

J. B. VAN HOLLEN,
In his official capacity as
Attorney General of Wisconsin,

Plaintiff,

v.

Case No. 08-CV-4085

GOVERNMENT ACCOUNTABILITY BOARD, et al,

Defendants.

NOTICE OF MOTION FOR SUMMARY JUDGMENT
FOR A PEREMPTORY WRIT OF MANDAMUS
OR, ALTERNATIVELY, DECLARATORY AND INJUNCTIVE RELIEF

NOTICE OF MOTION

To: All Defendants

YOU ARE HEREBY NOTIFIED that at a time, date and place to be set by the Court, the following motion for summary judgment will be presented to the Court.

MOTION FOR SUMMARY JUDGMENT
FOR A PEREMPTORY WRIT OF MANDAMUS
OR, ALTERNATIVELY, FOR DECLARATORY AND INJUNCTIVE RELIEF

NOW COMES the plaintiff to move the court for a summary judgment on the ground that there is no genuine issue as to a material fact and that plaintiff is entitled to judgment as a matter of law, said judgment to award to plaintiff a peremptory writ of mandamus commanding the defendants without delay to require municipal clerks in Wisconsin to cross check the state's voter registration list, retrospective to January 1, 2006, with other agency databases that 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. Alternatively, said judgment should award to plaintiff declaratory and injunctive relief providing that defendants must, and commanding the defendants without delay to, require municipal clerks in Wisconsin to cross check the state's voter registration list, retrospective to January 1, 2006, with other agency databases that 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. Further, these defendants should be required 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 the ineligible voters be identified and removed and voter eligibility be verified by the same steps as applied to individuals registering before and after August 6, 2008.

Additional grounds for this motion are as follows:

1. Plaintiff as Attorney General has a clear legal right and responsibility under Wis. Stat. § 5.07 to bring this action to force defendants to do their duty under state and federal law in order to assure the citizens of Wisconsin that only qualified voters vote. The people of Wisconsin – and in particular the legal, eligible voters – also have a clear right to have the defendants comply with the law.
2. Defendants have a positive and plain duty to require cross checks, retrospective to January 1, 2006, between the state's voter registration list and the other databases. *See Wis. Stat. § 5.05(10)* While defendants agree that their statutory duty to administer elections laws means they must require the municipal clerks to make such cross checks back to August 6, 2008, they refuse to assure the accuracy and currency of the voter registration list by requiring them to make such cross checks back to January 1, 2006, the date federal law requires Wisconsin to have had a functional computerized voter registration system. Both federal and state law require that all voters are to be treated in a uniform and non-discriminatory manner.
3. The injury to the plaintiff and the State of Wisconsin is substantial and irreparable. A national election is imminent. The integrity of the electoral process is at stake because only qualified voters should be permitted to vote and the State's voter registration list is not completely accurate.

4. There is no adequate remedy at law.

Dated this 17th day of September, 2008.

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Case No. 08-CV-4085

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Defendants.

PLAINTIFF'S BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT
FOR A PEREMPTORY WRIT OF MANDAMUS
OR, ALTERNATIVELY, DECLARATORY AND INJUNCTIVE RELIEF

STATEMENT OF THE CASE

This is an action to enforce election laws. It is brought by the Attorney General in his official capacity under Wis. Stat. § 5.07. The defendants are the General Accountability Board, its members, and certain officials charged with enforcing the election laws.

Plaintiff has filed a motion for summary judgment and a request for admissions in anticipation that there will be few, if any, facts in dispute. Per those requests, on August 27, 2008, the Attorney General asked the defendants to come into full compliance with the Help America Vote Act of 2002 (HAVA), 42 U.S.C § 15483 to assure that only eligible voters vote. Defendants are duty-bound to enforce HAVA. Wis. Stat. § 5.05(10). HAVA requires that a state's computerized statewide voter registration system was to be functional by January 1, 2004 with a possible extension by waiver to January 1, 2006. *See* 42 U.S.C. § 15483(d). Wisconsin

received a waiver to January 1, 2006. But Wisconsin's voter registration system did not become fully functional until August 6, 2008.

To comply with HAVA, the state must maintain a central, computerized, statewide voter registration list that includes the name and other registration information for all legally registered voters in the state and the list must serve as the official voter registration list for the conduct of all elections for federal office. *See* 42 U.S.C. § 153483(a)(1)(A) (ii), (viii). Critically, to comply with HAVA, the state's computerized list of voters must be coordinated with other agency databases within the State. *See* 42 U.S.C. § 15483(a)(1)(A)(iv). That requires cross checking.

Defendants have taken steps to comply with HAVA by requiring municipal clerks to cross check the state's voter registration list with other data bases. However, defendants have not required the clerks to cross check retrospective to January 1, 2006. Rather, they have required the clerks to cross check only to August 6, 2008.

The Attorney General brings this action to require cross checks to January 1, 2006. He seeks relief in mandamus and, alternatively, declaratory and injunctive relief.

ARGUMENT

THE ELEMENTS ARE MET TO REQUIRE DEFENDANTS TO REQUIRE CROSS CHECKS TO JANUARY 1, 2006.

A. Summary judgment standards summarized.

Under Wis. Stat. § 802.08(2), summary judgment shall be rendered if there is "no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Affidavits "shall be made on personal knowledge and shall set forth such evidentiary facts as would be admissible in evidence." Wis. Stat. § 802.08(3). The opposing party "may not rest upon the mere allegations or denials" in the pleadings but "must set forth specific facts showing that there is a

genuine issue for trial." *Id. See Maynard v. Port Publications, Inc.*, 98 Wis. 2d 555, 561, 297 N.W.2d 500 (1980).

B. Mandamus elements summarized.

Mandamus lies to compel a public body or public officer to perform "a duty which he is bound by law to perform." *Eisenberg v. ILHR Department*, 59 Wis. 2d 98, 102, 207 N.W.2d 874 (1973). But it is well established that mandamus will not lie unless the following requirements are met: (1) A clear legal right, (2) a plain and positive duty, (3) substantial damages or injury should the relief not be granted, and (4) no other remedy at law. *State ex rel. Oman v. Hunkins*, 120 Wis. 2d 86, 88, 352 N.W.2d 220 (Ct. App. 1984).

C. The elements for a peremptory writ of mandamus or declaratory relief and a mandatory injunction are met.

The legal right of the Attorney General to sue for compliance is clear. Wisconsin Statute § 5.07 provides:

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. No bond is required in such actions.

And the defendants' legal duty is plain, positive, and clear. Defendants' duty is grounded in Wis. Stat. § 5.05(1), which places upon them "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." (Emphasis added). Their duties also 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.

The clarity of the duty is also evident from the HAVA requirement that the state voter registration list must be kept current and accurate and must exclude ineligible voters. Here are the HAVA highlights:

- All voter registration information obtained by any local election official shall be electronically entered into the computerized list “on an expedited basis” at the time the information is provided to the local official. 42 U.S.C. § 15483(a)(1)(A)(vi).
- Defendants must provide such support as may be required so that local election officials are able to enter information into the state’s computerized list on an expedited basis. 42 U.S.C. § 15483(a)(1)(A)(vi).
- Defendants must ensure that voter registration records in the state are accurate and are updated regularly. 42 U.S.C. § 15483(a)(4).
- The seminal requirement of HAVA is that states create and implement 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).
- This 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).
- The list must also be implemented and maintained in a “uniform and non-discriminatory” manner. 42 U.S.C. § 15483(a)(1)(A).
- In order to maintain the integrity of this list, it must 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. This process is known as a “HAVA check.”
- Directly related to the obligation to perform HAVA checks is 42 U.S.C. § 15483(a)(2)(A)(iii), which states as follows regarding a state’s voter list: [I]f 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.

- The computerized system must 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).
- Entry of information into the system—and the HAVA checks—are to occur “on an expedited basis.” 42 U.S.C. § 15483(a)(1)(A)(vi).¹

Defendants effectively admit their duty is to cross check the state voter registration list with other databases. They have required municipal clerks to cross check databases with the state’s voter registration list. They have imposed that requirement to August 6, 2008. Yet the duty to be compliant with HAVA was effective January 1, 2006.

Damages are substantial and irreparable, and there is no adequate remedy at law. Electoral integrity and public confidence in government are at stake. The defendants’ August 28, 2008, letter to the Attorney General, in refusing to cross check to January 1, 2006, conceded there would be significant discrepancies between the state voter registration list and other databases if such cross checking were done.

Voting in federal elections is a fundamental right protected by the United States Constitution and by statute. *Purcell v. Gonzales*, 549 U.S. 1, 3-4 (2006); see also, *Sturgis v. Town of Neenah Bd. of Canvassers*, 153 Wis.2d 193, 199, 450 N.W.2d 481(Ct. App. 1989) (“the individual citizen has the fundamental, inherent right to have his or her vote counted, consistent with necessary restrictions to insure the integrity of the election process”). The loss or dilution of this right is clearly “substantial damage.”

¹ The legislation assumes that a state’s computer system will be functioning on the HAVA Effective Date. There is no dispute that Wisconsin’s system was not functioning until almost 38 months later. Under these circumstances, the only reasonable interpretation of HAVA is that, at a minimum, for registrations received after the HAVA Effective Date, any required HAVA checks must be done “on an expedited basis” once the computer system is operational.

The next president of the United States will be elected on November 4, 2008. If, prior to this election, HAVA is not applied in a uniform and non-discriminatory manner to all voter registrations received after that the HAVA Effective Date, the tally will be tainted by illegal, ineligible and fraudulent voters. An election cannot be undone or sanitized after the fact by identifying and voiding the ballots cast by illegal, ineligible and fraudulent voters because voting is an anonymous process.

The need for immediate relief is also underscored by the reactions to this lawsuit. Those who, like defendants, are reluctant to enforce the law for logistical reasons, as well as those who stand to gain politically by non-enforcement of HAVA, are already doing everything they can to delay and slow down the progress of this lawsuit. This, as much as anything, proves the need for this court to act promptly.

Critics complain that following the law will “disenfranchise” legal voters and cause havoc at the polls. This is a peculiar accusation because the Attorney General is only asking that defendants treat all post-HAVA voter registrations in the same way it treats those received after August 6, 2008. If, in fact, HAVA causes disenfranchisement it seems odd that there has been no outcry over defendants’ limited efforts to comply. In any event, the “disenfranchisement” argument is a stalking horse. Congress and the Wisconsin Legislature were the public-policy lawmaking bodies who established the rules. The critics are wrong. However, that is beside the point because the law is not ambiguous and it does not permit non-compliance because it would be difficult or time-consuming to follow the law. The state and federal election laws at issue in this case are intended to promote free, open and fair elections. Although, in the halls of Congress and the State Capitol in Madison, people are free to debate the policy implications of

our laws—and even propose different laws—the Attorney General, the defendants and this court do not have that luxury.

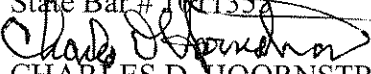
CONCLUSION

The court should grant summary judgment to the plaintiff awarding either a peremptory writ of mandamus commanding the defendants without delay to require municipal clerks in Wisconsin to cross check the state's voter registration list, retrospective to January 1, 2006, with other agency databases that 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. Alternatively, said judgment should award to plaintiff declaratory and injunctive relief providing that defendants must, and commanding the defendants without delay to, require municipal clerks in Wisconsin to cross check the state's voter registration list, retrospective to January 1, 2006, with other agency databases that 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.

Respectfully submitted,

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