

STATE OF WISCONSIN

CIRCUIT COURT
BRANCH _____

DANE COUNTY

J. B. VAN HOLLEN,
In his official capacity as
Attorney General of the State of Wisconsin
17 West Main Street
Post Office Box 7857
Madison, WI 53707-7857 ,

Case No.

Petition for Writ of Mandamus 30952

Plaintiff,

v.

GOVERNMENT ACCOUNTABILITY BOARD

17 West Main Street, Suite 310

Post Office Box 2973

Madison, WI 53701-2973

THOMAS CANE,

In his official capacity,

c/o Government Accountability Board

17 West Main Street, Suite 310

Post Office Box 2973

Madison, Wisconsin 53701-2973

GERALD NICHOL,

In his official capacity,

c/o Government Accountability Board

17 West Main Street, Suite 310

Post Office Box 2973

Madison, Wisconsin 53701-2973

MICHAEL BRENNAN,

In his official capacity,

c/o Government Accountability Board

17 West Main Street, Suite 310

Post Office Box 2973

Madison, Wisconsin 53701-2973

IF YOU REQUIRE THE ASSISTANCE OF AUXILIARY AIDS OR SERVICES BECAUSE OF A DISABILITY, CALL (608) 266-4678
(TTY -- (608) 266-4625) AND ASK FOR THE DANE COUNTY CIRCUIT COURT ADA COORDINATOR.

WILLIAM EICH,
In his official capacity,
c/o Government Accountability Board
17 West Main Street, Suite 310
Post Office Box 2973
Madison, WI 53701-2973

VICTOR MANIAN,
In his official capacity,
c/o Government Accountability Board
17 West Main Street, Suite 310
Post Office Box 2973
Madison, WI 53701-2973

GORDON MYSE,
In his official capacity,
c/o Government Accountability Board
17 West Main Street, Suite 310
Post Office Box 2973
Madison, WI 53701-2973

KEVIN J. KENNEDY,
In his official capacity,
c/o Government Accountability Board
17 West Main Street, Suite 310
Post Office Box 2973
Madison, WI 53701-2973 and

NATHANIEL E. ROBINSON
In his official capacity,
c/o Government Accountability Board
17 West Main Street, Suite 310
Post Office Box 2973
Madison, WI 53701-2973

Defendants.

COMPLAINT

Plaintiff J. B. Van Hollen, acting in his official capacity as Attorney General of the State of Wisconsin, alleges as follows for his cause of action against the Defendants.

INTRODUCTION

1. This action is brought pursuant to Wis. Stat. § 5.07, which states in relevant part, as follows:

Action to compel compliance. Whenever a violation of the laws regulating the conduct of elections or election campaigns occurs or is proposed to occur, the attorney general or the district attorney of the county where the violation occurs or is proposed to occur may sue for injunctive relief, a writ of mandamus or prohibition, or other such legal or equitable relief as may be appropriate to compel compliance with the law.

The Attorney General's authority to commence an action under Wis. Stat. § 5.07, is not dependant upon exhaustion of the complaint procedures set forth in Wis. Stat. § 5.061 and, if it were, proceeding under section 5.061 for the relief sought in this action would be futile. All relief sought in this Complaint is expressly authorized by section 5.07.

2. Wisconsin Attorney General J. B. Van Hollen is exercising the authority conferred upon him under section 5.07 because the fundamental right to vote is at risk. Because of the Defendants' inaction, properly qualified voters are at risk of having their votes diminished and diluted by the votes of unqualified, ineligible voters who are not entitled to cast ballots. The stakes are enormously high: unless this court acts quickly and decisively, the right to Wisconsin's ten (10) electoral votes may be determined by illegal ballots and, ultimately, the fate of Wisconsin's electoral votes may materially impact the November 4, 2008, election for President of the United States.

3. The United States Supreme Court has repeatedly affirmed the need to protect the integrity of federal elections by preventing election fraud and illegally cast ballots. In *Purcell v. Gonzales*, 549 U.S. 1, 3-4 (2006), it stated:

Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy. Voter fraud drives honest citizens out of the democratic process and breeds distrust of our government. Voters who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised. “[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen’s vote just as effectively as by wholly prohibiting the free exercise of the franchise.” *Reynolds v. Sims*, 377 U. S. 533, 555 (1964).

4. Likewise, in *Crawford v. Marion County Election Board*, 553 U.S. ___, 128 S.Ct. 1610 (2008), the Supreme Court stated: “The electoral system cannot inspire public confidence if no safeguards exist to deter or detect fraud or to confirm the identity of voters.” *Id.*, 128 S.Ct. at 1618 (*quoting* Commission on Federal Election Reform, Report, Building Confidence in U.S. Elections § 2.5 (Sept. 2005), App. 136-137) .

5. Despite state and federal laws that require Wisconsin to maintain an accurate and updated list of qualified voters, it is virtually certain that Wisconsin’s official list of registered voters currently includes the names of individuals who are not eligible to vote in the upcoming presidential election.

6. Pursuant to a grant of federal money, Wisconsin has developed the ability to ensure that fraudulent registrants and other ineligible voters are removed from the list before election day. In some cases, this requires registration information to be compared to information contained in other public databases. However, despite a clear legal obligation to do so, the Defendants, who control Wisconsin’s statewide, computerized voting list, refuse to verify the registration information provided to it prior to August 6, 2008. The Attorney General believes that the people of Wisconsin and the people of the United States deserve better. He has, therefore, brought this action to compel Wisconsin’s Government Accountability Board, its members, its director, and the administrator of its Elections Division, to take all steps necessary

to ensure that ineligible voters are removed from the State's official list of registered voters before the November elections.

GENERAL ALLEGATIONS

7. Plaintiff J. B. Van Hollen is the duly elected Attorney General for the State of Wisconsin and holds all authority conferred upon that office by law.

8. Defendant Government Accountability Board ("GAB") is an agency of the State of Wisconsin. GAB includes an Elections Division and the duties and authority of GAB are prescribed by the laws of the State of Wisconsin, including sections 5.05 through 5.06 of the Wisconsin Statutes.

9. Defendants Thomas Cane, Gerald Nichol, Michael Brennan, William Eich, Victor Manian and Gordon Myse are all adult residents of the State of Wisconsin who, collectively, comprise the current members of GAB. They are being sued in their official capacity.

10. Defendant Kevin J. Kennedy is an adult resident of the State of Wisconsin who is currently employed as the Director and General Counsel of GAB, including its Elections Division. In that capacity, he has been delegated certain functions relating to GAB's statutory duties, including the obligation to act as the chief election officer of the state. *See* Wis. Stat. §§ 5.05(1)(a), 5.05(3g), 5.05(9). Defendant Kennedy is being sued in his official capacity.

11. Defendant Nathaniel E. Robinson is an adult resident of the State of Wisconsin who is currently employed as the Elections Division Administrator of GAB. In that capacity he has certain responsibilities for carrying out the duties imposed by law upon GAB and other defendants. Defendant Robinson is being sued in his official capacity.

12. In this Complaint, Defendants will be referred to collectively as “GAB and GAB Members.” Such references shall be interpreted as meaning the Government Accountability Board and one or more of the named individual Defendants.

13. The Wisconsin Legislature has conferred upon GAB and GAB Members, “responsibility for the administration of [Wis. Stat.] chs. 5 to 12, other laws relating to elections and election campaigns, subch. III of [Wis. Stat.] ch. 13, and subch. III of [Wis. Stat.] ch. 19.” Wis. Stat. § 5.05(1) (emphasis added).

14. Included in this delegation of authority is the responsibility for carrying out any and all obligations placed upon the State of Wisconsin pursuant to the “Help America Vote Act of 2002,” as amended from time to time (“HAVA”), including those obligations set forth at 42 U.S.C. § 15483.

15. Duties imposed on GAB and GAB Members by the Wisconsin Legislature include a duty to adopt a “state plan that meets the requirements of P.L. 107-252.” Wis. Stat. § 5.05(10). P.L. 107-252 refers to HAVA.

16. As they relate to Wisconsin, the obligations imposed under HAVA became effective as of January 1, 2006 (“HAVA Effective Date”). As a matter of Wisconsin law, GAB and GAB Members, therefore, have had, and continue to have, a duty to ensure that Wisconsin is in compliance with all provisions of HAVA from and including that date.

17. Under Wis. Stat. § 6.36(1)(a), GAB is required to “compile and maintain electronically an official registration list.”

18. HAVA-related obligations imposed upon GAB and GAB Members by state law also include the creation and implementation of a central, computerized, statewide voter

registration list that includes the name and other registration information for all eligible electors within the state. *See* 42 U.S.C. § 15483(a)(1)(A).

19. Under state law, GAB and GAB Members have a duty to ensure that the list must be implemented in “uniform and non-discriminatory” manners. 42 U.S.C. §15483(a)(1)(A).

20. Under HAVA, this centralized, computerized voter registration list must contain the “name and registration information of every legally registered voter in the State” and “shall serve as the official voter registration list for the conduct of all elections for Federal office.” *See* 42 U.S.C. § 15483(a)(1)(A)(ii), (viii).

21. Under HAVA, this centralized, computerized voter registration list must also be “coordinated with other agency databases within the State.” *See* 42 U.S.C. § 15483(a)(1)(A)(iv). These “other agency databases” include, but are not limited to drivers license records maintained by the Wisconsin Department of Transportation and records showing an individual’s social security number.

22. Pursuant to the duties imposed under state law, GAB and GAB members also have an express obligation to ensure that ineligible voters are removed from Wisconsin’s statewide, computerized voter registration list. In particular, GAB and GAB Members are charged with ensuring that Wisconsin complies with 42 U.S.C. § 15483(a)(2)(A)(iii), which states as follows regarding a state’s voter list:

Notwithstanding the preceding provisions of this subparagraph, if a State is described in section 4(b) of the National Voter Registration Act of 1993 [42 U.S.C. 1973gg-2(b), that State shall remove the names of ineligible voters from the computerized list in accordance with State law.

Wisconsin, along with Idaho, Minnesota, New Hampshire, North Dakota, and Wyoming, is one of the states described in section 4(b) of the National Voter Registration Act of 1993, as

recognized by the United States Department of Justice, Civil Rights Division, Voting Section. *See* http://www.usdoj.gov/crt/voting/nvra/activ_nvra.htm#enforce.

23. Pursuant to the duties imposed under state law, GAB and GAB Members are obligated to make ensure that Wisconsin complies with 42 U.S.C. § 15483(a)(1)(A)(vi) & (vii), which require a chief state election official to “provide such support as may be required so that local election officials are able to” electronically enter voter information into the statewide, computerized voting list “on an expedited basis at the time the information is provided” to the local official.

24. Because the statewide, computerized voter registration system was not functioning prior to August 6, 2008, keeping Wisconsin in compliance with HAVA means that, under state law, GAB and GAB Members must, between now and the November 4, 2008 federal election, “provide such support as may be required so that local election officials are able to” electronically enter voter information into the system that was provided at anytime after the HAVA Effective Date, “on an expedited basis.” In other words, the lack of a functioning system between the HAVA Effective Date and August 6, 2008, does not excuse the obligation to enter voter registration information received after the HAVA Effective Date into the statewide, computerized voter registration system.

25. HAVA-related obligations imposed upon GAB and GAB Members by state law also include a duty to ensure that the information maintained in the statewide, computerized voter registration system is accurate and updated regularly. *See* 42 U.S.C. § 15483(a)(4). Such provisions shall include “a system of file maintenance that makes a reasonable effort to remove registrants who are ineligible to vote.” *See* 42 U.S.C. § 15483(a)(4)(A).

26. The urgency of having a complete and accurate record of eligible voters is illustrated by the HAVA requirement that all voter registration information received by the state shall be electronically entered into the computerized list “on an expedited basis.” 42 U.S.C. § 15483(a)(1)(A)(vi).

27. Despite the continuing state law obligation to ensure that Wisconsin was, and continues to be, in compliance with all requirements of HAVA and state statutes beginning no later than January 1, 2006, GAB and GAB Members have not brought Wisconsin into compliance. Due to the acts and/or omissions of GAB and GAB Members, Wisconsin is not in compliance with the HAVA or state statutes, as they relate to the creation and maintenance of a uniform, non-discriminatory, centralized, statewide voter registration list.

28. Although Wisconsin now has a statewide, computerized voter registration list, the list is not in compliance with applicable law because, among other reasons:

- (a) the list is not limited to eligible electors within the state;
- (b) ineligible voters have not been removed;
- (c) the list is not uniform and non-discriminatory because GAB and GAB Members do not treat voter registration applications received on or after August 6, 2008, in the same manner as voter registration applications received before that date;
- (d) with respect to certain names and registration information, the list has not been coordinated with other agency databases;
- (e) the list is not accurate and has not been maintained and updated regularly; and
- (f) a system of file maintenance that makes a reasonable effort to remove registrants who are ineligible to vote has not been employed.

The reason for the non-compliance is the failure of GAB and GAB Members to carry out their obligations under Wisconsin law.

29. GAB and GAB Members have also failed to bring Wisconsin into compliance with applicable laws because they are not providing the required support to local election officials so that all voter registration information received after the HAVA Effective Date has been entered into the statewide system.

30. By letter dated August 27, 2008, Attorney General J. B. Van Hollen urged GAB and GAB Members to come into compliance with applicable law. Among other things, GAB and GAB Members were urged to treat all voter registrations received after the HAVA Effective Date in the same manner, so that ineligible voters can be identified and removed from the statewide, computerized voter registration list. In particular, GAB and GAB Members were urged to conduct or require HAVA checks on voter information received prior to August 6, 2008, to the same extent as HAVA checks were being run on voter registrations received after that date, so that ineligible voters can be identified and removed.

31. Despite the Attorney General's pleas, and despite the clear legal obligations, GAB and GAB Members have repeatedly indicated that they will not treat all voter registrations received after the HAVA Effective Date in a uniform and non-discriminatory manner and will not conduct, nor require HAVA checks on any voter registration applications received prior to August 6, 2008. GAB and GAB Members have likewise indicated that they do not have any legal obligation to do these things.

32. In an August 28, 2008, letter to Attorney General J. B. Van Hollen, GAB admitted that its statewide, computerized database could be used to run HAVA checks on voter registrations prior to August 6, 2008, but stated that it would not do so. This point was also

made in an August 6, 2008, GAB press release which announced that this system, which should have been operating no later than January 1, 2006, was finally up and running. The press release also stated that “local election officials will now be able to check any *new voter registration* entered into the SVRS [statewide voter registration system]....” (emphasis added).

33. GAB and GAB Members have, through one or more authorized spokespersons, publically acknowledged that, with respect to voter registration applications received between the January 1, 2006, HAVA Effective Date and August 6, 2008, it will not run HAVA checks and will not coordinate information provided by the applicants with “other agency databases” as required by HAVA.

34. GAB and GAB Members have also advised local election officials that, with respect to voter registrations received prior to August 6, 2008, they should not run computerized HAVA checks, even though the capability to do so now exists and even though such checks would certainly reveal discrepancies between the voter registration information and information contained in other databases.

35. In fact, GAB has stated that, based upon its prior experience with HAVA checks, one or more discrepancies will be found in approximately 22% of voter registration applications. While not all of the discrepancies will lead to a determination that a voter is ineligible, the integrity of the statewide computerized voter registration list depends upon a process that identifies and resolves these discrepancies in a way that will allow qualified electors to vote and prevents those who are not eligible from casting ballots.

36. The statements by GAB and GAB Members implicitly acknowledge that, at the current time and also at the time of the presidential election scheduled for November 4, 2008, the

computerized, statewide voter registration list is not and will not be accurate, is not and will not be limited to eligible electors, and is not and will not be “uniform and non-discriminatory.”

37. The failure of GAB and GAB Members to remove ineligible voters and to conduct or require HAVA checks means that tens of thousands of individuals will be allowed to cast votes in the November 2008 presidential election even though a proper HAVA check, or other action, would show that there are discrepancies in their registration information which may, in fact, provide evidence that they are not eligible to vote.

38. It is widely anticipated that Wisconsin will be a “swing state” in the upcoming presidential election. It is also widely anticipated that Wisconsin’s ten (10) electoral votes may be won by a very narrow margin. For these reasons, it is essential that GAB and GAB Members take the steps necessary to insure that ballots are not cast by ineligible voters and that all who are eligible can vote.

COUNT I—WRIT OF MANDAMUS

39. Paragraphs 1-38, above, are hereby incorporated by reference into Count I of this Complaint.

40. The eligible voters of the State of Wisconsin, and the state’s citizenry as a whole, have a clear legal right to the protections afforded under HAVA and state statutes. Under Wisconsin law, they also have a clear legal right to have GAB and GAB Members take the steps necessary to insure that voting in the November 2008 presidential election is limited to properly registered, eligible voters.

41. Wisconsin law places upon GAB and GAB Members a plain and positive duty to establish and maintain a statewide, computerized voter registration list that is limited to eligible voters, is uniform and non-discriminatory, has been coordinated with other agency databases and

has had ineligible voters removed. These duties have existed since at least the HAVA Effective Date, exists presently, and will continue to exist on November 4, 2008, when the next presidential election is scheduled to occur.

42. Substantial damage and injury will occur if GAB and GAB Members do not carry out their legal obligations as alleged herein. At a minimum, the value of each vote cast by an eligible voter will be diluted by the presence of votes cast by ineligible voters. At worst, the right to receive Wisconsin's ten (10) electoral votes, and perhaps even the office of President of the United States, could be determined by individuals who were not eligible to cast votes, but were nonetheless allowed to do so.

43. No sufficient remedy is available to address the harm that will be suffered if GAB and GAB Members are not directed by a writ of mandamus to take all steps necessary to insure that the statewide, computerized voter registration list is brought into compliance with HAVA and state law prior to the November 4, 2008, election. Moreover, the harm that will accrue will be irreparable as votes are cast anonymously and it will be impossible after the election to determine which votes should not have been allowed.

44. If the relief requested herein is granted, there will be no significant harm to the public interest or to any authorized voter. At most, a qualified voter may need to clarify and/or verify certain information establishing a right to vote or, in some cases, cast a provisional ballot under state law. *See* 42 U.S.C. § 15483(b)(2)(B); Wis. Stat. § 6.32. Although, in some cases, this may create a minor inconvenience, it is the policy judgment of Congress and the Wisconsin Legislature that the public interest in preventing voter fraud and limiting elections to proper, eligible voters, outweighs the potential inconvenience.

45. In an August 28, 2008, letter to Attorney General J. B. Van Hollen, GAB has taken the position that, if HAVA checks are required for registration information received prior to August 6, 2008, “more than 20,000 Wisconsin voters could be wrongfully disenfranchised or forced to cast provisional ballots.” This is simply not true. The procedures in place will not prevent any qualified voter from voting and, as noted above, the use of HAVA checks and provisional ballots reflects a policy choice favored by Congress and the Wisconsin Legislature. Moreover, Wis. Stat. § 6.325 affirmatively protects eligible voters from disenfranchisement. It states, in part:

No person may be disqualified as an elector unless the municipal clerk, board of election commissioners or a challenging elector under s. 6.48 demonstrates beyond a reasonable doubt that the person does not qualify as an elector or is not properly registered.

46. For the reasons alleged herein, a writ of mandamus should immediately be issued directing GAB and GAB Members to take all steps necessary to insure that, prior to November 4, 2008, the statewide, computerized voter registration list is brought into compliance with HAVA and state law. At a minimum, this requires that ineligible voters be identified and removed and, that for individuals who registered on or after January 1, 2005, and prior to August 6, 2008, their eligibility to vote must be verified by the same steps as applied to individuals registering on or after August 6, 2008, including HAVA checks where applicable.

COUNT II--DECLARATORY RELIEF

47. Paragraphs 1-46, above, are hereby incorporated by reference into Count II of this Complaint.

48. A genuine dispute, ripe for adjudication exists between Plaintiff Attorney General J. B. Van Hollen and GAB and GAB Members, with respect to whether Wisconsin’s statewide, computerized voter registration list must be brought into compliance with HAVA and state law, prior to the November 4, 2008, presidential election.

49. A genuine dispute, ripe for adjudication also exists between Plaintiff Attorney General J. B. Van Hollen and GAB and GAB Members, with respect to whether GAB and GAB Members have a legal obligation to conduct or require that all voter registration applications received after January 1, 2006, and prior to August 6, 2008, be treated in the same manner as applications received after August 6, 2008, which, in some cases, requires that they be subjected to a HAVA check and appropriate follow-up to insure that the statewide, computerized voter registration list is limited to eligible voters and has had all ineligible voters removed.

50. For the reasons stated herein, Plaintiff Attorney General J. B. Van Hollen is entitled to a declaration that Wisconsin's statewide, computerized voter registration is not currently in compliance with applicable law, and must be brought into compliance prior to the November 4, 2008, presidential election. Plaintiff Attorney General J. B. Van Hollen is also entitled to a declaration that, in order to achieve such compliance, all registrations received after the HAVA Effective Date must be treated in a uniform and non-discriminatory manner which, in certain cases, will require that HAVA checks be performed on all registrations received after the HAVA Effective Date but before August 6, 2008, and appropriate follow-up must be taken with respect to any discrepancies.

COUNT III--INJUNCTIVE RELIEF

51. Paragraphs 1-50, above, are hereby incorporated by reference into Count III of this Complaint.

52. Plaintiff, the State of Wisconsin, and the people of the State of Wisconsin will be irreparably injured by any delay in Defendants' failure to discharge their duties to create and implement a central, statewide, computerized voter registration list as required HAVA and state

law, as the continuing failure to do so jeopardizes the integrity of the election process and dilutes the votes of legal, eligible electors.

53. Defendants' failure to discharge their duties as alleged herein cannot be redressed by an action at law because the integrity of the statewide, computerized voter registration list depends upon a process that identifies and resolves discrepancies in voter eligibility so that only qualified electors vote and those who are not qualified do not vote.

54. Preliminary and permanent injunctive relief are needed to protect against the irreparable injury described above.

55. For the reasons stated herein, Plaintiff Attorney General J. B. Van Hollen is entitled to preliminary and permanent injunctions directing the Defendants to bring the statewide, computerized voting registration list into compliance with HAVA and state law, prior to the November 4, 2008, presidential election. Plaintiff Attorney General J. B. Van Hollen is also entitled to preliminary and permanent injunctions directing the Defendants to remove ineligible voters and to conduct or require HAVA checks on all voter registration applications received after the HAVA Effective Date to the same extent as is currently being done on applications received on or after August 6, 2008, and to engage in all appropriate follow-up with respect to any discrepancies that are identified.

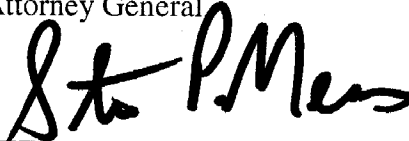
WHEREFORE, Plaintiff, Attorney General J. B. Van Hollen, demands judgment as follows:

- A. For an immediate writ of mandamus, as requested herein;
- B. Declaring the rights, duties and legal relations of the parties with respect to Defendants' duty to comply with Help America Vote Act of 2002, and state statutes, to assure the integrity of Wisconsin elections.

- C. Issuing such preliminary and permanent injunctive relief to preserve the integrity of Wisconsin elections, as requested herein.
- D. Awarding the costs and disbursements of this action to the extent allowed by law.
- E. Granting such other further relief as the court may deem just and equitable.

Dated this 10th day of September, 2008.

J. B. VAN HOLLEN
Attorney General



STEVEN P. MEANS
Assistant Attorney General
State Bar # 1011355

CHARLES D. HOORNSTRA
Assistant Attorney General
State Bar # 01010601

Attorneys for Plaintiff State of Wisconsin

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-0770