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January 15, 2008

Hon. Gary L. Sharpe
United States District Judge
James T. Foley U.S. Courthouse
445 Broadway, Room 441
Albany, NY 12207

Re: *United States of America v. New York State Board of Elections, et. Al.*
Northern District of New York
06-CV-0263 (GLS)

Dear Judge Sharpe:

On January 11, 2008, the United States filed a letter brief and proposed Supplemental Remedial Order. On behalf of the Defendant State of New York, I am now filing a proposed Supplemental Remedial Order, which largely retains the language contained in the federal government's proposed order, but includes several modifications. Those suggested changes are as follows:

Page 1, Introductory para.: The references to "New York" and "defendants" have been changed to refer to "the SBOE," which developed the compliance plan and is responsible for its implementation. This is consistent with the wording of the Original Remedial Order (pp. 2-3).

Page 2, para. 1: In line 1, the phrase "[t]his Court fully agrees with the United States" has been changed to delete the word "fully". As originally written, the language suggests that the Court has adopted entirely every statement, argument and/or representation – on every topic – made by the U.S. in their submissions. The proposed revision makes clear that the court agrees with DOJ's position that New York is not in full compliance with HAVA. In addition, the phrase "substantially failed to comply" has been modified to state simply that the defendants are not in compliance with the Original Remedial Order. Again, this is consistent with the wording of the Original Remedial Order (pp. 1-2).

Page 2, para. 2: The State's proposed order deletes this paragraph, which contains sweeping preemption language. It is true that the U.S. Constitution's Election Clause reserves to the federal government the power to regulate the time, place and manner of federal elections. However, should a conflict preemption issue arise, the parties should be afforded an opportunity to address the particular facts and circumstances involved.

Page 2, para. 3: The language has been modified to remove the characterization of the delays in HAVA implementation as “unacceptable and continued,” and to instead simply acknowledge the impossibility of fully complying with the voting systems requirements in 2008. There have been no findings of fact regarding the causes or the legitimacy of the delays. Moreover, the State’s proposed wording is in keeping with language and tenor of the Court’s June 2, 2006 Remedial Order (“Original Remedial Order”). See Original Remedial Order (Dkt. 77), pp. 2-3.

Pages 3-4, paras. 2-4: The references to “New York” and “defendants” have been changed to refer to “the SBOE.” In paragraph 4, line 3, language is added to permit the parties to agree to alter the reporting requirement without Court intervention.

Page 4, para. 5: In line 4, “SBOE” replaces “Defendants”. No such substitution is made in line 1, which concerns defendants’ obligation to notify the Court of any deviations from the compliance plan, since the original order also places the responsibility on all defendants.

Added Para. 7: This added paragraph – which provides that the order shall expire on January 1, 2010, absent good cause shown – tracks and updates the original order which provided for implementation in Fall 2007 and expiration of the order in January 2008.

Page 5, para. 7 (para. 8 of the State’s proposed remedial order): The State’s proposed order removes the reference to appointment of a special master as an example of the future actions the Court may take to enforce compliance. The reference is unnecessary and superfluous in light of the “any and all actions” language.

A redlined version of the State defendant’s proposed order, as well as a redlined version showing the modifications to the federal Government’s proposal are attached.

Respectfully submitted

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cc: All Counsel