held since this lawsuit was first filed, and Nassau County has expressed concern every time about impending electoral "chaos." On December 20, 2007, as

in the past, it was clear to the court that the parties were not pushing deadlines that would cause electoral difficulties, and in fact were concerned that future elections be held without difficulty. The County's interest in avoiding problems on election day is well reflected in the interests and efforts of the parties, and in the decisions of the district court. Intervention is not, and has never been, necessary for Nassau County to avoid electoral problems. Moreover, while there have been reasons for past delays in certifying systems, there is little reason at this point to expect any further delay. New York Election Law gives the SBOE ultimate responsibility for ensuring the proper conduct of elections. See Attachment D at 8. Consistent with state law, the Supplemental Remedial Order makes the SBOE responsible for administering Plans A and B in this case. The facts in the case show that thus far the SBOE is meeting these time deadlines. See Attachment E. With respect to accessible ballot marking devices, the SBOE reported to the district court in its January 4, 2008, filing that on January 23, 2008, SBOE Commissioners will determine which ballot marking device systems will be offered to the counties for their selection, and that following authorization, the counties will have until February 8, 2008, to complete their selection and purchase process. Attachment A at 4. The SBOE will select and order devices for any county that fails to do so by February 8, 2008. *Ibid*. The SBOE will conduct acceptance testing "at a central location rather than by the various County and New York City Boards of Election" in order to save time in the process. *Id.* at 5.

As for the replacement of lever machines in time for the fall 2009 elections, SBOE reports that its independent testing authority concurs with the time line set out in Plan A, and that the SBOE will "endeavor to use any prior test results" that were done by other independent testing authorities on any voting system. Attachment B at 2. By relying, where possible, on

prior testing, the SBOE will be able to certify some voting systems earlier than others in an effort to give the counties ample time to complete their designated tasks. *Ibid.* SBOE's goal is clearly to expeditiously complete the certification process so that counties have ample time to implement the new voting systems by no later than the fall of 2009. The facts in the case establish that, thus far, the State has been able to adhere to the time-tables set out in the supplemental order. See Attachment E at 1, 3. Moreover, pursuant to the terms of the Supplemental Remedial Order, Attachment C at 4, the district court and the United States are closely monitoring this ongoing process to ensure against any undue delay.

CONCLUSION

For the foregoing reasons, the district court's December 20, 2007, order denying the County's intervention should be affirmed.

Respectfully submitted,

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CERTIFICATE REGARDING PDF BRIEF

I, Lisa Wilson Edwards, hereby certify that the letter brief filed by the United States in *United States* v. *New York State Board of Elections*, No. 07-4211 (2d Cir.) was scanned for viruses using TREND MICRO-OfficeScan, and that no virus has been detected.

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Lisa Wilson Edwards

Dated: February 6, 2008

CERTIFICATE OF SERVICE

I hereby certify that on February 6, 2008, copies of the United States' Letter Brief and Attachments were served electronically and by overnight Federal Express delivery on the following counsel of record:

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