

In the United States District Court
for the Western District of Pennsylvania

CELESTE TAYLOR,)
)
RICHARD KING,)
)
RICHARD D. MCWILLIAMS,)
)
TIM STEVENS,)
)
CONSTANCE PARKER,)
)
WALI JAMAL ABDULLAH,)
)
ROBERT ALAN ROBERTSON, and)
)
PEOPLE FOR THE AMERICAN WAY,)
)
Plaintiffs)
)
v.)
)
DAN ONORATO)
Allegheny County Chief)
Executive and Member of the Allegheny)
County Board of Elections)
County Courthouse)
436 Grant Street)
Pittsburgh, PA 15219,)
)
PEDRO A. CORTÉS)
Secretary of the Commonwealth,)
Pennsylvania Department of State)
North Office Building)
Harrisburg, PA 17120,)
)
HARRY VANSICKLE)
Commissioner, Pennsylvania Bureau of)
Legislation, Elections)
and Commissions)
North Office Building)
Harrisburg, PA 17120,)
)
THE ALLEGHENY COUNTY BOARD)
OF ELECTIONS)

Civ. No. _____

County Courthouse)
 436 Grant Street)
 Pittsburgh, PA 15219,)
)
 JAMES M. FLYNN, JR.)
 County Manager for Allegheny County)
 436 Grant Street)
 Pittsburgh, PA 15219,)
)
 WAN J. KIM)
 Assistant Attorney General,)
 Civil Rights Division)
 U.S. Department of Justice)
 950 Pennsylvania Avenue N.W.)
 Washington, D.C. 20530-0001, and)
)
 ALBERTO GONZALES)
 Attorney General of the United States)
 U.S. Department of Justice)
 950 Pennsylvania Avenue N.W.)
 Washington, D.C. 20530-0001,)
)
 Defendants.)

* * * * *

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiffs, by their undersigned counsel, sue the above-mentioned State, County and Federal officials and entities for declaratory and preliminary and permanent injunctive relief to protect the voting rights of all registered voters in Allegheny County, Pennsylvania, under the Help America Vote Act, 28 U.S.C. §§ 15481, *et seq.* (“HAVA” or the “Act”), the First, Fifth and Fourteenth Amendments to the United States Constitution, the Americans with Disabilities Act, 42 U.S.C. §§ 12101 *et seq.* (the “ADA”), and the federal Rehabilitation Act, 29 U.S.C. § 794.

Plaintiffs seek to enjoin the use in the May 16, 2006 primary election of voting machines selected just days ago, which violate clear provisions of HAVA; use complex

technologies entirely new to the voters and election officials of Allegheny County; are inaccessible to many persons with disabilities; have failed repeatedly in other jurisdictions by causing votes to be tabulated incorrectly or lost altogether; are impossible to audit meaningfully; are not available in sufficient numbers to be used by more than a fraction of registered voters; and require far more lead time than five weeks to train election workers and voters in their use.

The new machines also pose the risk of vote fraud through manipulation of their computer software. As James A. Baker III and President Carter have recently warned, the “greater threat” to voting systems comes “from insiders who have direct access to these machines” and can modify their software for malicious purposes.

PRELIMINARY STATEMENT

1. On the eve of the May 16 primary elections, Defendants intend to throw out a voting system of “lever” machines in use for 40 years in Allegheny County in favor of unproven and unreliable electronic voting machines that violate federal standards and promise chaos on primary Election Day.

2. The machines Defendants want to use are their third choice. Their first choice was discarded due to the manufacturer’s checkered record and resulting concerns about the efficacy of the machines and the security of the voting system. Their second choice failed to survive even the most basic preliminary tests during a state inspection. Inspectors and company officials were unable to extract the results of a small sample of test ballots from the machine, and after that problem was corrected overnight, the machines generated voting results that were susceptible to alteration using any personal computer or laptop, or even a handheld device.

3. Just seven days ago – on April 5, 2006 – Defendant Onorato announced his decision to abandon the second choice, and that decision was ratified on Friday, April 7, by the Board of Elections. But rather than returning to the existing lever machines for the May 16 primary, for use until the County can purchase machines that comply with the law (and train voters and election officials in their use), Onorato announced a plan to purchase yet another voting machine. This third choice suffers from flaws at least as significant as the first two:

- it directly violates several provisions of HAVA;
- it is entirely inaccessible to voters with certain disabilities, in violation of both HAVA and the Americans with Disabilities Act, 42 U.S.C. §§ 12101 *et seq.*, as well as the Rehabilitation Act, 29 U.S.C. § 794;
- its use in other jurisdictions across the country has been fraught with problems that have cost voters in those jurisdictions their right to vote, including major problems in recent elections in Florida, Ohio, California, Texas, South Carolina and North Carolina;
- its manufacturer can deliver only a fraction of the machines ordered by May 16 and promises only one machine per precinct – sufficient to accommodate only 300 voters per precinct, according to Defendant Cortés; and the County will therefore use yet another voting system as a “backup,” which also violates HAVA and will require training in the use of *two* new and unfamiliar voting systems;
- its use in May is flatly incompatible with an orderly election that produces secure, reliable and verifiable results; and
- the hasty adoption of complex new voting technologies will, as it has around the country, cause electoral chaos which will in turn exacerbate the security risks in electronic voting.

4. Defendant Onorato announced his plan even before the Election Board had voted on it. And even Defendant Onorato acknowledged the consequences of his plan; he told a reporter, “If it was up to me, I’d be using the lever machines. . . . I think this is the biggest waste of federal money I’ve ever seen.” Another member of the Board, John

DeFazio, predicted on April 7: “This is not right, this is not fair, and it’s going to be a catastrophe.” Nonetheless, the Board of Elections, by a 2-1 vote, approved the use of the new machines.

5. Because of this eleventh-hour change of plans, training on these two new electronic voting systems has barely begun; there have been no (or minimal) orientations, workshops, classes, training, seminars, trial runs, handbooks, public education – no genuine groundwork of any kind laid for the transition to a complicated computer system fraught with potential hardware and software problems. At the same April 7 Board meeting, Mr. DeFazio (referring to the need for training for election staff), pointed out the obvious: “It’s impossible to get everyone trained. It’s going to be a mess.”

6. Defendants have proceeded in violation of federal law and the U.S. Constitution in a frantic attempt to hold onto a \$12 million federal subsidy for the purchase of voting machines *that comply with HAVA*. Defendants insist that the use of lever machines will require that these funds be repaid to the federal government, but their latest plan is no better because the machines they plan to buy plainly do not comply with HAVA. More important, any risk that Defendants may have to return federal funds is simply irrelevant. No price tag can be assigned to the right to vote; no potential loss of funds would entitle Defendants to rush into service deficient voting machines, particularly so close to the election that voters and election officials cannot possibly be sufficiently trained to ensure an orderly election. The last-minute choice of non-compliant voting machines will guarantee an across-the-board deprivation of Constitutional and statutory voting rights. And that deprivation will not be limited to the approaching primary; the machines are being purchased for the long haul, and if they are purchased and used, County voters

will be saddled with them for years. Every vote cast until the machines' life is exhausted will be cast on machines that violate federal law, discriminate against disabled voters, lack security measures necessary to ensure that votes are tabulated as cast, and are rife with other problems.

7. This case cries out for injunctive relief. An injunction would maintain the *status quo* until Defendants have actually considered their choices from available voting machines and selected ones that comply with HAVA; that include the features necessary to ensure that votes are counted as cast; that are secure from tabulation errors caused by deliberate tampering or inadvertent errors in operating the machines; and that protect the rights of disabled voters to enjoy the same independence and privacy as other voters. In short, an injunction will assure voters that the machines that protect their voting rights are evaluated and chosen based on merit, not based on the manufacturer's ability to make an incomplete delivery before a primary election only weeks away. And an injunction will avoid the chaos at the May 16 primary which is inevitable because election workers will have insufficient time to learn how to set up and operate complex computerized election machines, and thereby avoid the panoply of problems that other jurisdictions have experienced when forced to make the transition to these machines and others with insufficient lead time.

8. The next voting system that the County selects may last decades, like its predecessor. It is essential to take the time to get it right. This Court can insure an orderly, lawful transition to HAVA-compliant voting systems in Allegheny County by enjoining the use of the machines the County has announced it plans to use, and

preserving the *status quo* to permit the use of machines that have served reliably for decades.

JURISDICTION AND VENUE

9. This case is brought under 42 U.S.C. § 1983; HAVA, 28 U.S.C. §§ 15481, *et seq.*; the Americans With Disabilities Act, 42 U.S.C. §§ 12101, *et seq.* and the Rehabilitation Act, 29 U.S.C. § 794; and the First, Fifth and Fourteenth Amendments to the U.S. Constitution. This Court has jurisdiction over the subject matter pursuant to 28 U.S.C. §§ 1331, 1343 and 1361. Plaintiffs' action for declaratory and injunctive relief is authorized by 28 U.S.C. §§ 2201(a) and 2202.

10. Venue is proper because three of the defendants may be found in this District (and all but the two federal defendants reside in Pennsylvania), and because this is the District where a substantial part of the events giving rise to the claim occurred, 28 U.S.C. §§ 1391(b)(1) and (b)(2).

PARTIES

A. Plaintiffs

11. Plaintiff People For the American Way ("PFAW") is a national non-profit public interest organization with its main office in Washington, D.C., and more than 5,000 members in Allegheny County. PFAW was established to promote and protect civil and constitutional rights, including the fundamental right to vote. One of PFAW's primary missions is to promote the integrity and legitimacy of the electoral process and to that end, PFAW has repeatedly defended in court the rights of its members and supporters to vote and have those votes be counted as intended.

12. The rights this suit seeks to vindicate are germane to the purposes of PFAW, certain of whose members would otherwise have standing to sue in their own right, and the claims alleged herein do not require the participation of individual members in the lawsuit.

13. Plaintiff Celeste Taylor is a resident of Pittsburgh and a registered voter in Allegheny County. Since approximately 1999, Ms. Taylor has organized and led grass roots actions to encourage participation in the electoral process. Ms. Taylor is currently working with the People for the American Way Foundation, in Pittsburgh, on nonpartisan civic participation projects. Among many other past activities, she served as Field and Policy Director of a coordinated voter verification process conducted by Project Vote, a national non-partisan organization committed to reinvigorating democracy by protecting the right to vote and promoting participation in elections, and Pennsylvania ACORN, the Pennsylvania office of the nation's largest community organization of low- and moderate-income families. She was also President of Pittsburghers for Open Government, a non-partisan organization that promotes more effective citizen participation in government. She is a member of the Executive Board of the Pittsburgh branch of the National Association for the Advancement of Colored People and was the Pittsburgh Director of the NAACP National Voter Fund's mass voter education and registration effort.

14. Plaintiff Richard King, Ph.D., is a resident of Pittsburgh and a registered voter in Allegheny County. Dr. King is a leading advocate of voting rights in Allegheny County. He has advocated to public officials and to the public the importance of voting systems that feature auditable voter-verified paper records. Dr. King has been a regular attendee and participant at public meetings of the Allegheny County Council and the

Board of Elections during which the purchase and use of voting machines have been discussed and has led efforts to persuade Defendants to purchase voting machines that meet the requirements of HAVA.

15. Plaintiff Richard D. McWilliams is a resident of Pittsburgh and a registered voter in Allegheny County. He sustained a severe spinal cord injury in 1976 at the C4, C5 and C6 vertebrae. As a result, he has quadriplegia, is unable to walk and uses a wheelchair. He is the Treasurer of Disability Advocates for Rights and Equality (DARE), a Pittsburgh organization that advocates for rights of the people with disabilities, and a member of American Disabled for Attendant Programs Today (ADAPT). Mr. McWilliams has extremely limited manual dexterity and is unable to operate a touchscreen electronic voting machine or complete a paper ballot without the assistance of another person or the use of assistive technology, such as a “sip and puff” device.

16. Plaintiff Tim Stevens is a resident of Pittsburgh and a registered voter in Allegheny County. Mr. Stevens was President of the Pittsburgh branch of the NAACP for a decade, serving until 2004. He has remained a leader of the Pittsburgh African American community and is an advocate of the participation of African American citizens in the electoral process. He currently chairs B-PEP, the Black Political Empowerment Project, a non-partisan community collaborative consisting of agency, organization, and religious leaders whose mission includes advocating that African Americans register to vote and exercise their voting rights in every election.

17. Plaintiff Constance Parker is a resident of Pittsburgh and a registered voter in Allegheny County. A member of the NAACP for more than 20 years, Ms. Parker is currently First Vice-President of the Pittsburgh branch of the NAACP and chairs its

Political Committee. She is the Executive Convenor of the Black Women's Political Crusade, an organization that advocates the election of African American women to public office and their appointment to government positions.

18. Plaintiff Wali Jamal Abdullah is a resident of Pittsburgh and a registered voter in Allegheny County. Mr. Abdullah, an actor and playwright, has supported grass roots activities in support of the exercise of voting rights. During the months leading to the 2004 election, he was a supervisor for Voting is Power, a New Jersey-based non-partisan organization, in its efforts to register voters and provide transportation to the polls.

19. Plaintiff Robert Alan Robertson is a resident of McKeesport and a registered voter in Allegheny County. He broke his neck in 1990 and severely injured his spinal cord at the C7 vertebra. As a result, he is a C7 quadriplegic, paralyzed below his arms, unable to walk, and required to use a wheelchair. Mr. Robertson is able to use his arms but has lost the use of his hands, with the exception of his left thumb. He lacks sufficient manual dexterity to operate a touchscreen electronic voting machine or complete a paper ballot without the assistance of another person or the use of assistive technology, such as a "sip and puff" device.

20. Defendants' use of iVotronic voting machines and paper ballots in the May 16 primary election will harm all individual plaintiffs, as registered voters in Allegheny County, by depriving them of their HAVA-created right to vote on voting systems that comply with the requirements of § 301, and by placing them at risk of losing their Constitutionally protected rights to vote and to the equal protection of the laws. Each individual plaintiff will face the risk that his or her votes will be incorrectly tabulated or not tabulated at all due to system error; error by inadequately trained election workers;

hacking or tampering with the iVotronics machine; fraudulent manipulation of voting results; voter error in casting votes resulting from insufficient education in the use of complex and unfamiliar electronic equipment; and for other reasons described in greater detail hereafter.

21. In addition, use of iVotronic voting machines together with M650 optical scan counters and paper ballots will harm Plaintiffs McWilliams and Robertson because they will be inaccessible to them as a result of their limited manual dexterity, and they will be deprived of their right under HAVA to the same opportunity for access and participation (including privacy and independence) as non-disabled voters. Use of these systems will also discriminate against these plaintiffs based on their disability, in violation of the ADA and the Rehabilitation Act.

B. Defendants

22. Defendant Pedro A. Cortés is the Secretary of the Commonwealth for the Pennsylvania Department of State (the “Secretary”). He is responsible for the conduct of elections in the state, including elections for federal office.

23. The Secretary is the custodian of the election returns for federal, state, legislative, and most judicial offices; compiles and publishes the returns of the primary, municipal, general and special elections; and prescribes the forms of nomination petitions and nomination papers, campaign expense reporting forms, voter registration applications and all other forms and records required by the Pennsylvania Election Code.

24. The Secretary is also responsible for examining and reexamining voting machines and approving or disapproving them for use in Pennsylvania pursuant to state

statutory guidelines. The Secretary also disburses the State's portion of funding under HAVA for the purchase of voting machines that are compliant with § 301 of HAVA.

25. Defendant Harry VanSickle is the Commissioner of the Pennsylvania Bureau of Legislation, Elections and Commissions, the state agency with direct control over the conduct of elections in the Commonwealth of Pennsylvania, including elections for federal office. (Cortés and VanSickle are collectively the "State Defendants.")

26. The Board of Elections of Allegheny County (the "Board") comprises three members: the County's Chief Executive and two at-large County Council members. Defendant Dan Onorato is the Allegheny County Chief Executive and a member of the Board of Elections. The other two members of the Board of Elections are County Councilmen Dave Fawcett and John DeFazio. Collectively, Onorato, Fawcett and DeFazio are the "Board Members."

27. The Board has broad powers to conduct elections in Allegheny County and is responsible for selecting and equipping polling places in the county, including the purchase, maintenance, and deployment of all voting systems. By statute, the Board Members are also responsible for training, certifying poll workers and election officers, and receiving election results. The Board Members are responsible to inspect systematically and thoroughly the conduct of primary elections to ensure that they are honestly, efficiently, and uniformly conducted.

28. Defendant Onorato, as Chief Executive of the County, controls and is responsible for the administration of all County departments and agencies mentioned in this Complaint.

29. Defendant James M. Flynn, Jr., is the County Manager for Allegheny County. In that capacity, he is the chief administrative officer of the County, responsible to the County Executive for the administration of all County operations placed in his charge by ordinance, by the Chief Executive or by the Allegheny County Home Rule Charter (the "Charter"). His duties include the supervision of all Executive Branch departments and agencies relevant to this action. Among the departments he supervises is the Department of Administrative Services, which performs through its Elections Division administrative tasks related to federal elections, including equipping and servicing polling places with electronic voting machines and other election equipment. (The Board, Onorato and Flynn are collectively the "County Defendants").

30. Defendant Wan J. Kim is the Assistant Attorney General for the Civil Rights Division of the United States Department of Justice. As such, he is responsible for the Department's enforcement of HAVA and other voting rights matters.

31. Defendant Alberto Gonzales is the Attorney General of the United States. He bears ultimate responsibility for the Department's enforcement of HAVA and other voting rights matters. Kim and Gonzales are collectively the "Federal Defendants."

32. At all times, Defendants were required to act in compliance with applicable federal and state law.

33. All Defendants are being sued in their official capacities.

FACTS

A. Help America Vote Act, 42 U.S.C. §§ 15301 et seq.

34. In an effort to correct the problems encountered in Florida during the November 2000 presidential election, the United States Congress in October 2002

enacted the Help America Vote Act of 2002, P.L. 107-252.1, 42 U.S.C. §§ 15481 *et seq.* Applicable to all Federal elections held in the United States, HAVA establishes uniform standards for all voting systems used by the States, requires that voting systems be accessible to individuals with disabilities, and contains other measures to encourage accurate and accessible elections for federal officials. HAVA also authorized the creation of the Election Assistance Commission (“EAC”) to administer the Act.

35. Section 301 of HAVA, 42 U.S.C § 15481, establishes standards for voting systems used in any election for federal office. Section 301 requires, *inter alia*, that such systems:

- a. allow voters to verify, in a private and independent manner, their votes before their ballots are cast and counted;
- b. provide voters with the opportunity, in a private and independent manner, to change their ballots or correct any errors before the ballots are cast;
- c. notify voters who select more than one candidate for a single office and provide them with the opportunity to correct their ballots before the ballots are cast and counted;
- d. produce a permanent paper record with a manual audit capacity; and
- e. provide voters with an opportunity to change their ballots or correct any errors before the permanent paper record is produced.

36. HAVA provides that after January 1, 2006, no new electronic voting system may be approved or used in an election for federal office if it fails to meet these standards.

37. When a federal election is conducted using electronic voting systems, HAVA creates an absolute right in elections for federal office to cast ballots using electronic voting systems that meet the requirements of § 301, just as HAVA requires compliance for all voting systems used in elections for federal office.

38. HAVA also requires that voting systems be accessible for individuals with disabilities, including non-visual accessibility for the blind and visually impaired, in a manner that provides the same opportunity for access and participation (including privacy and independence) as for other voters. Among other things, this means that the voting system must provide the opportunity, in a private and individual manner, for voters to verify or change their votes before their ballots are cast and counted.

39. HAVA also requires each State to adopt a “HAVA State Plan” that describes how the state will distribute and monitor HAVA funds, how it will accomplish voter and poll worker education and training, and other matters related to carrying out HAVA’s goals. Pennsylvania has adopted a HAVA Plan, which is available at <http://www.hava.state.pa.us/hava/site/default.asp>

40. There have been numerous delays in the implementation of HAVA, including late appointment of the EAC’s members, inadequate funding, late issuance of guidances by the EAC, and more.

41. Despite this fact, the Department of Justice, acting through Defendant Kim, has threatened Pennsylvania with legal action if Pennsylvania’s counties (including Allegheny County) do not immediately adopt new voting systems which supposedly comply with HAVA, and abandon the use of lever systems. On February 21, 2006, Defendant Kim wrote to the Chief Counsel for Defendant Cortés, stating his intention to sue the Secretary, among others, if every Pennsylvania county did not shift to new voting machines by the May 16 primary. Mr. Kim’s letter also threatened to seek the return of approximately \$23 million in federal funds which Pennsylvania had received under HAVA (a sum which includes the approximately \$12 million to be used by Allegheny County).

42. This threat by Defendant Kim prompted the Secretary, Defendant Cortés, to instruct all Pennsylvania Boards of Election, including Allegheny County's, to replace their lever systems prior to the May 16 primary.

B. Independent Testing Authorities and HAVA's Requirements

43. HAVA requires that voting machines be approved by independent testing authorities ("ITAs") that have been accredited by the Election Assistance Commission. The accreditation procedure requires the Director of the National Institute of Standards and Technology to evaluate each ITA and submit to the Commission a list of those ITAs the Director proposes to be accredited. HAVA also permits the states to use ITAs to test and certify voting systems at their option, but such testing does not replace the statutory requirement for voting system approval by ITAs which have been approved by the Commission.

44. The EAC has yet to approve a single ITA based on the independent evaluation procedure established by HAVA. However, the EAC has instructed all States, including Pennsylvania, that they must comply with all requirements of HAVA.

45. Pennsylvania has enacted legislation establishing its own certification procedure for voting machines, § 1105-A of the Election Code, 25 P.S. § 3031.5. The state statutory requirements for certification are different from, and less stringent than, the requirements for voting machines set forth in § 301 of HAVA. State certification of a voting machine establishes its compliance with State law, but does not permit the use of the machine in an election for federal office unless it meets the more demanding requirements of HAVA. Although the Secretary has instructed Pennsylvania counties (including on the Secretary's HAVA website) that state certification is the same as HAVA

compliance, that is not correct. Indeed, 2005 Guidelines issued by the EAC make clear that state certification testing “must be defined by the state, with its laws, election practices, and needs in mind.”

C. The Existing Allegheny County Election System

46. For the last 40 years, Allegheny County has used a lever voting system that mechanically records the votes cast according to the voter’s choice.

47. Election workers in Allegheny County are fully trained on the operation of the existing lever machines, and the vast majority of voters are familiar with the machines also, having used them for their entire lives.

48. Each lever machine in use in Allegheny County today employs a “full-face” ballot system, in which every race, candidate and ballot question is displayed before the voter on a single large ballot, and voter selections are made from that single presentation.

D. HAVA Funding of Voting Machine Purchases

49. HAVA contemplates that states may choose to satisfy its requirements by moving eventually to new voting technologies, although HAVA does not require the use of such new technologies. To encourage this transition, HAVA authorizes federal funding programs for the purchase of electronic voting machines that comply with the requirements of § 301 of the Act, provided that such new machines are used in the first federal election of 2006 (which in this case means the May primary). Allegheny County is eligible for approximately \$12 million as a HAVA subsidy, but only if it purchases machines that are in fact compliant with HAVA.

50. HAVA subsidies are paid to individual States which then disburse money to local election officials to pay for the purchase of HAVA-compliant voting machines. In

Pennsylvania, the Secretary performs this disbursement function, providing HAVA funds to county boards of elections for the purchase of voting machines that comply with § 301 of HAVA.

51. In a purported effort to qualify voting machines for HAVA payments, the Secretary has examined and certified voting systems, and has publicized a list of systems which supposedly qualify for federal HAVA funding. A vendor whose system is denied certification has the option to reconfigure the system and request a new examination.

52. Defendant Cortés has announced his interpretation of HAVA as requiring that electronic voting systems need only meet the Federal Voting Systems Performance and Test Standards released in 2002 (the “2002 Standards”) in order to comply with HAVA. Defendant Cortés has therefore based his certifications of voting machines on inspections for compliance with the 2002 Standards and Pennsylvania law.

The EAC has made clear, however, that compliance with HAVA -- particularly in the area of accessibility for disabled voters -- demands much more than simply meeting the 2002 Standards.

53. To this day Defendant Cortés continues to base certification of voting systems on the 2002 Standards. Certification by the Secretary therefore provides no assurance of compliance with HAVA, and ignores the EAC’s guidance concerning HAVA’s requirements. Yet Defendant Cortes persists in telling Pennsylvania’s counties – including Allegheny County -- that they have satisfied HAVA if they acquire voting systems that he has certified.

54. The Board Members have relied upon the Secretary’s certification that a voting system complies with HAVA when deciding which electronic voting systems to

purchase and use in Allegheny County, because the Secretary has stated that counties may use HAVA subsidy funds only to purchase voting machines certified by him.

**E. Allegheny County's Scramble for Voting Machines
And the Federal Government's Disparate
Treatment of Pennsylvania and New York**

55. By late 2005, the deadline for compliance with HAVA for the 2006 election was rapidly approaching. The Allegheny County Council, concerned that the County would lose the \$12 million HAVA subsidy if the Board of Elections failed to find compliant voting machines prior to the May 16, 2006 primary election, enacted a unanimous resolution on December 6, 2005 (No. 58-05-RE) urging that state and federal officials work together to speed the certification of HAVA-compliant voting machines.

56. In its resolution, the County Council spelled out the options open to the Board of Elections as the deadline approached:

- a. Select one of the certified systems and run the risk that a preferable alternative will be certified by the state after the selection is made; or
- b. Postpone the selection of new voting machines until a more comprehensive list of certified machines was available, risking non-compliance with Section 301 if such a list was not available in a timely fashion.

57. Allegheny County's frantic efforts to obtain new machines were prompted primarily by threats from the Department of Justice – via Defendants Kim and Gonzales -- to file suit and also to seek return of the monies paid to Pennsylvania under HAVA, including the approximately \$12 million allocated to the County.

58. However, Defendants Kim and Gonzales have taken a very different approach to the same issues in the State of New York. In that case, United States v. New York Board of Elections, No. 06-Civ-0263 (N.D.N.Y.), where New York similarly faced a

deadline for new machines (albeit a much later one for a September 2006 primary), attorneys for the Department of Justice informed the federal court in a March 13, 2006 letter that the Department “does not expect the impossible,” and that the Department expects only that what New York “can reasonably get done before the 2006 federal elections should be done.”

59. On information and belief, there is no basis, rational or otherwise, for the starkly different positions taken by the Department of Justice in New York (where only “reasonable efforts” are expected before a September 2006 primary) and Pennsylvania, where the United States has threatened to file suit if radical changes are not made for a primary election which is four months earlier.

60. In conducting its search for electronic voting machines to replace the current lever systems, the Board of Elections focused on purchasing and using Direct Recording Electronic (“DRE”) voting machines. Unlike a lever machine or paper ballots, DREs use purely electronic means of recording a vote on an internal computer system composed of hardware and software.

61. In late 2005 and early 2006, the Board of Elections considered purchasing and using DREs manufactured by Diebold. However, the Board of Elections eventually rejected these Diebold DREs because of concerns about security and the fact that allegations of Diebold’s partiality, untruthfulness, and willingness to circumvent state and federal elections laws were likely to reduce voters’ confidence in the integrity of their elections.

62. Indeed, on February 21, 2006, the Allegheny County Council passed a “sense of the council” resolution that Diebold voting machines not be purchased because

the erosion of confidence in the system that would result from Diebold voting machines “runs directly contrary to the core values of equal and unfettered exercise of the fundamental right to vote.” The Board of Elections thereafter abandoned the idea of purchasing Diebold voting machines.

63. As a second choice, Defendant Onorato announced on February 24, 2006 that the County would purchase a DRE known as the “AVC Advantage” and manufactured by Sequoia/Smartmatic. These voting machines were at least a decade old and were based on technology that was at least a decade older still; they had previously been used in elections in Clark County, Nevada and elsewhere. Despite its age, the AVC Advantage had not yet been certified by the Secretary, but Defendant Onorato nonetheless predicted that certification would follow shortly. The sole announced benefit to purchase of the Advantage was that it employed a full-face ballot similar to the lever machines, thus decreasing somewhat the risk of voter confusion in the May primary.

64. The decision to purchase the used AVC Advantage machines was beset with problems from the start, including:

- a. The AVC Advantages were not HAVA-compliant because they did not produce a permanent paper record with a manual audit capacity, did not provide nonvisual accessibility for the blind and visually impaired, and were not accessible to individuals with other disabilities, such as impaired manual dexterity;
- b. Sequoia/Smartmatic itself acknowledged that without modification, the AVC Advantage did not comply with HAVA;
- c. There had been a history of problems in jurisdictions in which the AVC Advantage was used, including manipulation of vote totals and insufficient security; and
- d. The AVC Advantage had not yet been examined or certified by the Secretary. (Of course, as explained above, even if certified by the Secretary, the AVC Advantage would still not be HAVA-compliant.)

65. In March 2006, at the request of Sequoia/Smartmatic, the Secretary began an examination of the AVC Advantage to determine its certification under state law. To conduct this examination, the Secretary retained Prof. Michael Shamos as a consultant.

66. Prof. Shamos began testing the AVC Advantage on March 28, 2006, and observed a flaw in its software. He characterized the flaw as minor, commenting to the press that “so far, it’s not fatal.” When testing resumed the next day, Prof. Shamos found that the system could easily be hacked and the vote information readily changed. He also demonstrated that the machine would not allow a “no” vote on a referendum question. As a result of this demonstrated vulnerability to manipulation, testing of the AVC Advantage was suspended on March 29 and scheduled to resume on April 11, 2006.

67. On March 30, according to published reports, Defendant Cortes informed his fellow Defendants that he could still certify the Advantage in time for the May primary. No later than April 5, 2006, however, even Defendant Cortes realized that he could not certify a machine which was publicly known to be vulnerable to vote tampering, and he informed Defendant Onorato that the Advantage would not be certified.

F. The iVotronic Electronic Voting Machine

68. On April 5, 2006, Defendant Onorato announced the county’s most recent choice for an electronic voting machine that Defendants hope will qualify them for the HAVA funding: the iVotronic voting machine, manufactured by Election Systems & Software (“ES&S”). The iVotronic uses ES&S’s proprietary “Unity” software, version 9.1.2.0.

69. The iVotronic voting machine was certified by the Secretary on December 22, 2005, with six separate “conditions” which must be met if the machine is to be lawfully

used in Pennsylvania elections. In other words, the machine as tested has failed Pennsylvania's certification requirements, and it cannot meet those requirements unless six different changes are made before the machine is used in elections. One of those "conditions" listed five separate "options" or settings on the machine that, if used improperly, would violate state or federal law. (In his report, the Secretary described these as "Illegal Options.")

70. These six conditions and other qualifications established by the Secretary of the Commonwealth are highly technical and require implementation by elections personnel. With only five weeks left before the May primaries, the limited time given for training will inevitably lead to machine breakdowns and set-up errors that may permit over-voting or cause tabulation errors, depriving voters of their right to vote.

71. The certification also listed five "Recommendations" that detailed separate weaknesses in the machine's operation and identified the design and manufacturing steps necessary to cure these defects. However, the Secretary's certification did not require that any "recommended" action be taken until "future versions" of the iVotronic were manufactured. On information and belief, ES&S took no steps to modify the machine after receiving this conditional certification and recommendations. No additional inspection was performed by the Secretary after identifying these conditions and recommendations, and none is planned.

72. The iVotronic voting machine is a DRE voting machine that uses a touchscreen system to record votes on internal flash memory. A poll worker activates the machine with a device called a Personalized Electronic Ballot ("PEB") to turn the machine on and enable voting. Voters make their selections using a touchscreen which scrolls

down through multiple screens – it does not use a “full-face” ballot. At the end of the day, poll workers move summary data from each machine onto the PEB. The PEBs are then transported to election headquarters, or their contents may be transmitted via computer modem. This last option violates Pennsylvania law, because it creates a security risk from the transmission of voting results over uncertified equipment. The Secretary’s certification therefore prohibits its use.

73. Notwithstanding the Secretary’s certification, the iVotronic voting machine does not satisfy the requirements of § 301 of HAVA for several reasons, including:

- a. The machine as designed and to be shipped to Allegheny County can be configured to allow over-votes (selecting more than one candidate in a race) and it is likely that some or all of the untrained poll workers dealing with unfamiliar hardware and software will fail to correct this option, resulting in over-votes in Allegheny County; and
- b. The machine is not accessible to persons who suffer from disabilities related to manual dexterity. In particular, the iVotronic is not compatible with a “sip and puff” controller that permits a disabled person without use of his or her hands to control the machine.

74. Voting machines manufactured by ES&S, including the iVotronic voting machine, have had a history of problems with lost votes (November 2002 -- Wake County, North Carolina); over-votes and memory failures (November 2004 -- Miami-Dade County, Florida and Fall 2005 -- Kershaw, South Carolina); recording votes for the wrong candidate (November 2004 -- Mahoning County, Ohio and Fall 2005 -- Merced County, California); and missing database components and flawed programming (March 2006 -- Jefferson County, Texas).

75. One of the most chilling examples of electoral chaos caused by the iVotronic was the 2002 primary election in Miami-Dade County. The following was confirmed by an investigation conducted by the County's Inspector General:

- (a) because of time pressure, machines were not properly tested or set up, and failed for that reason;
- (b) untrained poll workers – harassed by angry voters and growing lines – could not fix the problems or, in some cases, operate even properly functioning machines;
- (c) thousands of voters gave up and left, many others questioned whether their vote had registered on the machines, and voters and poll workers alike were left in tears;
- (d) the day resulted in headlines around the country to the effect that Florida still had not fixed its election problems; and
- (e) an internal review of election results conducted in May 2003, found the ES&S iVotronic electronic voting system to be unusable for auditing.

76. The Secretary has certified the iVotronic machines to be used for a maximum of 300 voters per machine. Allegheny County plans to purchase 4,700 machines from ES&S, but ES&S has proposed to deliver only a fraction of the machines before the May 16 primary – only one machine per polling location. This means that there will only be one, 300-vote capacity iVotronic voting machine available at each polling station on May 16.

77. Even this delivery schedule is optimistic. ES&S has recently informed numerous other counties – in Pennsylvania and around the country -- of its inability to provide the number of machines or the training it promised. For example,

- a. For the March 7, 2006 primary elections in Jefferson County, Texas, although ES&S provided iVotronic machines on time, the database components were missing and the programming was flawed;

- b. ES&S has told the Board of Elections in Lebanon County, Pennsylvania that it will not be able to provide the quantity of machines agreed upon on January 26, 2006. The Lebanon County Board of Elections reached an agreement with ES&S for 267 electronic voting machines but was recently informed that ES&S would not be able to provide them the complete order of electronic voting machines; and
- c. In the beginning of March 2006, ES&S informed election officials in Luzerne County, Pennsylvania that it would not be able to provide training, computer support or enough electronic machines for the May primaries.

78. Assuming that ES&S actually delivers the reduced number of machines promised, Allegheny County has approximately 877,000 voters in 1,314 voting districts, or an average of 600-700 voters per polling location. A single iVotronic voting machine, capable of recording only 300 votes, will quickly prove insufficient to handle hundreds of potential voters per polling station, particularly in during high-traffic times in the early morning and early evening.

79. Allegheny County has announced it will use as a back-up paper ballots and an optical-scan voting system, the ES&S M650 Optical Scan central count tabulator. When the single iVotronic machine cannot accommodate the voters in a polling station and/or the line seeking access to the single machine becomes "too long" (a term which Defendants have not defined), election officials will provide voters with paper ballots. The voters will be asked to complete the paper ballots, the ballots will be secured, and at the end of the day they will be transported to a central location where they will be scanned and tabulated by ES&S's optical scanning equipment.

80. The optical-scan "backup," which was proposed solely because Allegheny County could not obtain even close to enough of the iVotronic machines, creates its own host of problems and violates HAVA in this context. The M650 is not accessible for voters

with disabilities related to visual impairment or manual dexterity, and because the ballots will be scanned outside the polling place, there will be nothing to alert voters to “over-votes,” described above, or “under-votes,” in which the voter fails to vote on each choice presented in the ballot.

81. Defendants have not yet disclosed whether ES&S will also be responsible for printing the paper ballots which are part of their latest plan. In Nebraska, where ES&S was under contract to supply election ballots for “early voting” which began on April 3, 2006, the company simply failed to deliver the ballots and could only tell its customers that they might be available by April 14.

82. Allegheny County voters have yet to receive any education concerning the use of the iVotronic or the M650 Optical Scan voting machines. Upon information and belief, ES&S (or other) training of Allegheny County’s poll workers in the use of these machines and the administration of elections in which they are used has not yet begun. But even if training and public education began immediately, the time remaining before the election does not even remotely approach what is required for a transition from mechanical lever machines used for 40 years to electronic systems based on 21st century technology.

83. As a result, on Election Day, May 16, 2006, election officials will have to cope with two different voting machines, both new to them and each using technology entirely different from the other. In addition, voters will be confronted with a radically different voting system – an electronic system which does not use a full-face ballot -- without any opportunity for education in its use.

84. Defendants' representatives have previously admitted under oath, in proceedings before the Commonwealth Court of Pennsylvania, that the use of two different voting technologies would be both confusing for voters and impractical for a county's election staff and polling workers, because of the need for comprehensive training on two completely different systems. This potential for confusion is only magnified by the five weeks remaining before Election Day.

G. Certain Chaos

85. Full HAVA compliance this year is impossible without causing electoral chaos. Hurried implementation of HAVA will create havoc on Election Day, hindering the vote and undermining voter confidence in the outcome of the elections.

86. The rush to comply with HAVA sought by Defendants will actually thwart the purpose of that statute, namely to help Americans vote and to have those votes counted as cast. Indeed, the legislative history of HAVA expressly states that a rush to implement new voting technology would lead to disaster. As a report by the Committee on House Administration stated: "As the Committee learned more about the production capability of the voting machine industry, the timelines and procurement processes counties and states must go through to award contracts to voting-machine vendors, and the huge costs involved, the Committee decided that an aggressive deadline might cause more serious problems than it would solve."

87. If Allegheny County implements these new voting technologies -- the ES&S iVotronic and M650 Optical Scan systems -- for the May 2006 primaries, then votes will be compromised in those primaries and in ensuing elections because, among other things:

- a. Voters will not be prepared to use the new voting technologies and (particularly given the change to a scroll-through ballot from the former full-face ballot) will not be able to cast their votes accurately;
- b. Voting systems will not be properly accessible to voters with disabilities;
- c. Election officials and poll workers will not be prepared to assist voters with the new technologies, to rectify voters' inevitable mistakes on unfamiliar voting systems and to recognize and address voting system malfunctions; and
- d. The voting systems chosen by Allegheny County will not adequately protect and secure votes, because they are vulnerable to manipulation and fraud.

88. A prime example of the electoral chaos likely when new voting systems are introduced too close to Election Day is the March 21, 2006 primary in Chicago, Illinois and surrounding Cook County. Like the two different technologies Allegheny County intends to use in the May primaries, Chicago/ Cook County used a mix of technologies – both DREs and optical scan systems. On Election Day:

- a. the voting systems failed across the county;
- b. the ballots and votes from more than 400 precincts were still uncounted for days after the election because (i) the voting systems malfunctioned and (ii) the systems' memory cartridges, which contained the results, were lost;
- c. County officials stated that memory cartridges from 252 polling stations were missing and that they could not find the results from 162 suburban precincts;
- d. despite other reports to the contrary, the Cook County elections chairman stated that all the votes were accounted for but that they could not be tabulated on the machines; and
- e. votes had to be hand-tabulated due to the systems' failures.

89. Further, votes in Allegheny County will be lost and uncounted in more significant numbers than under the pre-HAVA system because the new voting machines

will lose them (vote unrecorded due to system error); the voter will not understand how to register the vote on the new machines (vote unrecorded due to human error); the new machines will be out-of-order and unable to receive votes; and a sufficient back-up system for these votes (such as paper ballots) will not be in place; the voting systems will be inaccessible given voters' disabilities; and the voting systems will not be secure enough to protect votes from tampering, hacking and insider manipulation.

H. The Risks to Voter Security: ES&S's Ownership

90. The risk from tampering or hacking the voting machines' computer controls is heightened in this case. ES&S itself presents a security threat to U.S. elections, including those in Allegheny County, because of the company's and its senior executives' strong partisan ties. Like Allegheny County's first choice – Diebold – ES&S poses unacceptable risks of partiality and bias which will, at a minimum, undermine public trust in the fairness of elections.

91. ES&S is an Omaha, Nebraska-based company which declines to fully reveal its ownership. According to published reports, about half of ES&S is owned by the Omaha World-Herald Company, the publisher of Omaha's daily newspaper, and another quarter of the company is owned by the McCarthy Group, an Omaha investment fund. The other owners, if any, are unknown, as is the full ownership of the McCarthy Group.

92. Republican U.S. Senator Chuck Hagel was the head of ES&S's predecessor, American Information Systems (AIS) until 1995, when he resigned to run for Senate. Senator Hagel continues to own a multi-million dollar interest in the McCarthy Group, Inc., of which ES&S is a subsidiary. In the past, Senator Hagel – widely

considered a likely Republican presidential contender in 2008 -- has failed to fully disclose his financial ties to ES&S.

93. Michael McCarthy, CEO of the McCarthy Group, Inc. acted as Senator Hagel's campaign manager in both the 1996 and 2002 elections.

94. In 2006, McCarthy contributed money to the Sandhills PAC, which contributed money to Rick Santorum, the Senate Republican incumbent for Pennsylvania, who will be on the May 16 primary ballot in Allegheny County. According to published reports, in the past three election cycles, Michael McCarthy and his wife contributed substantial sums of money to Republican candidates and nothing to Democrats, while in the last five and half years, executives and employees of the McCarthy Group, Inc. contributed almost six times as much money to the GOP as to Democratic candidates.

95. Strong partisan ties, combined with a lack of transparency regarding the ownership of this company, will lead to public questions about the integrity of the voting process, which in turn will diminish voters' confidence in that process. Such voter concerns are well founded.

I. The Risks to Voter Security: Hacking and Tampering

96. As James A. Baker III and President Carter warned in their National Election Commission Report, the risk of insider fraud with respect to electronic voting machines is real:

The greater threat to most systems comes not from external hackers, but from insiders who have direct access to the machines. Software can be modified maliciously before being installed into individual voting machines. There is no reason to trust insiders in the election industry any more than in other industries, such as gambling, where sophisticated insider fraud has occurred despite extraordinary measures to prevent it.

97. These concerns are shared by all the major independent authorities who have considered election security, including the Government Accountability Office; the National Academy of Sciences' Committee on a Framework for Understanding Electronic Voting, co-chaired by former Governors Richard Celeste and Dick Thornburgh; and ACCURATE, a multi-institution, academic research project funded by the National Science Foundation's "CyberTrust Program.

98. These security concerns arise from the fact that privately-held companies, like ES&S, are producing proprietary software and trade-secret source code that are the opposite of the open and transparent elections that are needed to inspire voter confidence. When a voter uses a DRE, there is no inherent internal connection between the voter's input and the voting system's recording of that input. The recording of the voter's intent is entirely at the discretion of the software. As the Carter-Baker Report noted, the software can be manipulated and the outcome of the election can be altered without a trace by a single malicious insider or hacker. Accordingly, all electronic voting systems software must be rigorously screened and tested to ensure that the software does not, intentionally or through error, misrecord votes. That is a time-consuming process that will be fatally compromised by the extreme haste with which Allegheny County is proceeding."

99. The security of the ES&S iVotronic voting system is questionable and because there is less than five weeks before the May primaries, there is not enough time to ensure security of these systems through testing and training. Some of the additional security problems the iVotronic machines have had in other jurisdictions include:

- (a) A feature in the voting machines which allow poll workers to add to or replace vote totals;
- (b) As found through a test commissioned by Ohio Secretary of State J. Kenneth Blackwell, passwords for ES&S electronic voting systems are “hard coded” to the voting machines. This resulted in the discovery that every iVotronic machine could be accessed by using one of two different passwords; and
- (c) The same Ohio test found that data transferred to and from the iVotronic machines were not encrypted, making it easily susceptible to hacking from both insiders and outsiders.
- (d) The software in the ES&S iVotronic voting system has allowed “vote hopping” (a choice for one candidate is read as a vote for another), causing votes to be misread.

100. The ES&S iVotronic is easily susceptible to hacking and tampering by both insiders and outsiders, and the rushed and chaotic adoption of the machines will, of necessity, result in reduced security and increase the opportunities for electoral fraud.

COUNT I

(State and County Defendants)

(§ 1983 Claim for Violation of Rights Guaranteed Under HAVA)

101. Plaintiffs incorporate the allegations of paragraphs 1 through 100 as if fully set forth herein.

102. When a federal election is conducted using electronic voting systems, HAVA creates an absolute federal right to cast ballots using electronic voting systems that meet the requirements of § 301, just as HAVA requires compliance for all voting systems used in elections for federal office.

103. The iVotronic voting machines together with M650 optical scan counters and paper ballots do not comply with HAVA. The use of these machines will deprive Plaintiffs

of their federally-protected right to use only HAVA-compliant voting systems in elections for federal office.

104. Plaintiffs will be irreparably harmed by the loss of their federally-protected voting rights.

105. By reason of the foregoing, Defendants, acting under color of state law, have deprived and will deprive Plaintiffs and their members of rights secured to them by HAVA protected under 42 U.S.C. § 1983.

COUNT II

(State and County Defendants)

(§ 1983 Claim for Violation of the Due Process Clause of the 14th Amendment to the U.S. Constitution)

106. Plaintiffs incorporate the allegations of paragraphs 1 through 100 as if fully set forth herein.

107. The First Amendment's guarantees of freedom of speech and association also protect the right to vote and to participate in the political process. Together with the 14th Amendment to the Constitution guarantee of due process, the First Amendment protects the right to vote as a fundamental right.

108. The Defendants' actions in their official capacity to replace Allegheny County's existing lever voting machines on the eve of the May 16, 2006 primary election will severely burden or deny Plaintiffs and other Allegheny County voters their fundamental right to vote under the Due Process Clause of the 14th Amendment.

109. By purchasing electronic voting machines for use in Allegheny County for the May 16, 2006 primary election that violate HAVA and are flawed for a variety of other reasons, as explained above, Defendants will impose a severe burden on Plaintiffs' and

their members' fundamental right to vote and to participate in the political process by depriving thousands of voters of their right to cast their votes and have their votes counted.

110. Defendants have no compelling or important interest that justifies this severe burden or deprivation of Plaintiffs' and their members' fundamental right to vote and to participate in the political process.

111. Defendants, acting under color of state law, are creating an election process in Allegheny County that will have pervasive errors which will undermine the organic processes of the ballot because votes will not be secured, will not be auditable, will be significantly inaccurate, will not be accessible to voters with disabilities, and will not be accessible to other voters due to Election Day chaos. These problems will create a broad-gauged, patent and fundamental unfairness that will deny and severely burden the fundamental right to vote and the right to due process under the 14th Amendment.

COUNT III

(State and County Defendants)

(§ 1983 Claim for Violation of the Equal Protection Clause of the 14th Amendment to the U.S. Constitution)

112. Plaintiffs incorporate the allegations of paragraphs 1 through 100 as if fully set forth herein.

113. Defendants' failure to properly set constitutionally adequate and uniform procedures, standards, testing and voting system requirements denies Plaintiffs the equal protection of the laws under the 14th Amendment, because it severely burdens the right to vote and deprives voters, candidates and their voting supporters in Allegheny County of

the right to vote and have their votes recorded, counted and reported fully and accurately in the May 16 primary election and in future elections in which the iVotronic voting system is used.

114. The failure of the Allegheny County government properly to investigate the new voting systems to be purchased denies Plaintiffs the equal protection of the laws under the 14th Amendment because it will deprive Allegheny County voters, candidates and their voting supporters of the right to vote and have their votes recorded, counted and reported fully and accurately in the May 16 primary election and subsequent elections.

115. As a result, voters, candidates and their supporters in Allegheny County, will have access to the vote that is not equal to that of voters in other Pennsylvania counties, or in other states, in violation of the right to the equal protection of the laws granted by the 14th Amendment. Moreover, some citizens of Allegheny County – those who are fortunate enough to have their votes counted accurately – will be treated differently than other County voters – those whose votes are not counted, or miscounted. In addition, citizens of Allegheny County will be treated differently from the citizens of other counties, which have in place voting machines and election systems which do not fundamentally impair the right to vote.

116. This unequal system serves no compelling interest, lacks any substantial relationship to any important state interest, and is not rationally related to any legitimate state interest.

117. By reason of the foregoing, Defendants, acting under color of state law, have deprived and will deprive Plaintiffs and their members of the rights, privileges, and

immunities secured to them by the First and Fourteenth Amendments to the United States Constitution and protected under 42 U.S.C. § 1983.

118. Plaintiffs and their members have no adequate remedy at law for such deprivation of their rights, privileges, and immunities.

COUNT IV

(State and County Defendants)

(§ 202 of the Americans with Disabilities Act of 1990 (42 U.S.C. §§ 12101 et seq.))

119. Plaintiffs incorporate the allegations of paragraphs 1 through 100 as if fully set forth herein.

120. The Americans With Disabilities Act of 1990, 42 U.S.C. §§ 12101 *et seq.*, was enacted to eliminate discrimination against individuals with disabilities persisting in “such critical areas as . . . voting.” 42 U.S.C. § 12101(a)(3).

121. Plaintiffs Richard McWilliams and Robert Alan Robertson are individuals with disabilities, as defined by the ADA, 42 U.S.C. § 12102(2). They are also registered voters in Allegheny County.

122. Title II of the ADA prohibits discrimination in public services furnished by governmental entities. It provides that “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.” 42 U.S.C. § 12132.

123. The Board of Elections is a “public entity” within the meaning of the ADA, 42 U.S.C. § 12131(1).

124. Defendants were required to provide meaningful access to the polls, given the fundamental importance of the right to vote to individuals with disabilities. This means that voters with disabilities should be able to vote in person and at their assigned polling places without facing additional risks and inconveniences that are not faced by voters without disabilities.

125. At the time Defendants selected the iVotronic and M650 voting machines for use in the May 16, 2006 primary election, there were alternative voting systems available that complied with the accessibility requirements of HAVA and the ADA.

126. Defendants have discriminated against Allegheny County voters with disabilities by purchasing new voting machines that are not accessible to people with disabilities when they could have purchase voting machines that complied with HAVA and the ADA, and which were accessible to people with disabilities.

127. Plaintiffs have been injured by Defendants' actions in violation of federal law.

COUNT V

(State and County Defendants)

(§ 504 of the Rehabilitation Act, 29 U.S.C. § 794)

128. Plaintiffs incorporate the allegations of paragraphs 1 through 100 as if fully set forth herein.

129. Plaintiffs Richard McWilliams and Robert Alan Robertson are individuals with disabilities, as defined by Section 6 of the Rehabilitation Act, 29 U.S.C. § 705(20).

130. Section 504 of the Rehabilitation Act, 29 U.S.C. § 794, provides that no person with a disability shall “be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”

131. Section 504 similarly provides that a “program or activity” includes “a department, agency, special purpose district, or other instrumentality of a State or of a local government,” such as the Board of Elections, defendant herein.

132. Defendants’ contemplated purchase of the iVotronic and M650 machines will rely on substantial federal funding.

133. By purchasing the iVotronic and M650 voting machines, which are not accessible to people with disabilities, Defendants are subjecting plaintiffs to discrimination in a program or activity which receives substantial federal assistance, all in violation of the Rehabilitation Act.

Count VI

(Federal Defendants)

(Fifth Amendment to the U.S. Constitution)

134. Plaintiffs incorporate the allegations of paragraphs 1 through 100 as if fully set forth herein.

135. Defendants Kim and Gonzales, acting on behalf of the United States and the Department of Justice, have threatened legal action against the Secretary and against the Commonwealth of Pennsylvania unless the State and County Defendants immediately adopt new voting machines for the May 16 primary.

136. This threat, combined with the threat to seek recoupment of monies paid to Pennsylvania under HAVA, has prompted the State and County Defendants to rush to acquire and implement new voting technologies without regard for the security, reliability, and accessibility of the new machines, and without regard for the chaos which is certain to result on Election Day if the machines are placed in use.

137. Despite these threats, the Department of Justice has taken a sharply different approach in a similar matter in the adjoining state of New York, by recognizing that the Department does not “expect the impossible” when it comes to matters affecting the fundamental right to vote. In New York, the Department of Justice has made clear that it would not pursue legal action if circumstances did not permit the State to adopt new machines prior to the first federal election of 2006.

138. Defendants’ actions – treating the Commonwealth of Pennsylvania, the plaintiffs, and Allegheny County unequally on the basis of the same relevant facts – violate plaintiffs’ right to due process of law, as protected by the Fifth Amendment to the U.S. Constitution.

139. This unequal system serves no compelling interest, lacks any substantial relationship to any important federal interest, and is not rationally related to any legitimate federal interest.

140. Defendants’ illegal actions may only be cured by declaratory and injunctive relief, requiring Defendants Kim and Gonzales to treat Pennsylvania and Allegheny County (and the voters of Allegheny County) equally to the voters of other states, and to refrain from litigation or the threat of litigation if Allegheny County does not adopt new voting systems for the May 16 primary or thereafter.

PRAYER FOR RELIEF

WHEREFORE Plaintiffs respectfully request that the Court grant them the following expedited declaratory and injunctive relief, pursuant to 28 U.S.C. § 1657 and Fed. R. Civ. P. 65:

1. Declaring that the iVotronic and M650 voting machines, as described above, fail to comply with § 301 of HAVA;
2. Declaring that the certification by the Secretary that the iVotronic and M650 were HAVA-compliant is null and void, and that these voting systems, as described above, do not in fact comply with HAVA;
3. Preliminarily and permanently enjoining Defendants from purchasing or using iVotronic and M650 voting machines for use in any election for federal office in Allegheny County or elsewhere on May 16, 2006 or in the November general election;
4. Preliminarily and permanently enjoining Defendants from depriving Plaintiffs of their federally-protected right that only HAVA-compliant electronic voting machines be used in the primary election of May 16, 2006 and in the November general election;
5. Preliminarily and permanently enjoining the Secretary from interfering with the Board of Elections' use of the existing lever system until such time as the Board may purchase HAVA-compliant voting machines for use in Allegheny County;
6. Requiring Defendants Kim and Gonzales to refrain from litigation or the threat of litigation if Allegheny County does not adopt new voting systems for the May 16 primary or thereafter;
7. Declaring that, as to Defendants Kim and Gonzales, the use of existing lever machines in the May 16 primary provides no basis for litigation or the threat of litigation or efforts to seek recoument of monies paid to Pennsylvania for the benefit of Allegheny County in connection with HAVA;

8. Awarding plaintiffs' their reasonable attorneys' fees and expenses; and
9. Such other and further relief as may be just and necessary.

Dated: _____

Harry Litman
PA Bar No. 51634
Litman Law Firm
One Oxford Centre
301 Grant Street
34th Floor
Pittsburgh, Pennsylvania 15219
(412) 456-2000
harry.litman@verizon.net

Thomas J. Farrell
PA Bar No. 48976
Jay K. Reisinger
PA Bar No. 78743
Valerie A. Antonette
PA Bar No. 93407
Reich, Alexander, Reisinger & Farrell, LLC
Suite 1000 – Koppers Building
436 Seventh Avenue
Pittsburgh, Pennsylvania 15219-1827
(412) 391-3700
tfarrell@reichalexander.com
jreisinger@reichalexander.com
vantonette@reichalexander.com

Gregory M. Harvey
PA Bar No. 04445
Montgomery, McCracken, Walker & Rhoads, LLP
123 South Broad Street
Philadelphia, Pennsylvania 19109-1099
(215) 772-7684
gharvey@mmwr.com

Norman I. Eisen
[Pro Hac Vice application pending]
Eleanor H. Smith
[Pro Hac Vice application pending]
Zuckerman Spaeder LLP
1800 M Street, N.W.
Suite 1000
Washington, D.C. 20036-5802
(202) 778-1800
neisen@zuckerman.com
esmith@zuckerman.com

Martin S. Himeles, Jr.
[Pro Hac Vice application pending]
Cyril V. Smith
[Pro Hac Vice application pending]
Zuckerman Spaeder LLP
100 East Pratt Street
Suite 2440
Baltimore, Maryland 21202
(410) 332-0444
mhimeles@zuckerman.com
csmith@zuckerman.com

Attorneys for Plaintiffs

Elliot M. Minberg
[Pro Hac Vice application pending]
People For the American Way Foundation
2000 M Street N.W. #400
Washington, D.C. 20036
(202) 467- 4999
eminberg@pfaw.org

Co-counsel for Plaintiff PFAW

