

The Honorable Ricardo S. Martinez

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

WASHINGTON ASSOCIATION OF CHURCHES,
as an organization and representative of its
members; WASHINGTON ASSOCIATION OF
COMMUNITY ORGANIZATIONS FOR
REFORM NOW (ACORN), as an organization and
representative of its members; ORGANIZATION
OF CHINESE-AMERICANS – GREATER
SEATTLE CHAPTER, as an organization and
representative of its members; CHINESE
INFORMATION & SERVICE CENTER, as an
organization and representative of its clients;
FILIPINO AMERICAN POLITICAL ACTION
GROUP OF WASHINGTON, as an organization
and representative of its members; KOREAN
AMERICAN VOTERS ALLIANCE, as an
organization and representative of its members;
SERVICE EMPLOYEES INTERNATIONAL
UNION (SEIU) – LOCAL 775, as an organization
and representative of its members; and
WASHINGTON CITIZEN ACTION, as an
organization and representative of its members,

Plaintiffs,

vs.

SAM REED, in his official capacity as Secretary of
State for the State of Washington,

Defendant.

NO. CV 06-0726 RSM

**PLAINTIFFS' RESPONSE
TO DEFENDANT'S
MOTION TO COMPEL
JOINDER OF UNITED
STATES AS ADDITIONAL
PARTY DEFENDANT**

NOTE ON MOTION
CALENDAR:

JUNE 30, 2006

1 In this Response, plaintiffs urge the Court to deny defendant's Motion to Compel
2 Joinder of United States as Additional Party Defendant ("Def. Mot.").

3 **ARGUMENT**

4 **DEFENDANT'S MOTION TO COMPEL JOINDER SHOULD BE DENIED**
5 **BECAUSE THE UNITED STATES IS NOT A NECESSARY PARTY TO THIS**
6 **ACTION.**

7 Defendant argues that plaintiffs must join the United States as a party because its
8 presence is necessary to prevent Washington State from being subject to inconsistent
9 obligations with respect to three issues: (1) the State's obligations under the Help America
10 Vote Act of 2002 ("HAVA"), 42 U.S.C. § 15301 *et seq.*, to obtain identifying numbers from
11 voter registration applicants; (2) the State's obligations under HAVA to attempt to "match"
12 the information furnished by applicants; and (3) the consequences under HAVA of the
13 State's failure to "match" such information. Defendant is mistaken. The presence of the
14 United States is unnecessary for the first and second reasons, because those points are not in
15 dispute here: plaintiffs do not challenge that HAVA requires registration applications to
16 include driver's license numbers or Social Security digits (if the applicants have them) or
17 that HAVA requires states to attempt to "match" the information submitted. While there is a
18 dispute about the third issue – whether HAVA mandates that Washington refuse to register
19 voters whose application information is not "matched" to other databases – joinder of the
20 United States is not necessary.

21 Defendant bears the burden of establishing that the U.S. is a necessary party, *see*
22 *Makah Indian Tribe v. Verity*, 910 F.2d 555, 558 (9th Cir. 1990), but he has failed to
23 establish any of the elements in Rule 19(a)(2) for compelling joinder of the U.S. First,
24 defendant has not satisfied the threshold requirement that the federal government "claims an
25 interest" in this subject. Defendant argues that the U.S. Department of Justice ("DOJ") has
26 established a position on HAVA's "matching" provision that differs from plaintiffs. Even if
27 that were true – and it is not – that does not equate to the U.S. claiming an interest in this

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1 case. Agencies of the federal government have opinions about all kinds of statutes, but that
 2 does not make the U.S. a necessary party to every litigation in which the federal courts are
 3 asked to interpret and enforce those statutes. That is particularly true here where DOJ is
 4 charged with the authority to enforce HAVA through the courts, but not to issue
 5 interpretations of the statute. And in any event, the documents submitted by defendant do
 6 not show that DOJ has adopted a position contrary to plaintiffs’.

7 Second, and for many of the same reasons, defendant has not established that he
 8 faces a “substantial risk” of inconsistent obligations if DOJ is not joined. He merely
 9 speculates that, in the event this Court rules for plaintiffs, DOJ may sue Washington State –
 10 in other words, DOJ may sue the State for complying with this Court’s interpretation of
 11 HAVA. There is zero evidence to suggest that DOJ has threatened to sue Washington, or
 12 any other state, for complying with a federal court’s construction of this federal statute.
 13 Imagining that the federal government might challenge the Court over HAVA – in a way it
 14 never has done or even threatened to do – is not grounds for compelling joinder: unfounded
 15 speculation about potential future events does not render DOJ a necessary party. *See*
 16 *Northrop Corp. v. McDonnell Douglas Corp.*, 705 F.2d 1030, 1046 (9th Cir.1983).

17 The Court is empowered and competent to resolve the basic questions of statutory
 18 interpretation and conflict preemption presented here. Neither the supposed views of the
 19 federal government, nor defendant’s unfounded conjecture about what that government
 20 might do if plaintiffs prevail, makes DOJ a necessary party under Rule 19.

21 **A. Defendant Has Not Established That DOJ Is A Necessary Party**
 22 **Under Rule 19(a)(2).**

23 Insofar as is relevant here, Rule 19(a)(2) of the Federal Rules of Civil Procedure
 24 provides that a party is necessary if “the person claims an interest relating to the subject of
 25 the action and is so situated that the disposition of the action in the person’s absence may . . .
 26 (ii) leave any of the persons already parties subject to a substantial risk of incurring double,
 27 multiple, or otherwise inconsistent obligations by reason of the claimed interest.” Fed. R.

1 Civ. P. 19(a)(2). Defendant has proven neither the threshold test (that DOJ “claims an
2 interest”) nor the second requirement (that defendant faces a “substantial risk” of
3 inconsistent obligations).

4 **1. Defendant Has Not Shown That DOJ Claims An Interest in this Case**

5 An essential prerequisite to joinder under Rule 19(a)(2) is that the non-party actually
6 claim an interest in the action. *See United States v. Bowen* 172 F.3d 682, 688-89 (9th Cir.
7 1999) (“Joinder is ‘contingent . . . upon an initial requirement that the absent party *claim* a
8 legally protected interest relating to the subject matter of the action.’”) (quoting *Northrop*
9 *Corp.*, 705 F.2d at 1043). The Ninth Circuit has made clear that parties which have actual or
10 constructive knowledge “of an action and choose not to join in it, need not be considered
11 necessary parties because they have not *claimed* an interest in the litigation.” *Blumberg v.*
12 *Gates*, 204 F.R.D. 453, 455-56 (C.D. Cal. 2001). Thus, Rule 19(a)(2) is “wholly
13 inapplicable” where, as here, the absent party has not come forward to assert that its interests
14 will be impaired by allowing litigation to proceed in its absence. *Ass’n to Protect*
15 *Hammersley, Eld, and Totten Inlets v. Taylor*, 299 F.3d 1007, 1015 (9th Cir. 2002)
16 (declining to order joinder of government agency).

17 It is important to clarify what is – and what is not – in dispute because defendant
18 makes much of DOJ’s supposed positions on HAVA. Most have nothing to do with
19 plaintiffs’ claims. Plaintiffs do not contest that HAVA requires voter registration
20 applications to include numerical identifiers. *See* 42 U.S.C. § 15483(a)(5)(A). Plaintiffs
21 also do not contest that HAVA requires states to try to “match” the information submitted by
22 an applicant with information contained in other government databases. *See id.*
23 § 15483(a)(5)(B). What plaintiffs do contest is Washington’s misinterpretation of HAVA as
24 requiring the rejection of eligible registrants whose information defendant fails to “match.”

25 Defendant suggests that the U.S. has claimed an interest because “federal agencies
26 are playing an active role in implementing and enforcing” HAVA, and because HAVA
27 “specifically assigns an enforcement role to the U.S. Attorney General.” Def. Mot. at 3.

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1 Those vague and sweeping generalities prove too much – and too little. Too much because
 2 were they sufficient to satisfy the threshold requirement of Rule 19(a)(2), then the U.S.
 3 would be a necessary party in every HAVA litigation¹ – indeed, in every litigation involving
 4 statutes that the Attorney General may enforce through a civil action.² Too little because
 5 defendant has not shown that the U.S. has claimed an interest in the particular issue in
 6 dispute here. The mere fact that the Attorney General “may bring a civil action against any
 7 State . . . as may be necessary to carry out” HAVA, 42 U.S.C. § 15511, does not mean that
 8 the U.S. “claims an interest” in this matter. For example, even where the U.S. had an
 9 “ongoing relationship” with Indian tribal authorities in enforcing federal law, it was not a
 10 necessary party in a challenge to those authorities’ actions, because “the United States ha[d]
 11 not come forward to claim an interest.” *Sturdevant v. Deer*, 70 F.R.D. 539, 543 (E.D. Wisc.
 12 1976).

13 Defendant also seems to suggest that the Court should infer that the U.S. claims an
 14 interest based on statements DOJ has made about HAVA in other contexts. As discussed in
 15 Section B below, most of the DOJ statements do not even relate to the dispute there. The
 16 few that are relevant do not show that DOJ has adopted a policy that “matching” is a
 17 precondition to registering and voting.

21 ¹ In fact, we have found no cases in which DOJ has been found a necessary party in a HAVA lawsuit,
 22 even though the statute has prompted substantial litigation.

23 ² While the Attorney General is authorized to enforce many federal statutes, our research indicates that
 24 the DOJ is not a necessary party in most litigation involving these laws. *See, e.g., Abbott Laboratories v.*
 25 *Celebrezze*, 228 F. Supp. 855, 862 (D. Del. 1964) (holding that Attorney General was not a necessary party in
 26 action challenging regulations promulgated under the Food, Drug and Cosmetic Act, although Act authorizes
 27 Attorney General to enforce statute). Cf. *Nat. Coalition for Students With Disabilities Educ., Legal Defense*
 28 *Fund, et al. v. Bush*, 170 F.Supp.2d 1205, 1210-11 (N.D. Fla. 2001) (denying motion to dismiss for failure to
 join necessary parties in a challenge under National Voter Registration Act, which authorizes enforcement
 actions by Attorney General, because full and effective relief was available); *Dufay v. Bank of America N.T. &*
S.A. of Oregon, 94 F.3d 561 (9th Cir. 1996) (hearing challenge under Equal Credit Opportunity Act, which
 grants power of enforcement to Attorney General, without United States as party), *Miller v. American Exp.*
Co., 688 F.2d 1235 (9th Cir. 1982) (same).

2. **Defendant Has Not Shown a Substantial Risk of Inconsistent Obligations**

1 Defendant has not shown, as Rule 19(a)(2) requires, that deciding this case in the
 2 absence of the U.S. would subject Washington to a “substantial risk of incurring double,
 3 multiple, or otherwise inconsistent obligations.” Even if DOJ had clearly established a
 4 policy that HAVA compels states to reject “unmatched” applications – and it has not –
 5 defendant has offered nothing to suggest that if this Court were to rule otherwise, DOJ
 6 would flout that ruling and sue the State in hopes of obtaining a contrary ruling from this or
 7 another district court. Defendant has not established a substantial likelihood that DOJ would
 8 sue the State for complying with an order of this Court. *See Arthur v. Starrett City Assoc’s*,
 9 89 F.R.D. 542, 547 (E.D.N.Y. 1981) (“[T]he chain of events that defendants suggest will
 10 result from the grant of relief sought in this action is far too remote to support a finding that
 11 [defendant] faces a ‘substantial’ risk of inconsistent obligations if [the federal agency is not
 12 joined]. Accordingly, defendants’ scenario is too speculative to require [joinder].”).

13 That DOJ is *not* a necessary party is entirely consistent with the text of HAVA, as
 14 well as clearly established caselaw. Though HAVA grants the Attorney General authority to
 15 bring a civil action against a state that refuses to comply with the statute, it does not grant
 16 the Attorney General the power to issue binding interpretations of the statutory language or
 17 binding determinations of states’ compliance. HAVA simply authorizes the Attorney
 18 General to sue a state in federal court so that *the court* will declare that the state has violated
 19 HAVA, or that *the court* will issue an injunction requiring the state to take certain actions.
 20 As is the case with countless other federal statutes, HAVA empowers the Attorney General
 21 to bring enforcement actions, but it is the federal judiciary’s job to say what the law means.

22 Because construing federal laws like HAVA and examining Congressional intent are
 23 within the province of the judiciary, not the executive, it is no surprise that we could not find
 24 any case in which DOJ was held to be a necessary party in cases challenging states’ policies
 25 as inconsistent with HAVA. There have been numerous such challenges specifically
 26 implicating the sections of HAVA as to which the Attorney General has enforcement
 27 powers. The U.S. was not a party in any of them, and the federal courts resolved the
 28

1 HAVA-based challenges without DOJ's presence.³ See, e.g., *Am. Ass'n of People with*
 2 *Disabilities v. Shelley*, 324 F.Supp.2d 1120 (C.D. Cal. 2004) (no finding that DOJ was
 3 necessary party in challenge based on HAVA section 301); *Sandusky County Democratic*
 4 *Party v. Blackwell*, 387 F.3d 565 (6th Cir. 2004) (no finding that DOJ was necessary party
 5 in challenge based on HAVA Section 302); *White v. Blackwell*, 418 F.Supp.2d 988 (N.D.
 6 Ohio 2006) (same); *Bay County Democratic Party v. Land*, 347 F.Supp.2d 404 (E.D. Mich.
 7 2004) (same); *Florida Democratic Party v. Hood*, 342 F.Supp.2d 1073 (N.D. Fla. 2004)
 8 (same); *League of Women Voters of Ohio v. Blackwell*, No. 3:05CV7309, 2005 WL
 9 3274844 (N.D. Ohio Dec. 2, 2005) (no finding that DOJ was necessary party in challenge
 10 based on HAVA Section 303).

11 Courts also have allowed challenges to state regulations implementing other federal
 12 statutes without requiring joinder of the U.S. For example, where plaintiffs sued a local
 13 housing authority, claiming that local policies were inconsistent with and preempted by
 14 federal law, the district court observed that "[t]he resolution of this dispute centers around a
 15 determination of whether or not a federal statute and the regulations promulgated thereunder
 16 preempt state law. This is a legal determination which this court can make" without the
 17 presence of the United States. *FHM Constructors, Inc. v. Village of Canton Housing Auth.*,
 18 779 F. Supp. 677 (N.D.N.Y. 1992). Similarly, in considering a challenge to a Wisconsin
 19 program implementing the federal 1987 Surface Transportation Act, the district court
 20 concluded that the U.S. was not a necessary party because "plaintiffs' challenges to the
 21 constitutionality of Wisconsin's disadvantaged business program are directed toward the
 22 state's implementation of the federal legislation, not toward the federal legislation itself."
 23 *Milwaukee County Pavers Ass'n v. Fiedler*, 731 F. Supp. 1395 (W.D. Wis. 1990); see also
 24 *Edgecomb v. Housing Auth. of Vernon*, 824 F. Supp. 312, (D. Conn. 1993) (finding that U.S.
 25 was not a necessary party because plaintiffs challenged local policies implementing federal
 26 regulations, not the federal regulations themselves); *Chesir v. Housing Auth. of Milwaukee*,

27 _____
 28 ³ Although the U.S. appeared as amicus in some of those cases, it did not seek to intervene as a party.

1 801 F. Supp. 244, (E.D. Wisc. 1992) (same); *Jones v. Blinziner*, 536 F. Supp. 1181 (N.D.
2 Ind. 1982) (same).

3 As these cases show, the absence of the United States here does not impact the
4 Court's ability to decide whether state law is consistent with federal law. Moreover, "the
5 mere fact that defendants may defend on the ground that federal law or regulation either
6 encourage or require the complained of practices does not mean that the action cannot go
7 forward without [the United States]." *Arthur*, 89 F.R.D. at 546.

8 Finally, since the Attorney General is not authorized to declare the meaning of
9 HAVA, and because DOJ is entrusted with no role in promulgating regulations to fill gaps in
10 Congress's statutory command, there is simply no need for the Court to defer to the
11 "administrative construction of the statute before the court." Def. Mot. at 4. Deference to
12 an administrative agency's construction of a statute is only appropriate when Congress has
13 delegated to the agency the power to administer a statutory program, and "to fill any gap
14 left, implicitly or explicitly, by Congress" in the statutory scheme. *Chevron U.S.A., Inc. v.*
15 *Natural Res. Defense Council, Inc.*, 467 U.S. 837, 843 (1984) (quotation marks and citation
16 omitted). Here, because DOJ plays no such role, deference to its interpretation of HAVA is
17 unwarranted. Moreover, even if deference to DOJ's construction of HAVA were
18 appropriate, it would not make DOJ a necessary party.

19 The Court is confronted with ordinary questions of statutory construction and
20 conflict preemption, and defendant has advanced no reason why the Court is not competent
21 to resolve these issues in the absence of DOJ. Plaintiffs submit that the Court is entirely
22 capable of determining the meaning of HAVA and whether it preempts RCW 29A.08.107,
23 based on the language of the HAVA, "the specific context in which that language is used,
24 and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337,
25 341 (1997). DOJ is not a necessary party.

1 **B. Defendant's Submissions Do Not Support the Conclusion that HAVA Requires**
2 **a Successful "Match" as a Precondition to Voter Registration.**

3 Defendant claims that the various exhibits he has submitted establish that it is the
4 policy of the U.S. that HAVA requires the states to refuse to register applicants whose
5 information is not successfully "matched." Yet a reading of those exhibits reveals no such
6 policy by DOJ, or any other federal agency. Whether defendant advanced the materials to
7 persuade the Court to compel the joinder of DOJ, or simply to preview his defense, they do
8 not help his cause:

9 **1.** Defendant argues that a DOJ filing in a lawsuit involving New York State's
10 failure to adopt any procedures or systems required by HAVA shows the U.S. is necessary.
11 Def. Mot. at 5 (citing Att. B). Defendant cites the New York lawsuit for the proposition that
12 the Attorney General "stands ready and willing" to sue states if they do not refuse to register
13 unmatched voters. But that is not what happened in New York.⁴ New York State was sued
14 because it did not even purport to put in place any of the systems and programs required by
15 HAVA. Thus, all the exhibit illustrates is that DOJ may bring enforcement actions to ensure
16 that states have *some* system in place to collect numerical identifiers from applicants and
17 attempt to match applicants' information with data in government databases, and that states
18 have in-person voting systems that are HAVA-compliant.

19 DOJ's filing in the New York action does not prove that it would bring an
20 enforcement action against a state that registered "unmatched" voters and utilized alternative
21 means to verify identity. Indeed, it suggests the very opposite: DOJ states that "the United
22 States does not oppose [New York]'s proposal" for a statewide voter database that "will
23 indicate if a voter is a first-time voter with no verified identification and flag that voter as
24 requiring identification resolution in order to vote." Def. Mot. Att. B at 15,17. Thus, the
25 New York plan unopposed by DOJ is consistent with plaintiffs' reading of HAVA: it
26 envisions that voters whose information cannot be matched will not be denied registration.

27 ⁴ Nor, to our knowledge, has DOJ brought litigation against any of the majority of states which do not
28 make matching a precondition to registering and voting.

1 In arguing that Washington's policies on the consequences of unsuccessful matching
2 have been endorsed by DOJ, defendant also points to the fact that DOJ's filing in New York
3 indicates that New York has plans to utilize some matching software developed by
4 Washington. New York, however, plans to use Washington software only as a baseline,
5 with "subsequent modification of such software to meet New York State requirements."
6 Def. Mot. Att. B at 18. Most importantly, New York has rejected Washington's policy
7 regarding the consequences of a failed match. New York filed proposed regulations in its
8 litigation with DOJ, noting that it had "previously shared a copy of the proposed regulations
9 with the United States on June 6, 2006." Letter from Todd D. Valentine, Special Counsel,
10 New York State Board of Elections, to the Court, Docket No. 84, *United States v. New York*
11 *State Bd. of Elections*, No. 06-CV-0263 (GLS) (June 16, 2006). These proposed regulations,
12 to which DOJ has not objected, provide that a failure to match "shall not be the basis for the
13 rejection of a voter's application," *id.*, Att. 1 at 12, and that "[i]f a voter's identity is not
14 verified before election day, the voter will be asked to provide identification before they
15 vote for the first time," in order to verify her identity, *id.* Att. 1 at 15. The fact that New
16 York may borrow some helpful elements of Washington's system does not imply any
17 endorsement by either New York or DOJ of the anomalous Washington policy that New
18 York has rejected.

19 2. Like DOJ's filing in the New York litigation, several letters from DOJ to the
20 chief election officials of various states provide defendant no support on the question of the
21 consequences of failed matches. *See* Def. Mot. at 6 (citing Att. D, E, and F). These exhibits
22 simply indicate that DOJ is prepared to bring enforcement actions if states fail to set up
23 some mechanism for trying to match registrants' numerical identifiers. The letters confirm
24 what plaintiffs and defendant agree on: that states must collect numerical identifiers and
25 attempt to match them. The letters say nothing about the policies for dealing with applicants
26 whose information is not successfully matched.

1 **3.** Defendant also submits a Declaration of Catherine S. Blinn, Assistant
2 Director of Elections for the Office of the Washington State Secretary of State, in which
3 Blinn simply repeats defendant’s central contention: that DOJ “has taken the position that if
4 a voter registrant gives” a numerical identifier that is not successfully matched, “the
5 registration should be rejected.” Def. Mot. Att. A at 2-3. But she provides no evidence to
6 support this conclusory hearsay. Paragraph 5 of the Blinn Declaration cites a DOJ website
7 containing frequently asked questions. While the website confirms that states must attempt
8 to match registrants’ information, it does not indicate DOJ’s view on the consequences of a
9 failed match – or whether DOJ has a view on the subject. If anything, the DOJ’s website
10 suggests that states may use non-matching methods to verify applicants’ identities: it
11 expressly references HAVA Section 303(b)’s non-matching identification verification
12 provisions. *See* <http://www.usdoj.gov/crt/voting/misc/faq.htm>.

13 **4.** Paragraph 5 of the Blinn Declaration also cites a March 17, 2003 letter from
14 Assistant U.S. Attorney General Ralph Boyd to the Secretary of State of Alabama, which
15 reiterates that states must collect numerical identifiers and attempt to match them. *See* Letter
16 from Ralph Boyd, Assistant U.S. Attorney General, to Nancy L. Worley, Alabama Secretary
17 of State, at 2, *available at* http://www.usdoj.gov/crt/voting/hava/states_ltr.pdf. Once again,
18 the letter includes no indication that unmatched applications must be rejected. It does,
19 however, reference the alternative methods for verifying identity in HAVA Section 303(b).
20 *Id.* at 3.

21 **5.** Finally, defendant relies on a letter from a former counsel to an Assistant
22 U.S. Attorney General to a Maryland election official. *See* Def. Mot. Att. C. This exhibit,
23 too, fails to establish that DOJ has adopted a firm policy on the consequences of failed
24 matches. The letter states explicitly that DOJ “states its formal positions with respect to
25 statutes it enforces only through case-by-case litigation” and that “[t]he opinions expressed
26 in this letter are not binding and would not prevent the Department from taking a different
27 position in any future litigation under HAVA” *Id.* at 1. No positions stated in the

1 letter, expressed once in nonbinding fashion and not repeated since 2003, establish that DOJ
2 has adopted *any* firm position on the issues at stake here.

3 **CONCLUSION**

4 For the foregoing reasons, the court should deny defendant's motion to compel
5 joinder of the United States.

6 DATED this 26th day of June, 2006.

HILLIS CLARK MARTIN & PETERSON, P.S.

7
8 /s/ Louis D. Peterson

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CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of June, 2006, I electronically filed this PLAINTIFFS' RESPONSE TO DEFENDANT'S MOTION TO COMPEL JOINDER OF UNITED STATES AS ADDITIONAL PARTY DEFENDANT with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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DATED this 26th day of June, 2006 at Seattle, Washington.

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- 6/26/06