

STATE OF WISCONSIN : CIRCUIT COURT : DANE COUNTY
BRANCH 2

J.B. VAN HOLLEN

In his official capacity as

Attorney General of the State of Wisconsin

17 West Main Street

Post Office Box 7857

Madison, WI 53707-7857,

Case No. 08-CV-004085

Judge Maryann J. Sumi

Plaintiff,

THE REPUBLICAN PARTY OF WISCONSIN

148 E. Johnson Street

Madison, WI 53703,

Intervenor-Plaintiff,

vs.

GOVERNMENT ACCOUNTABILITY BOARD

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Defendants,

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Intervenor-Defendants.

**MEMORANDUM IN SUPPORT OF MOTION JOINING IN PLAINTIFF,
J.B. VAN HOLLEN, AS ATTORNEY GENERAL,
MOTION FOR SUMMARY JUDGMENT FOR A PEREMPTORY WRIT OF
MANDAMUS, OR ALTERNATIVELY DECLARATORY JUDGMENT AND
INJUNCTIVE RELIEF AND SEEKING ADDITIONAL RELIEF**

It is unfortunate that, despite the expenditure of tens of millions of dollars and a two-year extension, Wisconsin is one of only a handful of states that was unable to comply with the Help America Vote Act of 2002 (HAVA) by the mandatory drop-dead date of January 1, 2006. At its most benign, it is an embarrassment that the system was not able to perform the basic requirements of HAVA until August 6, 2008,¹ setting that embarrassment aside, GAB's ongoing refusal now to comply with the law or take steps to check potentially fraudulent registrations between January 2006 and August 2008 has far reaching consequences in the public's faith in the electoral system and may, indeed, change the outcome itself.

¹ It should be noted that the GAB, when it came into existence, inherited a system already over a full year out of compliance with HAVA. Further, the HAVA check requires the coordination and cooperation of several state agencies, not just the GAB. There is plenty of blame to go around, and blame for the system not being operational for 20 months after it should have been is irrelevant at this point in time.

If GAB is allowed to continue its current path through to the critical upcoming November 4, 2008 election, what is now an embarrassment could well become a nightmare of international proportions with the Presidency of the United States hanging in the balance. If Wisconsin's election is close, and there is every reason to believe it will be, the rest of the country (and the watching world) will be faced with addressing Wisconsin's decision to ignore the law requiring a simple process – a process met by other states. There is nothing unique about the issues Wisconsin faced after January 1, 2006.

Given that HAVA checks *will be run* after the election, the State's conscious decision not to attempt to verify its voter registration list *before* the election would seem inexcusable. The public knows that criminal charges have been brought against individuals in the last 20 months for placing false names onto Wisconsin's voter registration list (the "SVRS") – clearly demonstrating there is a serious problem to address. <http://www.wisn.com/politics/17593807/detail.html>. If the presidential election is decided by a few hundred or few thousand votes² and no effort to comply is undertaken, the deciding votes may well be votes cast by ineligible voters registered illegally that could have been prevented. Compliance with the 2002 federal law is mandatory. The Court should take steps to assure the public that it has done everything possible to correct the State's failure to comply with the law.

RPW joins this matter as an intervening plaintiff in support of the Attorney General's pending Motion for Summary Judgment for a Peremptory Writ of Mandamus, or Alternatively Declaratory Judgment and Injunctive Relief and Seeking Additional Relief. RPW respectfully requests the Court grant additional relief as described below.

² Even if the presidential race is not decided by a slim margin, we know from experience that many legislative races will be decided by a mere handful of votes.

SUMMARY OF THE ISSUES

The various defendants complicate this case by mixing the purely legal questions of what HAVA requires with the factual issues of what can be done once illegality is established. Analytically, the Court should divide these issues.

The legal issues are straight-forward. There are two distinct legal questions before the Court: (1) On what registrations does HAVA mandate that the HAVA checks be run?; and (2) After we know which registrations must be subject to the HAVA checks, what must be done with the non-matches?

After the Court answers these two legal questions, which require the interpretation of Section 303 of HAVA (and there is very little other guiding authority), only then is it appropriate to move to an analysis of remedy, or, what can or should be ordered by this Court in the remaining time before the election.³ If HAVA does require that all post-January 1, 2006, registrations be treated uniformly, then the Court may address the enforcement issue of the ability to timely complete those checks. If timely completion of all registrations will not be possible, then, at a minimum, the GAB should be directed to make all possible efforts to complete as many HAVA checks as possible, paying particular attention to the areas where we know there has been criminal behavior with the intent of placing fraudulent names into the SVRS.

Obviously, the best course of action is to resolve why each non-match occurred. But if this is not possible, it cannot be reasonable to do nothing with non-matches. It would seem imminently reasonable for those with unresolved non-matches to show one of the very liberal

³ Various defendants have criticized the timing of this litigation. Any alleged "timing" problem was created by the fact that the State was unable to turn on the HAVA check until less than 90 days before the election, and then did not finalize procedures to operate the system until August 27, 2008. This litigation was instigated only 14 days after GAB announced its intention to violate HAVA, as examined below.

forms of proof of residence allowed under Wisconsin law at the poll, or in the most rare circumstance, to vote a provisional ballot. This Court need not interpret HAVA and mandate compliance in a manner that orders the removal of a single voter from the SVRS, and yet it has the power to insure at least minimal compliance with the law.

RPW first presents its arguments on what HAVA Section 303 requires. It is clear that the law mandates that HAVA checks be run on all post-January 1, 2006 registration activity. Moreover, HAVA does not grant the GAB the discretion to ignore a non-match registration file resulting from the HAVA check. If the Court agrees with either or both of these legal propositions, the RPW has presented for consideration appropriate writs of mandamus compelling compliance with the Court's interpretation of the law. Obviously, full compliance should be everyone's goal, and that too is embodied in the first Writ of Mandamus presented by the RPW.

If full compliance is no longer possible, then the best possible efforts of those responsible for the Wisconsin election system should be directed to the portions of the SVRS where know criminal activity has or is likely to take place. This approach is embodied in the Alternative Writs of Mandamus presented by the RPW.⁴

FACTS

The facts of this case have been well-outlined in previous pleadings and are virtually undisputed. As noted above, the facts necessary to apply HAVA Section 303 to this situation are straightforward:

- The State of Wisconsin, acting through the then Elections Board and the then and current Chief State Election Official (CSEO), Kevin Kennedy, received an extension such that

⁴ The RPW presents this alternative solely due to the practical and time limitations that the Court will need to analyze and address. In presenting this possible practical alternative, the RPW stresses that full compliance with HAVA should be ordered, and GAB should be capable to achieve compliance. In presenting this alternative, the RPW in no manner waives any arguments or rights related to the GAB's HAVA violations which would continue to exist and occur even if the Alternative Writ of Mandamus were to be adopted.

HAVA Section 303 was not mandatory in Wisconsin on January 1, 2004, as in several other states, but became effective and mandatory in Wisconsin on January 1, 2006.

- The GAB did not complete HAVA checks until August 6, 2008.
- At its meeting August 27-28, 2008, the GAB considered the issue of completing HAVA checks back to January 1, 2006, and declined to do so. Absent intervention by this Court, the GAB will not complete the HAVA checks on any registration received prior to August 6, 2008, but will complete the check on any registration received on or after that date.
- At its meeting of July 16, 2008, the GAB considered an emergency rule, recommended by the GAB staff, that would have required registrants that were non-matches from the HAVA checks to, if the non-match could not be resolved prior to Election Day, present proof of residence at the poll, or if unable to do so, cast a provisional ballot. The GAB members cast a tie vote (3-3). By operation of procedural rules, the proposed emergency rule was not adopted on a 3-3 vote. The GAB was requested to reconsider this action at its August 27-28, 2008, meeting. After discussion, the GAB did not change its position from the July 27, 2008, meeting, and took no other action directing any course of action for unresolved non-matches.

ARGUMENT

I. HAVA REQUIRES THE CHECK BE COMPLETED ON ALL POST JANUARY 1, 2006, REGISTRATIONS AND THAT APPROPRIATE ACTION BE TAKEN IN RESPONSE TO NON-MATCHES.

A. The Clear Language Of HAVA Unambiguously Requires That Registration Activity After January 1, 2006, Be Subject To The HAVA Match.

There is no dispute that the relevant section of HAVA, Section 303, became effective in Wisconsin on January 1, 2006. HAVA Section 303(d). Both HAVA Section 303(a), which mandates the overall standards for the SVRS, and HAVA Section 303(b), which creates requirements for the subset of registrants who are new voters registered by mail, in clear terms require the State of Wisconsin to complete a HAVA check for any registration activity occurring after January 1, 2006.

First, we examine the general requirements of Section 303(a), applicable to the entire SVRS. Pursuant to Section 303(a) (1)(A)(iv), the SVRS, “**shall** be coordinated with other agency databases within the state.” (emphasis added). This mandatory requirement did not

become effective on August 6, 2008. It became effective on January 1, 2006. HAVA Section 303(d)(1)(B). The fact that the GAB failed to meet this requirement between January 1, 2006 and August 6, 2008, due to either its inability or the inability of other involved state agencies, does not now excuse Wisconsin from the responsibility to meet the requirement. No provision of the law allows a state to violate this provision. There is no “excusable” failure of compliance.

In addition to general obligations, HAVA Section 303(a)(5), requires that the GAB conduct “verification” of the driver’s license and social security information provided in order for a registration to be entered into the SVRS. Specifically, under the verification section, GAB was required to receive a current and valid driver’s license number for every registrant after January 1, 2006, or in the case where a valid driver’s license had not been issued, the last four digits of the registrant’s social security number. Then, pursuant to Section 303(a)(5)(A)(iii), which is a requirement clearly effective for all registration activity beginning January 1, 2006, the following requirement existed, and continues to exist:

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 paragraph, in accordance with state law.

This cannot be read to mean anything other than the HAVA check must be completed – “The state shall determine . . .” *Id.* (emphasis added). The GAB cannot credibly argue it has complied with this requirement for pre-August 6, 2008 registrations. It did not even “verify,” in any respect, that there were the same amount of numerals in the driver’s license number provided as a valid Wisconsin driver’s license.

The GAB has not complied with this section for any registrant information provided prior to August 6, 2008. Again, the law simply does not include an excuse provision—the fact that the GAB was “unable” to fulfill its obligation for a period of time, or the timing of any particular

registration, does not affect a finding now that the legal obligation of Section 303 has been violated. Nothing in the language of HAVA Section 303(a) supports the proposition that the **mandatory obligations** are extinguished during a particular post-2006 timeframe when the State argues it was unable to complete the obligation. The mandatory obligations created by Section 303(a)(1)(A)(iv) and 303(a)(5)(A)(iii), are continuing obligations of the GAB that must be met.

Likewise, Section 303(b) also provides additional confirmation of the mandatory obligation to complete the HAVA match for every new voter registered by mail on or after January 1, 2006. Specifically, pursuant to Section 303(b)(3)(A)(ii), this class of registrants is excused from the requirement of providing identification at the polls only if the driver's license number or social security information provided, "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." This clear and mandatory requirement means that for any new, by-mail registrant since January 1, 2006, for whom the GAB is unable to verify a match with the HAVA match, there must be appropriate identification provided at the polling location.

The obligation to conduct HAVA checks under various mandatory directives of Section 303 arose on January 1, 2006, and nothing has extinguished that obligation. The GAB has not complied.

B. Pursuant To The Clear Terms of HAVA, The GAB May Not Treat Registrants Submitting Information After August 6, 2008, Differently Than Registrants Submitting Information Before That Date.

The proposed course of action by GAB divides the relevant Wisconsin registrants (those registering on or after January 1, 2006, and therefore subject to HAVA Section 303) into two distinct classes, and the procedures for processing those two classes of registrants are completely different. HAVA specifically bans operation of the SVRS in this manner.

The introductory paragraph to the relevant section, HAVA Section 303 contains the following simple directive:

. . . each state, acting through the chief state election official, shall implement, in a **uniform and non-discriminatory manner**, a single, uniform, official, centralized, interactive computerized statewide voter registration list, defined, maintained, and administered at the state level . . .

Likewise, Section 303(b) directs that the state “shall in a **uniform and non-discriminatory manner**, require an individual to meet the requirements . . . “

Quite simply the GAB is prohibited from creating two distinct classes of registrants, depending upon submission before or after August 6, 2008. The GAB has an obligation, the specifics of which arose on January 1, 2006, to treat all registrants, “in a uniform and non-discriminatory manner.” This obligation of uniformity did not arise on August 6, 2008, or any other random date. The obligation for uniformity arose on January 1, 2006. That obligation exists today and will continue to exist. Again, GAB is in clear non-compliance.

C. Under HAVA, The GAB Is Prohibited From Ignoring The Outcome Of The HAVA Check.

While HAVA speaks with absolute precision on the requirement, arising January 1, 2006, to complete the HAVA check, HAVA does not contain precise instructions to the states as to exactly what action must be taken with the outcome of the HAVA check. However, while the specific actions to be taken are not precisely delineated, HAVA is clear that the GAB does not have the discretion, as it has proposed, to simply ignore the results of the HAVA check.

This is most clearly stated in HAVA Section 303(a)(5)(A)(iii), which is entitled, “Determination of Validity of Numbers Provided.” This provision, also discussed above, directly addresses what the GAB must do with the driver’s license or social security numbers provided by potential registrants. This Section states, “the state **shall determine** whether the

information provided by an individual is sufficient to meet the requirements of this sub-paragraph, in accordance with state law.”

In the case of a non-match in which the GAB has conducted no follow-up or ascertained any reason for the non-match, the GAB simply could not have met its mandatory responsibility of “determining” that the driver’s license number or social security number provided was “sufficient.” In fact, the only information the GAB has is that the number is not sufficient. Yet the GAB proposes that no further corrective action of any kind be taken. Under this proposed approach, the GAB has absolutely failed its responsibility to determine that the driver’s license or social security number submitted is sufficient to complete the registration.

The necessity of the GAB taking appropriate action as a result of the HAVA non-match is also found in Section 303(b)(3)(B)(ii), which applies to new voters that register by mail. That section provides that the requirements found in sub-paragraphs 1 and 2 of Section 303(b) do not apply only if, “a state or local election official matches the information submitted under clause (i) [which refers to the driver’s license number] with an existing state identification record bearing the same number, name and date of birth as provided in such registration.” However, the GAB is proposing to ignore this provision by not even attempting to complete the required HAVA check for pre-August 6, 2008, registrants and ignoring the results of the HAVA check for new by-mail registrants received after August 6, 2008.

The GAB staff clearly informed the Board at its July 16, 2008, meeting that, in its opinion, ignoring the results of the HAVA check was not consistent with “voluntary guidelines issued from the United States Election Assistance Commission ‘EAC,’ recent court rulings in other states, and current Election Day practices in Wisconsin.” GAB Staff Memorandum, July 16, 2008 available online at http://elections.state.wi.us/meetings_doc.asp?thismeeting=1737.

The GAB staff recommended to the GAB that an emergency rule be adopted to address the situation as to how to appropriately, under HAVA, proceed with non-match registrations. On a 3-3 vote, the GAB failed to follow the staff recommendation on HAVA compliance. See 8-27-08 GAB meeting, Day 1, Part 5 at the 36:40 mark at the following address:

http://www.wisconsinseye.com/wisEye_programming/ARCHIVES-agencies.html.

Further, after refusing to adopt the staff-recommended compliance plan for addressing the non-matches from the HAVA check, the GAB did not substitute that plan with any other appropriate course of action. In short, the GAB has chosen to simply ignore the outcome of the HAVA check.

Beyond the absurdity of the proposition that the State of Wisconsin has now constructed a \$30 million “advisory” system, or the nonsensical idea that HAVA would require a check be completed but nothing be done with the outcome, HAVA’s clear terms do not grant the GAB the discretion to ignore the outcome of the HAVA check. That the law allows states flexibility in what it will do ought not to be confused with the obligation to do something.

A reasonable course of action is to take all steps possible to determine why a registrant was a non-match in the HAVA check, and then to make all possible corrections to the registration list prior to Election Day.⁵ For the non-matches for which no corrective action can be taken prior to Election Day, the registrants should be, as recommended by GAB staff, simply

⁵ It has been asserted before that HAVA in some manner prohibits the staff recommended course of action of flagging registrations as “Needs Id.” That assertion is clearly refuted by the recent decision of the Eleventh Circuit in *Florida State Conference of the NAACP v. Browning*, 522 F.3d 1153 (11th Cir. 2008). In *Browning*, the Eleventh Circuit reviewed the following Florida procedure, “If the information the applicant fills out on her registration form cannot be matched to the information held by the DHSMV or the SSA, the registration will not be completed and the applicant will receive a brief and generic notification through the mail to that effect.” *Id.*, at 1156-57. This is obviously a far more drastic procedure than anything even being considered in Wisconsin, and the Eleventh Circuit upheld this procedure as consistent with HAVA.

flagged on the registration list as “Needs ID.”⁶ One of the many, very liberal forms of proof of residency allowed by Wisconsin law will then suffice. Even if a registrant cannot comply with that minimal requirement, they should still then be allowed to cast a provisional ballot.

II. A PEREMPTORY WRIT OF MANDAMUS SHOULD BE ISSUED TO ENSURE COMPLIANCE WITH HAVA OR, IF THAT IS NOT POSSIBLE, IN THE ALTERNATIVE, ORDERING BEST EFFORTS AT HAVA COMPLIANCE DIRECTED TO THE AREAS OF THE SVRS WHERE CRIMINAL BEHAVIOR HAS ALREADY OCCURRED OR IS MOST LIKELY TO OCCUR.

The appropriate elements for the issuance of a writ of mandamus are summarized in the Plaintiff’s Brief in Support of Motion For Summary Judgment for a Peremptory Writ of Mandamus or, Alternatives, Declaratory and Injunctive Relief of the Attorney General, and therefore will not be repeated here.

However, the RPW does suggest differing potential contents of the writ of mandamus than the Attorney General. The following are the specific differences:

- The Attorney General has sought a writ directing the defendants to, “require municipal clerks in Wisconsin” to conduct the required HAVA checks. As discussed specifically in Section C below, the RPW believes the writ should be directed at the GAB and the HAVA designated Chief State Election Officer (“CSEO”), and that those defendants be directed to complete the HAVA checks at the state level, not to off-load responsibility for the problem created at the state level to the local level.
- The Attorney General has not sought specific direction as to the appropriate procedure regarding non-matches which cannot be resolved prior to Election Day. The RPW joins the staff and three members of the GAB in the view that the recommended rule is the appropriate approach under HAVA, and further that HAVA specifically does not create discretion for GAB to simply ignore unresolved non-matches.
- Finally, in the event that full HAVA compliance at this late date may not be possible, RPW has therefore suggested alternative appropriate relief directing resources towards achieving best efforts at HAVA Compliance to the areas of the SVRS where there is knowledge that criminal activity has taken place with the goal of placing fraudulent names into the SVRS.

⁶ The United States Supreme Court recently upheld an Indiana law that *requires* individuals voting in person to present photo identification before casting a ballot to preserve the state’s legitimate interest in preventing voter fraud. *See Crawford v. Marion County Election Board*, 553 U.S. ____ (2008). If such a burden is permissible, clearly it would be permissible to follow an even less onerous process of flagging HAVA non-matches.

A. Full Compliance With HAVA Should Be The Goal.

To return to the beginning, this case is about implementation of the Help America Vote Act of 2002. Given the State's open failure to comply with the law, this is certainly not Wisconsin State Government's finest hour. This is not the time to point fingers – it is time to take steps that will hopefully avoid national and international embarrassment and, worse yet, questions about the legitimacy of the election of the President of the United States.

The SVRS is a state-level system. The essence of the HAVA check is running two databases against one another. The ability to **appropriately mark** non-match files obviously exists, because that is precisely what the GAB staff recommended to the GAB Board. July 16, 2008, Staff Memorandum at p. 2 (“The statewide voter registration system contains the ability to automatically mark a voter’s record on the poll list with the notation “ID Required” if they fail a HAVA Check.”) These are database management functions that can be completed at the state level prior to the election. The fact that several local election officials have taken it upon themselves to bring their locality into HAVA compliance further demonstrates that HAVA compliance is achievable. *See* citation to Waunakee and Sun Prairie at page 15 herein.

Full HAVA Compliance is not only critical, but is possible before this important election.

B. In The Alternative, Best Efforts Should Be Directed At The Areas Of Known Criminal Behavior.

Dozens of special deputy registrars have been referred to law enforcement for fraudulent registrations submitted (many pre-dating August 6, 2008) for inclusion on the SVRS. Milwaukee Associated Press, Milwaukee Prosecutor Looking Into Voter Fraud, *La Crosse Tribune*, August 22, 2008 (“Election Commission Executive Director Sue Edman said that brings the total to 39 and the number could grow. Many of the workers are accused of turning cards they filled out themselves.”) An indictment has already been issued, and although not yet

charged, the indictment clearly also shows that not only an individual, but the organization employing him, were violating the law. <http://www.wisn.com/politics/17593807/detail.html>. The organization employing the individual and large numbers of others in Wisconsin was, according to the indictment, compensating the individual differently by the number of registrations submitted, in clear violation of Wisconsin Election Fraud statute 12.13(3)(ze). *Id.* It has been further reported that another major group retaining large groups of deputy registrars in Wisconsin was illegally retaining felons to complete registrations for the SVRS, although it remains unknown if they were also being compensated illegally based upon how many names they could get into the SVRS. Associated Press, Felons Hired to Register Milwaukee Voters *Green Bay Press Gazette*, October 1, 2008, (“Felons hired to register Milwaukee voters.”)

GAB argues that it is simply incapable of doing what most other states have done – run registrations since January 1, 2006, through the HAVA check. So, the GAB’s answer has been to do nothing. Ironically, despite GAB’s decision to do nothing, some local election officials have decided to proceed responsibly, and conduct HAVA checks back to January 1, 2006. Here in Dane County the Waunakee and Sun Prairie clerks have acknowledged they are running HAVA Checks back to January 1, 2006. Robert Chappell, J.B. Van Hollen's Own Voter Registration May Violate Standard He's Suing To Enforce, *Isthmus*, October 2, 2008; Associated Press, Clerks Not Checking Old Voter Registrations, *La Crosse Tribune*, September 25, 2008. In fact, in Sun Prairie, the HAVA checks were apparently being completed prior to this litigation. *Id.* Further, while the completion of the check process in its entirety has been raised by GAB, no one has indicated that the match process cannot be completed. At the very least, that process, if done at the state level, would provide conscientious clerks and local election officials the information they could use for a “best effort” at compliance.

If the Court is not inclined to order full HAVA compliance, then the RPW respectfully urges this Court to order that the GAB make and direct that the best efforts be made to comply with HAVA in the areas of the SVRS where criminal activity has apparently taken place with the goal of placing fraudulent names into the SVRS.

The specific alternative writ suggested by the RPW is within the RPW's motion.

C. The Writ Of Mandamus Appropriately Directs Action By The State, GAB, And The CSEO.

The Attorney General has sought relief that, although nominally through the GAB, is essentially directed at local election officials. In response, the GAB appears to protest that those local election officials will be unable to carry out certain HAVA requirements if this Court orders compliance with the law. Both of those arguments miss a fundamental point. Pursuant to HAVA Section 303(a)(1)(A), it is the responsibility of the State, acting through the CSEO, to implement and maintain a HAVA compliant system. HAVA Section 303(a)(1)(A) ("each State, acting through the chief State election official, shall implement . . .") In short, the continued attempts of the CSEO and our state election agency, GAB, to claim HAVA compliance is not possible because of an alleged inability to do so at the local level misses the point. The writ of this Court for ordering compliance with HAVA Section 303 is appropriately directed to CSEO and the GAB, not local election officials.

The CSEO and the GAB are directly responsible for ensuring that the "computerized list shall be coordinated with other agency databases within the state," and they have the means and ability to do so if this Court so directs. It is the State that is mandated to verify the sufficiency of the driver's license or social security number provided. The State is doing just that now and forwarding information back to the local officials. The continued protestations that the GAB

will be unable to get the local election officials to take action to comply with the mandates of HAVA are simply misplaced.

It is the direct responsibility of the CSEO and GAB to ensure list coordination, and they must find a way to fulfill that responsibility prior to the upcoming critical election. Whatever writ or order this Court may find appropriate is properly directed at the CSEO and the GAB.

CONCLUSION


For all the foregoing reasons, a peremptory writ of mandamus ordering full compliance with HAVA, or in the alternative, partial compliance with all best efforts directed at the areas of most critical need, should be entered as soon as possible by this Court.

Dated this 6th day of October, 2008.

Respectfully submitted,

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