

J.B. VAN HOLLEN,

Plaintiff,

Case No. 08-CV-4085

vs.

GOVERNMENT ACCOUNTABILITY BOARD,  
THOMAS CANE, GERALD NICHOL,  
MICHAEL BRENNAN, WILLIAM EICH,  
VICTOR MANIAN, GORDON MYSE,  
KEVIN J. KENNEDY and NATHANIEL E. ROBINSON,

Defendants.

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**GOVERNMENT ACCOUNTABILITY BOARD'S BRIEF IN  
SUPPORT OF ITS MOTION TO DISMISS**

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**I. INTRODUCTION.**

The Attorney General has sued the Defendants the Government Accountability Board, its members Thomas Cane, Gerald Nichol, Michael Brennan, William Eich, Victor Manian, and Gordon Myse, and its staff Kevin Kennedy and Nathaniel Robinson (hereinafter collectively "the Government Accountability Board" or "the Board") claiming that the Board has failed to do certain things that the Attorney General asserts it should be doing regarding the maintenance of the state-wide computer voting list that it compiled as required by the Help America Vote Act 42 U.S.C. §15301 et seq. (P.L.107-252) ("Help America Vote Act" or "HAVA"). Simply put, the Attorney General

asserts that his interpretation of HAVA's requirements regarding the maintenance of that list and its coordination with the Wisconsin Department of Transportation database is right, and the Government Accountability Board's interpretation is wrong. However, it is the Board, not the Attorney General, that has responsibility and discretion to interpret and implement HAVA's provisions.

The Government Accountability Board brings its Motion to Dismiss pursuant to Wis. Stat. §802.06(2) on several grounds. First, under §802.06 (2)(a)(1), the Board contends that the Wisconsin Attorney General has no authority granted to him by the Legislature to bring a lawsuit about these matters. Second, under §802.06(2) (a)(6), the complaint fails to state a claim upon which relief can be granted, in two specific respects: (a) the relief he seeks is not available via mandamus, and (b) the relief he seeks is prohibited by law.

A motion to dismiss on the basis that a complaint fails to state a claim upon which relief can be granted tests the legal sufficiency of the complaint. *Scott v. Savers Property and Cas. Ins. Co.*, 2003 WI 60, ¶15, 262 Wis. 2d 127, 663 N.W.2d 715, *reconsideration denied*. The facts pled by the Plaintiff are liberally construed and accepted as true for purposes of the motion, but not for trial. *Id.*

## **II. THE ATTORNEY GENERAL HAS NO AUTHORITY TO BRING THIS SUIT.**

### **A. The Authority And Claim Asserted By The Attorney General.**

J.B. Van Hollen is the elected Attorney General of the State of Wisconsin, who

brings this case “in his official capacity as Attorney General of the State of Wisconsin.” *Complaint*, p. 2, ¶7. He claims that he has the authority to do so pursuant to Wis. Stat. §5.07, the only source of authority to which he cites. *Complaint* ¶¶1, 2.

**B. The Attorney General Of The State Of Wisconsin Has Only Those Powers That Are Specifically Granted To That Office By The Legislature.**

In Wisconsin, the Attorney General has only those powers explicitly granted to that office by the legislature. The Attorney General has neither implied powers nor residual powers based on the common law. He may do only what the legislature allows him to do. In *State of Wisconsin v. City of Oak Creek*, 2000 WI 9, ¶¶19-22, 24, 232 Wis. 2d 612, 625-628, 605 N.W.2d 526, the Wisconsin Supreme Court succinctly explained the strict limitations on the power of the Attorney General of Wisconsin:

¶ 19 We begin with the plain meaning of Wis. Const. art. VI, § 3. As stated above, art. VI, § 3 defines the scope of the attorney general's powers: “[t]he powers, duties and compensation of the ... attorney general shall be prescribed by law.” This court has consistently stated that the phrase “prescribed by law” in art. VI, § 3 plainly means prescribed by statutory law.

¶ 20 The first case that examined this phrase was *State v. Milwaukee Elec. Ry. & Light Co.*, 136 Wis. 179, 190, 116 N.W. 900 (1908). This court very clearly stated:

In Wisconsin, otherwise than in many if not most states, the powers of the attorney general are strictly limited. He is a constitutional officer, but by the constitution he is given only such powers as “shall be prescribed by law.” Sec. 3, art. VI, Const. It is therefore essential to the maintenance of an action brought by the attorney general ex officio and sua sponte that we should find some statute authorizing it.

\* \* \*

¶ 21 Similarly, this court held in *State ex rel. Haven v. Sayle*, 168 Wis. 159, 163, 169 N.W. 310 (1918), that the attorney general “must find authority in the statute when he sues in

the circuit court in the name of the state or in his official capacity." In *State v. Snyder*, 172 Wis. 415, 417, 179 N.W. 579 (1920), we reiterated that "[i]n this state the attorney general has no common-law powers or duties." See also *State ex rel. Jackson v. Coffey*, 18 Wis.2d 529, 538, 118 N.W.2d 939 (1963); *State ex rel. Reynolds v. Smith*, 19 Wis.2d 577, 584, 120 N.W.2d 664 (1963); *State ex rel. Beck v. Duffy*, 38 Wis.2d 159, 163, 156 N.W.2d 368 (1968)(abrogated on other grounds by *State v. Antes*, 74 Wis.2d 317, 246 N.W.2d 671 (1976)).

¶ 22 This court has further stated that "[t]he attorney general is devoid of the inherent power to initiate and prosecute litigation intended to protect or promote the interests of the state or its citizens and cannot act for the state as *parens patriae*." In *re Estate of Sharp*, 63 Wis.2d 254, 261, 217 N.W.2d 258 (1974)(citing Arlen C. Christenson, *The State Attorney General*, 1970 Wis. L.Rev. 298). This is because the Wisconsin Constitution removed all of the attorney general's "powers and duties which were found in that office under common law." *Id.* Therefore, "[u]nless the power to [bring] a specific action is granted by law, the office of the attorney general is powerless to act." *Id.* . . .

\* \* \*

¶ 24 In sum, it is well established by case law that according to the plain meaning of Wis. Const. art. VI, § 3, the attorney general's powers are prescribed only by statutory law.

Thus, for the Attorney General to have the authority to sue the Government Accountability Board about its implementation of HAVA, there must be a statute that gives him the authority to do so. There is no such statute.

**C. Wis. Stat. §5.07 Does Not Provide The Attorney General The Authority To Bring This Lawsuit.**

**1. This case is about "voting qualifications."**

This lawsuit is about "voting qualifications," i.e., the determination of who is and is not qualified and eligible to vote. The Attorney General's Complaint makes that abundantly clear:

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. . . .

*Complaint ¶ 2.* (emphasis added)

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.

*Complaint ¶ 5.* (emphasis added)

. . . He has, therefore, brought this action to compel Wisconsin's Government Accountability Board, its members, its director, and the administrator of its Election 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.

*Complaint ¶ 6.* (emphasis added)

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. . . .

*Complaint ¶ 22.* (emphasis added)

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 [sic] 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.** . . .

*Complaint ¶ 46.* (emphasis added)

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, . . .

*Complaint ¶ 50.* (emphasis added)

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**. . . .

*Complaint* ¶ 55. (emphasis added)

2. **The Attorney General has no power to bring a lawsuit about “voting qualifications.”**

The Attorney General does not have the power to bring a lawsuit regarding “voting qualifications.” A review of Wis. Stat. §§5.06 and 5.07 makes that apparent. It is appropriate to read both of those sections *in pari materia*, as they are contained in the same chapter and assist in implementing the chapter’s goals and policy. See *Beard v. Lee Enterprises*, 225 Wis. 2d 1, 15, 591 N.W.2d 156 (1999); *In Interest of R.W.S.*, 162 Wis. 2d 862, 871, 471 N.W.2d 16 (1991); *Pulfus Farms v. Town of Leeds*, 149 Wis. 2d 797, 804, 440 N.W.2d 329 (1989).

§5.06(1) states, in relevant part:

Whenever any elector of a jurisdiction or district served by an election official believes that a decision or action of the official or the failure of the official to act with respect to any matter concerning nominations, qualifications of candidates, **voting qualifications**, including residence, ward division and numbering, recall, ballot preparation, election administration or **conduct of elections** is contrary to law, or the official has abused the discretion vested in him or her by law with respect to any such matter, the elector may file a written sworn complaint with the board requesting that the official be required to conform his or her conduct to the law, be restrained from taking any action inconsistent with the law or be required to correct any action or decision inconsistent with the law or any abuse of the discretion vested in him or her by law. . . . (Emphasis added.)

§5.06(3) states:

A complaint under this section shall be filed promptly so as not to prejudice the rights of any other party. In no case may a complaint relating to **nominations, qualifications of candidates or ballot preparation** be filed later than 10 days after the complainant knew or should have known that a violation of law or abuse of discretion occurred or was proposed to occur. (Emphasis added)

It is obvious from those statutes that the legislature considered each of the matters listed in §5.061: (a) nominations; (b) qualifications of candidates; (c) voting qualifications; (d) recall; (e) ballot preparation; (f) election administration; and (g) conduct of elections, to be separate matters. When the legislature uses similar but different terms in a statute, particularly within the same section, courts presume it intended each of the terms to have different meanings. *Wisconsin Central Limited v. Wisconsin Department of Revenue*, 2000 WI App 14, ¶12, 232 Wis. 2d 323, 606 N.W.2d 226. Most certainly, nothing allows one to conclude that all of those specific matters listed in § 5.06(1) are subsumed under the last matter listed, “conduct of elections.”

The first statute in Chapter 5 specifically addressing the Attorney General’s powers to sue is found in §5.06(2), which states, in relevant part:

No person who is authorized to file a complaint under sub.(1), other than the attorney general or a district attorney, may commence an action or proceeding to test the validity of any decision, action or failure to act on the part of any election official with respect to any matter specified in sub. (1) without first filing a complaint under sub.(1), nor prior to the disposition of the complaint by the board.

Section 5.06(2) allows the Attorney General to file a lawsuit without first making a complaint to the Board under §5.06(1).

Specifically which “matter specified in sub (1)” about which the Attorney General is empowered to bring a lawsuit is not addressed in §5.06. That is the key question here. The answer is found in §5.07, the statute claimed here by the Attorney General as his sole source of authority, which states:

Whenever a violation of the laws regulating the **conduct of elections** or election campaigns occurs or is proposed to occur, the attorney general . . . 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. . .

Section 5.07 does not grant the Attorney General expansive authority. It restricts him to bringing lawsuits only about the “conduct of elections or election campaigns.” It does not authorize him to sue over “voting qualifications” which is one of the other “matter[s] specified in [5.06(1)].”

As his own Complaint states, this case is about “voting qualifications,” not the “conduct of elections or election campaigns.” Had the legislature wanted to give the Attorney General broader authority, it could easily have written §5.07 to parallel the full list of matters contained in §5.06(1) by saying:

Whenever a violation of the laws regulating nominations, qualifications of candidates, voting qualifications, including residence, ward division and numbering, recall, ballot preparation, election administration or conduct of elections occurs or is proposed to occur, the attorney general . . . 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,

but the legislature did not do so. It gave the Attorney General the power to sue over one aspect of the many matters listed in §5.06(1) only: the “conduct of elections,” nothing more.

It is well-settled that “where a statute with respect to one subject contains a given provision, the omission of such provision from a similar statute concerning a related subject is significant in showing that a different intention existed.” *In Interest of R.W.S.*, 162 Wis. 2d at 879, quoting *State v. Wilkos*, 14 Wis. 2d 186, 192, 109 N.W.2d 889 (1961).

Likewise, when the legislature uses the same phrase in two different statutes on the same topic, courts are to presume that the legislature intended the phrase to have the same meaning in both statutes. *F.R. v. T.B.*, 225 Wis. 2d 628, 639, 593 N.W.2d 840 (Ct. App. 1999). In granting authority to sue over the “conduct of elections” but not “voting qualifications,” the legislature intentionally limited the Attorney General’s authority. Absent a broader grant of authority in Wis. Stat. §5.07, the Attorney General may not bring a lawsuit, like this one, about “voter qualifications.”

**3. The Legislature had the opportunity to give the Attorney General specific authority to enforce the Help America Vote Act and it did not do so.**

Wis. Stat. §§5.06 and 5.07 were enacted by the Wisconsin Legislature over twenty-five years ago. The Help America Vote Act was enacted by the United States Congress in 2002. In accordance with its obligations under §15512(a) of HAVA, the Wisconsin Legislature then enacted Wis. Stat. §5.061, which provides for enforcement of Title III (including 42 U.S.C. §15483) of HAVA at the state level via an administrative procedure. That procedure allows for complaints from any person who “believes that a violation of Title III of P.L. 107-252 [42 U.S.C. §15483] has occurred, is occurring or is proposed to occur with respect to an election for national office in this state . . .” *Wis. Stat. §5.061(1)*.

Unlike what it did when it adopted §5.06, the Legislature adopted §5.061 without making any reference to the Attorney General and without excepting the Attorney General from its requirements. Section 5.061 certainly does not provide that the

Attorney General may bring any lawsuit, much less a lawsuit like this which attempts to enforce provisions of 42. U.S.C. §15483, all of which relate to voter registration lists.

Because §5.07 only authorizes the Attorney General to bring lawsuits regarding the “conduct of elections or election campaigns” and because §5.061 does not provide the Attorney General with an exemption from using the exclusive administrative complaint procedures set forth in §5.061, the Attorney General has no authority to bring a lawsuit like this one, involving a provision in Title III of P.L. 101-252 (42 U.S.C. §15483).

**D. HAVA Does Not Provide The Wisconsin Attorney General With Authority To Bring Suit, Though He May Use The Administrative Procedure.**

**1. The “Attorney General” with authority to enforce HAVA in court is the United States Attorney General.**

Just as the Wisconsin Legislature has given no specific authority to the Wisconsin Attorney General to enforce the voter registration list requirements of HAVA, the United States Congress gave no authority to the attorneys general of the States to enforce those provisions either. Instead, it gave the United States Attorney General sole authority to bring such suits in federal court for declaratory and injunctive relief:

The Attorney General may bring a civil action against any State or jurisdiction in an appropriate United States District Court for such declaratory and injunctive relief (including a temporary restraining order, a permanent or temporary injunction, or other order) as may be necessary to carry out the uniform and nondiscriminatory election technology and administration requirements under sections 15481, 15482, and 15483 of this title.

*42 U.S.C. §15511.*

“The Attorney General” referred to in this section is the United States Attorney General, not one or more of the attorneys general of the states. Lest there be disagreement on exactly which Attorney General this statute is referring to, reference to the United States Attorney General in the United States Code is typically made using capital letters: “Attorney General,” while reference to one or more Attorneys General of the states, like the Plaintiff here, is typically made using lower case letters: “attorney general.” For example, another Federal law regulating voting provides:

Upon receipt of such report, the court shall cause the Attorney General to transmit a copy thereof to the State attorney general and to each party to such proceeding. . .

42 U.S.C. §1971. And, the United States Court of Appeals for the Sixth Circuit specifically noted that the “Attorney General” referred to in HAVA at 42 U.S.C. §15511 is the U.S. Attorney General. *Sandusky County Democratic Party v. Blackwell*, 387 F.3d 565, 573 (6<sup>th</sup> Cir. 2004). Thus, HAVA provides only the United States Attorney General, not the Attorney General of the State of Wisconsin, with authority to bring this kind of suit.

**2. The Wisconsin Attorney General has access to the courts via the administrative process, but failed to use it.**

Those persons who are not the United States Attorney General are not without recourse to enforce HAVA’s voter registration list provisions, however. “Any person” who believes a violation of Title III of HAVA has occurred may utilize a State-based administrative complaint process. 42 U.S.C. §15512(a). As noted previously, in

Wisconsin that process is found in Wis. Stat. §5.061.

Under Wis. Stat. §5.061, any person who believes that a violation of HAVA “has occurred, is occurring, or is proposed to occur . . . may file a written, verified complaint with the Board.” *Wis. Stat. §5.061(1)*. The complainant may then ask for a hearing, which proceeds as a contested case hearing under Chapter 227 of the Wisconsin Statutes. A decision must be issued within 89 days of the date the complaint was filed, *Wis. Stat. §5.061(3)*, although nothing prevents the Board from making decisions sooner. Adverse decisions may be reviewed by petition to circuit court. *Wis. Stat. §227.53*. The scope of review is typically a review of the record and affords, depending on the question and expertise of the agency, various levels of weight to the agency decision. *Wis. Stat. §227.57*. Appeal of the circuit court’s decision to the Court of Appeals is available to any party. *Wis. Stat. §227.58*.

As a general matter, “when a statute sets forth a procedure for review of administrative action and court review of the administrative decision, such remedy is **exclusive** and must be employed before other remedies are used.” *Nodell Inv. Corp. v. Glendale*, 78 Wis. 2d 416, 422 (1976), *emphasis added*. The Attorney General acknowledges in his Complaint that he did not utilize the procedure provided in Wis. Stat. §5.061. *Complaint* ¶1.

While this Court is not without subject matter jurisdiction over this dispute, the statutes, Wis. Stats. §§5.061 and Chapter 227, provide a clear condition precedent before

a circuit court may consider a case such as this: the utilization of the administrative process. Once that process has been used, Chapter 227 further confines the Court's review. Thus at this stage of the dispute, exclusive jurisdiction rests with the agency, the Board. The Court is not competent to proceed in this dispute in any way until the agency has considered it. *Heideman v. American Family Ins. Group*, 163 Wis. 2d 847, 859-60, 473 N.W.2d 14 (Ct. App. 1991).

The Attorney General should have followed the administrative procedure so that the Board could have applied its special competence and expertise and developed a factual record: that is the purpose behind the administrative procedures preceding circuit court review. *County of Sauk v. Trager*, 118 Wis. 2d 204, 211, 346 N.W. 756 (1984). The Attorney General makes the legal assertion that "exhaustion" of the administrative process available to it under Wis. Stat. §5.061 in this case would have been "futile," but does not explain how he came to that conclusion. *Complaint ¶1*.

The Attorney General appears to invoke the "futility" exception to the exhaustion doctrine. The exhaustion doctrine requires a party, before proceeding to court, to exhaust any administrative procedures that have already been initiated. *Wis. Collectors Assn. v. Thorp Finance Co.*, 32 Wis. 2d 36, 47, 145 N.W.2d 33 (1966). The "futility" exception to that doctrine allows, under certain circumstances, for that party to skip the balance of the administrative process and go directly to court. The Attorney General misunderstands the exhaustion doctrine: it does not apply here, both because

jurisdiction over this dispute is exclusively vested in the Board and the administrative appeal process under Chapter 227, and because no administrative procedures were ever initiated by the Attorney General. Therefore, the futility exception to that doctrine also does not apply.

Considering the doctrines of “primary jurisdiction” (also known as the doctrine of prior resort, of which exclusive jurisdiction is a part) and “exhaustion,” the Wisconsin Supreme Court long ago acknowledged:

Considering the doctrines of prior resort and of exhaustion together, the net result is in effect that the administrative agency is entitled to the first and the next-to-last word. It must be given an opportunity to speak first (this is the doctrine of prior resort) and it cannot be deprived of the power to pass upon the case until it has spoken its final word with reference thereto. The last word is the court’s, on judicial review.

While the requirement of exhausting administrative remedies has a somewhat different historical background than the rule of prior resort, yet the two doctrines have developed into complementary parts of a general principle which ordinarily serves to preclude judicial consideration of a question while there remains any possibility of further administrative action. The state courts often refer to the two principles interchangeably, and it is sometimes difficult to tell whether a court’s refusal of jurisdiction is premised on one of these two rules or on the other . . . . Not only are the two doctrines complementary; they are sometimes confused.

*Nodell Inv. Corp. v. Glendale*, 78 Wis. 2d 416, 427 n. 13, 254 N.W.2d 310 (1977), quoting Cooper, STATE ADMINISTRATIVE LAW 572-73 (1965).

Given the Board’s exclusive jurisdiction over this dispute and the principles underlying the various doctrines of primary jurisdiction and exhaustion, the Court must dismiss this case. The Attorney General did not even try to utilize the administrative procedures created for him, and all other persons, for resolution of

allegations that the requirements of Title III of HAVA are not being met.

**III. THE ATTORNEY GENERAL FAILS TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.**

**A. The Relief Sought By The Attorney General Is Not Available Via Mandamus.**

The Attorney General is seeking an order of mandamus from the Court, directing the Government Accountability Board “to take all steps necessary to insure [sic] that, prior to November 4, 2008, the statewide, computerized registration list is brought into compliance with HAVA and state law.” *Complaint* ¶ 46. A writ of mandamus is a common law writ directed to a governmental official to compel him or her to perform a nondiscretionary duty. *See State ex rel. Greer v. Stahowiak*, 2005 WI App 219, ¶ 6, 287 Wis. 2d 795, 706 N.W.2d 161. While mandamus is the appropriate remedy to compel public officials to perform certain duties, those duties must be clear and unequivocal and not discretionary. *State ex rel. Oman v. Hunkins*, 120 Wis. 2d 86, 88, 352 N.W.2d 220, 221 (Ct. App. 1984).

A party seeking a writ of mandamus must show that: (1) the party has a clear legal right; (2) the duty sought to be enforced is positive and plain; (3) the party will be substantially damaged by nonperformance of such duty; and (4) there is no other adequate specific legal remedy for the threatened injury. *Miller v. Smith*, 100 Wis. 2d 609, 621, 302 N.W.2d 468, 474 (1981). *See also Lake Bluff Housing Partners v. South Milwaukee*, 197 Wis. 2d 157, 170, 540 N.W.2d 189, 194 (1995).

The Attorney General claims that the Government Accountability Board has not complied with 42 U.S.C §15483. But he has not identified any “positive and plain,” i.e., any “clear, unequivocal and non-discretionary” duty that the Board has under 42 U.S.C. § 15483. The relief that the Attorney General seeks is for the Board to take “all steps necessary “ to comply with 42 U.S.C. §15483 before the upcoming election. Taking unspecified necessary steps is not a “clear, unequivocal and non-discretionary duty.”

42 U.S.C. §15483 is a lengthy statute that describes a number of explicit duties, the implementation of which are left to the states themselves. (The full text of it is attached to this brief as Appendix 1.) Subsection (a) of §15483 of HAVA requires states to maintain a centralized, computerized voter registration list which is coordinated, in no specifically required way, with other state agency databases, and which includes a unique identifying number for each registrant. That identifier can be a driver’s license number, the last four digits of a social security number or, if the individual has neither, a number created for that person. *42 U.S.C. §1543(a)(1)(A)*. It also requires states to perform list maintenance on a “regular basis,” which, among other things, includes utilizing a system that “makes a reasonable effort to remove registrants who are ineligible to vote from the official list of eligible voters,” with “safeguards to ensure that eligible voters are not removed in error from the official list of eligible voters.” *42 U.S.C. §1543(a)(4)(A) and (B)*. Removals are to be accomplished consistent with the requirements of provisions in the National Voter Registration Act of 1993 (discussed

further in subsection B., *infra*), and in a manner that ensures that “only voters who are not registered or who are not eligible to vote are removed from the computerized list . . . .” 42 U.S.C. §1543(a)(2)(A)(i) and (B)(ii).

Subsection (a) also requires that “[t]he chief State election official and the official responsible for the State motor vehicle authority of a State shall enter into an agreement to match information in the database of the statewide voter registration system with information in the database of the motor vehicle authority to the extent required to enable each such official to verify the accuracy of the information provided on applications for voter registration.” 42 U.S.C. §15483(5)(B)(i). The “chief State election official” in Wisconsin is an employee of the Government Accountability Board, as designated by the Board. *Wis. Stat. §5.05(3g)*; that employee is Defendant Kevin Kennedy.

Thus, to summarize, 42 U.S.C. §1543(a) requires Wisconsin to (a) have a computerized statewide voter registration list that is coordinated with other state agency databases, including the state’s motor vehicle authority’s database to “match information” to ensure accuracy of information provided on applications for voter registration, (b) assign in the list identifying numbers to each voter, (c) maintain that list on a regular basis, including by making reasonable efforts to remove names from the list, such removal occurring in accordance with provisions of the National Voter Registration Act of 1993, and providing safeguards to ensure that eligible voters are not

removed from the list. Title III of HAVA, 42 U.S.C. §§15481-15485, does not mandate that a state implement those provisions in any specific way. Furthermore, while 42 U.S.C. §15483(c)(1) requires Wisconsin to comply with the requirements of subsection (a) on and after January 1, 2006, there is no provision in (a) that requires as a ministerial act the activities the Attorney General seeks a mandamus order to force the Board to undertake.

Rather, HAVA gives the states broad discretion about their implementation of its registration list provisions. At 42 U.S.C. §15485 (“Methods of implementation left to discretion of State”), Congress stated that “[t]he specific choices on the methods of complying with the requirements of this subchapter [§§15481-15485] shall be left to the discretion of the State.” The Wisconsin Legislature granted the State’s discretion to the Government Accountability Board by giving it the broad “responsibility for the administration of chs. 5 to 12, other laws relating to elections and election campaigns . . . .” *Wis. Stat. 5.05(1)*.

The Attorney General admits that “Wisconsin now has a statewide, computerized voter registration list,” but claims that there are deficiencies in the manner in which the Board has carried out other responsibilities that it has under HAVA. *Complaint* ¶28. Apparently, the Attorney General believes that the Board must follow his interpretation of its responsibilities under Title III of HAVA. Indeed, he brought this lawsuit only after the Board did not do what he told it to do in his

August 27, 2008 letter. *Complaint* ¶30.

Yet, the Attorney General implicitly admits that for the Board to do what he wants, it must “take all steps necessary” to do so. Taking unidentified “steps” is not ministerial. It perforce involves the exercise of discretion, and discretionary acts cannot under any circumstances be the object of an order of mandamus.

Likewise, the Attorney General has described neither a clear legal right to be enforced by the Board, nor a duty of the Board that is positive and plain. The Attorney General is free to disagree with the manner in which an administrative agency is exercising its discretionary authority. However, his disagreement does not supply the elements necessary for a court to issue an order of mandamus.

**B. The Relief Sought By The Attorney General Is Prohibited.**

The Attorney General contends that the Board has failed in its duties under HAVA and, in particular, its duties under Title III of that Act, relating to statewide voter registration lists. As noted previously, the relief the Attorney General seeks is an order compelling the Board to “take all steps necessary to ensure that ineligible voters are moved from the State’s official list of registered voters before the November elections.” *Complaint* ¶6; *see also* ¶¶46, 55.

HAVA provides that “if an individual is to be removed” from a state’s voter registration list, “such individual shall be removed in accordance with the provisions of the National Voter Registration Act of 1993 [“NVRA”] . . . including . . . subsections

(a)(4), (c)(2), (d), and (e) of section 8 of such Act (42 U.S.C. 1973gg-6).” 42 U.S.C.

§15483(a)(2)(A)(I), *emphasis added*.<sup>1</sup> Subsection (c)(2) of Section 8 of the NVRA prohibits within the 90 day window prior to election day the kind of systematic removal of the names of ineligible voters from official lists that the Attorney General seeks an order to require:

A State shall complete, not later than 90 days prior to the date of a primary or general election for Federal office, any program the purpose of which is to systematically remove the names of ineligible voters from the official lists of eligible voters.

42 U.S.C. §1973gg-6(c)(2)(A)<sup>2</sup>.

Removal of voters from the registration list before November 4, 2008, as desired by the Attorney General, would also be inconsistent with Wisconsin’s explicitly stated public policy. Under Wis. Stat. §6.40(2)(b), municipal clerks may conduct door-to-door

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<sup>1</sup>The primary purpose of the NVRA, nick-named the “motor voter law,” was to increase voter registration and participation in Federal elections. It accomplished this purpose by requiring states to allow voter registration by mail, at the same time a person applies for or renews a driver’s license, or signs up for public benefits. 42 U.S.C. §§1973gg *et seq.* The NVRA does not generally apply to Wisconsin due to our offering same-day registration. 42 U.S.C. §1973gg-2. A secondary purpose of the NVRA was to ensure accurate voter registration rolls. 42 U.S.C. §1973gg. When HAVA incorporated NVRA provisions on the removal of individuals from registration rolls, it caused those provisions, which did not previously apply to Wisconsin and several other states, to now apply uniformly across the country, including in Wisconsin.

<sup>2</sup>This prohibition does not prevent the State from removing specific names at the registrant’s request, due to the registrant’s criminal conviction or mental incapacity, or due to the registrant’s death. 42 U.S.C. §1973gg-6(c)(2)(B). These exceptions are not relevant to this lawsuit; the Attorney General does not contend that specific names are not being removed on these bases, but instead that by virtue of the Board’s alleged decision to compare the registration list to other state databases for registrations after August 6, 2008 only, namely, the drivers license records maintained by the Wisconsin Department of Transportation and records showing an individual’s social security number, ineligible voters may remain registered. *See Complaint* ¶¶6, 21.

canvases at any time to identify electors who have moved, and to register voters at their present addresses. Electors who appear to have moved cannot be deemed “ineligible” voters unless and until they have been provided with at least 30 days’ notice of suspension of their registration and the opportunity, before being deemed “ineligible,” to certify that they still reside at their address and apply for continued registration. *Wis. Stat. §§6.40(2)(b) and 6.50(1) and (2)*. Likewise, when municipalities perform their regular, required registration list revisions within 90 days following each general election, they must provide the same kind of notice and opportunity to correct any misconception. *Wis. Stat. §6.50(1) and (2)*. A similar notice and 30 day period to respond before being deemed “ineligible” is guaranteed to electors about whom a municipality has received reliable information of residence change outside of the municipality. *Wis. Stat. §6.50(3)*.

The Court may take judicial notice that a general election for federal office is to occur on November 4, 2008. Ninety days before the November 4, 2008 election was August 6, 2008. As of the date of the filing of this brief, October 6, 2008, the November 4 election is a mere 29 days away. Thus, the remedy the Attorney General seeks through this lawsuit, the identification and removal of ineligible voters from the state’s voter registration list, is today an illegal remedy. Even if the Attorney General had the authority to bring this lawsuit, he would have had to have brought it, and obtained an order for the remedy he seeks, in advance of August 6, 2008. Thus, the relief he seeks

would violate federal law. Therefore, the Court cannot grant it and this case must be dismissed.

**IV. CONCLUSION.**

The Government Accountability Board's Motion to Dismiss should be granted.

Dated this 6<sup>th</sup> day of October 2008.

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**42 U.S.C. § 15483. Computerized statewide voter registration list requirements and requirements for voters who register by mail**

(a) Computerized statewide voter registration list requirements

(1) Implementation

(A) In general

Except as provided in subparagraph (B), each State, acting through the chief State election official, shall implement, in a uniform and nondiscriminatory manner, a single, uniform, official, centralized, interactive computerized statewide voter registration list defined, maintained, and administered at the State level that contains the name and registration information of every legally registered voter in the State and assigns a unique identifier to each legally registered voter in the State (in this subsection referred to as the “computerized list”), and includes the following:

(i) The computerized list shall serve as the single system for storing and managing the official list of registered voters throughout the State.

(ii) The computerized list contains the name and registration information of every legally registered voter in the State.

(iii) Under the computerized list, a unique identifier is assigned to each legally registered voter in the State.

(iv) The computerized list shall be coordinated with other agency databases within the State.

(v) Any election official in the State, including any local election official, may obtain immediate electronic access to the information contained in the computerized list.

(vi) All voter registration information obtained by any local election official in the State shall be electronically entered into the computerized list on an expedited basis at the time the information is provided to the local official.

(vii) The chief State election official shall provide such support as may be required so that local election officials are able to enter information as described in clause (vi).

(viii) The computerized list shall serve as the official voter registration list for the conduct of all elections for Federal office in the State.

(B) Exception

The requirement under subparagraph (A) shall not apply to a State in which, under a State law in effect continuously on and after October 29, 2002, there is no voter registration requirement for individuals in the State with respect to elections for Federal office.

(2) Computerized list maintenance

(A) In general

The appropriate State or local election official shall perform list maintenance with respect to the computerized list on a regular basis as follows:

(i) If an individual is to be removed from the computerized list, such individual shall be removed in accordance with the provisions of the National Voter Registration Act of 1993 (42 U.S.C. 1973gg et seq.), including subsections (a)(4), (c)(2), (d), and (e) of section 8 of such Act (42 U.S.C. 1973gg-6).

(ii) For purposes of removing names of ineligible voters from the official list of eligible voters –

(I) under section 8(a)(3)(B) of such Act (42 U.S.C. 1973gg-6 (a)(3)(B)), the State shall coordinate the computerized list with State agency records on felony status; and

(II) by reason of the death of the registrant under section 8(a)(4)(A) of such Act (42 U.S.C. 1973gg-6 (a)(4)(A)), the State shall coordinate the computerized list with State agency records on death.

(iii) 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.

(B) Conduct

The list maintenance performed under subparagraph (A) shall be conducted in a manner that ensures that –

(i) the name of each registered voter appears in the computerized list;

(ii) only voters who are not registered or who are not eligible to vote are removed from the computerized list; and

(iii) duplicate names are eliminated from the computerized list.

(3) Technological security of computerized list

The appropriate State or local official shall provide adequate technological security measures to prevent the unauthorized access to the computerized list established under this section.

(4) Minimum standard for accuracy of State voter registration records

The State election system shall include provisions to ensure that voter registration records in the State are accurate and are updated regularly, including the following:

(A) A system of file maintenance that makes a reasonable effort to remove registrants who are ineligible to vote from the official list of eligible voters. Under such system, consistent with the National Voter Registration Act of 1993 (42 U.S.C. 1973gg et seq.), registrants who have not responded to a notice and who have not voted in 2 consecutive general elections for Federal office shall be removed from the official list of eligible voters, except that no registrant may be removed solely by reason of a failure to vote.

(B) Safeguards to ensure that eligible voters are not removed in error from the official list of eligible voters.

(5) Verification of voter registration information

(A) Requiring provision of certain information by applicants

(i) In general Except as provided in clause (ii), notwithstanding any other provision of law, an application for voter registration for an election for Federal office may not be accepted or processed by a State unless the application includes —

(I) in the case of an applicant who has been issued a current and valid driver's license, the applicant's driver's license number; or

(II) in the case of any other applicant (other than an applicant to whom clause (ii) applies), the last 4 digits of the applicant's social security number.

(ii) Special rule for applicants without driver's license or social security number If an applicant for voter registration for an election for Federal office has not been issued a current and valid driver's license or a social security number, the State shall assign the applicant a number which will serve to identify the applicant for voter registration purposes. To the extent that the State has a computerized list in effect under this subsection and the list assigns unique identifying numbers to registrants, the number

assigned under this clause shall be the unique identifying number assigned under the list.

(iii) Determination of validity of numbers provided The State shall determine whether the information provided by an individual is sufficient to meet the requirements of this subparagraph, in accordance with State law.

(B) Requirements for State officials

(i) Sharing information in databases The chief State election official and the official responsible for the State motor vehicle authority of a State shall enter into an agreement to match information in the database of the statewide voter registration system with information in the database of the motor vehicle authority to the extent required to enable each such official to verify the accuracy of the information provided on applications for voter registration.

(ii) Agreements with Commissioner of Social Security The official responsible for the State motor vehicle authority shall enter into an agreement with the Commissioner of Social Security under section 405 (r)(8) of this title (as added by subparagraph (C)).

(C) Omitted

(D) Special rule for certain States

In the case of a State which is permitted to use social security numbers, and provides for the use of social security numbers, on applications for voter registration, in accordance with section 7 of the Privacy Act of 1974 (5 U.S.C. 552a note ), the provisions of this paragraph shall be optional.

(b) Requirements for voters who register by mail

(1) In general

Notwithstanding section 6(c) of the National Voter Registration Act of 1993 (42 U.S.C. 1973gg-4 (c)) and subject to paragraph (3), a State shall, in a uniform and nondiscriminatory manner, require an individual to meet the requirements of paragraph (2) if –

(A) the individual registered to vote in a jurisdiction by mail; and

(B)

(i) the individual has not previously voted in an election for Federal office in the State;  
or

(ii) the individual has not previously voted in such an election in the jurisdiction and the jurisdiction is located in a State that does not have a computerized list that complies with the requirements of subsection (a) of this section.

(2) Requirements

(A) In general

An individual meets the requirements of this paragraph if the individual —

(i) in the case of an individual who votes in person —

(I) presents to the appropriate State or local election official a current and valid photo identification; or

(II) presents to the appropriate State or local election official a copy of a current utility bill, bank statement, government check, paycheck, or other government document that shows the name and address of the voter; or

(ii) in the case of an individual who votes by mail, submits with the ballot —

(I) a copy of a current and valid photo identification; or

(II) a copy of a current utility bill, bank statement, government check, paycheck, or other government document that shows the name and address of the voter.

(B) Fail-safe voting

(i) In person An individual who desires to vote in person, but who does not meet the requirements of subparagraph (A)(i), may cast a provisional ballot under section 15482

(a) of this title.

(ii) By mail An individual who desires to vote by mail but who does not meet the requirements of subparagraph (A)(ii) may cast such a ballot by mail and the ballot shall be counted as a provisional ballot in accordance with section 15482 (a) of this title.

(3) Inapplicability

Paragraph (1) shall not apply in the case of a person —

(A) who registers to vote by mail under section 6 of the National Voter Registration Act of 1993 (42 U.S.C. 1973gg-4) and submits as part of such registration either —

(i) a copy of a current and valid photo identification; or

(ii) a copy of a current utility bill, bank statement, government check, paycheck, or government document that shows the name and address of the voter;

(B)

(i) who registers to vote by mail under section 6 of the National Voter Registration Act of 1993 (42 U.S.C. 1973gg-4) and submits with such registration either –

(I) a driver's license number; or

(II) at least the last 4 digits of the individual's social security number; and

(ii) with respect to whom a State or local election official matches the information submitted under clause (i) with an existing State identification record bearing the same number, name and date of birth as provided in such registration; or

(C) who is –

(i) entitled to vote by absentee ballot under the Uniformed and Overseas Citizens Absentee Voting Act [42 U.S.C. 1973ff et seq.];

(ii) provided the right to vote otherwise than in person under section 1973ee-1 (b)(2)(B)(ii) of this title; or

(iii) entitled to vote otherwise than in person under any other Federal law.

(4) Contents of mail-in registration form

(A) In general

The mail voter registration form developed under section 6 of the National Voter Registration Act of 1993 (42 U.S.C. 1973gg-4) shall include the following:

(i) The question "Are you a citizen of the United States of America?" and boxes for the applicant to check to indicate whether the applicant is or is not a citizen of the United States.

(ii) The question "Will you be 18 years of age on or before election day?" and boxes for the applicant to check to indicate whether or not the applicant will be 18 years of age or older on election day.

(iii) The statement "If you checked 'no' in response to either of these questions, do not complete this form."

(iv) A statement informing the individual that if the form is submitted by mail and the individual is registering for the first time, the appropriate information required under this section must be submitted with the mail-in registration form in order to avoid the additional identification requirements upon voting for the first time.

#### (B) Incomplete forms

If an applicant for voter registration fails to answer the question included on the mail voter registration form pursuant to subparagraph (A)(i), the registrar shall notify the applicant of the failure and provide the applicant with an opportunity to complete the form in a timely manner to allow for the completion of the registration form prior to the next election for Federal office (subject to State law).

#### (5) Construction

Nothing in this subsection shall be construed to require a State that was not required to comply with a provision of the National Voter Registration Act of 1993 (42 U.S.C. 1973gg et seq.) before October 29, 2002, to comply with such a provision after October 29, 2002.

#### (c) Permitted use of last 4 digits of social security numbers

The last 4 digits of a social security number described in subsections (a)(5)(A)(i)(II) and (b)(3)(B)(i)(II) of this section shall not be considered to be a social security number for purposes of section 7 of the Privacy Act of 1974 (5 U.S.C. 552a note ).

#### (d) Effective date

##### (1) Computerized statewide voter registration list requirements

###### (A) In general

Except as provided in subparagraph (B), each State and jurisdiction shall be required to comply with the requirements of subsection (a) of this section on and after January 1, 2004.

###### (B) Waiver

If a State or jurisdiction certifies to the Commission not later than January 1, 2004, that the State or jurisdiction will not meet the deadline described in subparagraph (A) for good cause and includes in the certification the reasons for the failure to meet such

deadline, subparagraph (A) shall apply to the State or jurisdiction as if the reference in such subparagraph to "January 1, 2004" were a reference to "January 1, 2006".

(2) Requirement for voters who register by mail

(A) In general

Each State and jurisdiction shall be required to comply with the requirements of subsection (b) of this section on and after January 1, 2004, and shall be prepared to receive registration materials submitted by individuals described in subparagraph (B) on and after the date described in such subparagraph.

(B) Applicability with respect to individuals

The provisions of subsection (b) of this section shall apply to any individual who registers to vote on or after January 1, 2003.