IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v.

TOWN OF THORNAPPLE, WISCONSIN; ANGELA JOHNSON, RALPH C. KENYON, TOM ZELM, and JACK ZUPAN, in their official capacities as Town Clerk and Town Board Supervisors of the Town of Thornapple; TOWN OF LAWRENCE, WISCONSIN; CHARIDY LUDESCHER, BOB NAWROCKI, STACY ZIMMER, and DUANE BILLER, in their official capacities as Town Clerk and Town Board Supervisors of the Town of Lawrence; and STATE OF WISCONSIN,

Defendants.

Civil Case No.: 3:24-cv-00664-jdp

UNITED STATES' REPLY IN SUPPORT OF ITS MOTION FOR A PRELIMINARY INJUNCTION (ECF No. 3)

The United States respectfully submits this reply brief in support of its motion for a preliminary injunction (the "Motion") against the Town of Thornapple and Thornapple officials Angela Johnson,[1] Ralph C. Kenyon, Tom Zelm, and Jack Zupan, in their official capacities as Town Clerk and members of the Town Board of Thornapple (the "Thornapple Defendants"). *See* ECF Nos. 3-4.

I. Introduction

On September 20, 2024, the United States moved for preliminary injunctive relief against the Thornapple Defendants. ECF No. 3. The Court set a September 25, 2024, deadline for the Thornapple Defendants' response to the United States' Motion. Despite that deadline, the Thornapple Defendants declined to respond. Instead, Defendants moved to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). *See* ECF No. 13. The Court set a briefing schedule for that motion under which the United States has until October 16, 2024, to file a response. *Id.*

For the reasons stated in the United States' brief supporting its Motion, ECF No. 4, and given the Thornapple Defendants' failure to respond, this Court should grant the motion for a preliminary injunction and enter the proposed Order.

II. The Thornapple Defendants Have Waived Any Arguments Opposing the Preliminary Injunction.

The Thornapple Defendants elected not to respond to the United States' Motion for a Preliminary Injunction, despite the Court's detailed "Procedure to be Followed on Motions for

[1] If, as the Thornapple Defendants represent, Angela Johnson has resigned as municipal clerk, *see* ECF No. 13 n.1, Ms. Johnson's successor is automatically substituted as a party. *See* Fed. R. Civ. P. 25(d).

Injunctive Relief."[2] As a result, they do not appear to dispute any of the United States' proposed findings of fact, ECF No. 5. Further, they have waived any arguments in opposition to the motion. *See Bernard v. Ill. Dep't of Corr.,* No. 20-cv-50412, 2023 WL 8650374, at *2 (N.D. Ill. Dec. 14, 2023) (finding that, in failing to file a response, the defendant waived any arguments in opposition to the plaintiff's motion for a preliminary injunction); *Bonte v. U.S. Bank, N.A.*, 624 F.3d 461, 466 (7th Cir. 2010) ("Failure to respond to an argument . . . results in waiver"); *see also Wojtas v. Cap. Guardian Tr. Co.,* 477 F.3d 924, 926 (7th Cir. 2007) (a party's failure to oppose an argument in a 12(c) motion constituted a waiver because "[a] failure to oppose an argument permits an inference of acquiescence and 'acquiescence operates as a waiver'" (quoting *Cincinnati Ins. Co. v. E. Atl. Ins. Co.*, 260 F.3d 742, 747 (7th Cir. 2001))).

III. The United States Is Substantially Likely to Succeed on the Merits of Its HAVA Claim.

To the extent Thornapple attempts to rely on their motion to dismiss as a response to the United States' Motion, that pleading fails to demonstrate that preliminary injunctive relief is inappropriate here. Thornapple's sole legal argument in response to the United States' complaint—raised in their motion to dismiss—is that a paper ballot voting system "does not amount to a 'voting system' under HAVA." Thornapple Defs.' Mot. to Dismiss, ECF No. 13 ("Mot. to Dismiss") at 2.[3] Defendants are incorrect. Put simply, Section 301's text explicitly

[2] According to the Court's "Procedure to be Followed on Motions for Injunctive Relief," where a movant has filed a motion and supporting materials in compliance with the Court's procedures, "the opposing respondent(s) *shall file and serve*," among other things, "[a] response to the movant's statement of proposed findings of fact . . . . together with a brief in opposition to the motion for injunctive relief no later than" the deadline set by the Court. *See* W.D. Wisc. Local Rules, Motions for Injunctive Relief, https://perma.cc/FD32-VPDM (emphasis added).

[3] The United States addresses briefly the arguments raised in Thornapple's recently filed 12(b)(6) motion. The United States reserves its right to supplement its response to Defendants' motion to dismiss in an opposition filed pursuant to the October 16 deadline set by the Court.

contemplates that "voting systems" used to conduct federal elections include a "paper ballot voting system." 52 U.S.C. § 21081(a)(B), (b)(2), (c)(2). And HAVA's purpose and legislative history bolster that conclusion.

A. Thornapple's practice of conducting elections using paper ballots is a "voting system" governed by HAVA.

Congress designed HAVA to improve the administration of elections for federal office in the United States. The Act does so by, among other things, establishing certain "uniform and nondiscriminatory election technology and administration requirements," which apply in elections for federal office. *See* 52 U.S.C. §§ 20901-21145. Those minimum requirements are set forth in Title III of HAVA, which includes Section 301. *Id.* § 21081. Section 301, titled "Voting Systems Standards," contains requirements that "[e]ach voting system used in an election for Federal office" must meet. *Id.* Relevant here, one such requirement is that a voting system "be accessible for individuals with disabilities, including nonvisual 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." *Id.* § 21081(a)(3)(A). To satisfy this requirement, any voting system in use on or after January 1, 2006, must include "at least one direct recording electronic voting system or other voting system equipped for individuals with disabilities at each polling place." *Id.* § 21081(a)(3)(B), (d).

Thornapple argues that using paper ballots for voting in federal elections is not a "voting system" covered by HAVA. Mot. to Dismiss at 3-7. They are wrong. Section 301 defines a "voting system" as:

(1) The total combination of mechanical, electromechanical, or electronic equipment (including the software, firmware, and documentation required to program, control, and support the equipment) that is used—
   A. to define ballots;
   B. to cast and count votes;
   C. to report or display election results; and
   D. to maintain and produce any audit trail information; and

(2) the practices and associated documentation used—
   A. to identify system components and versions of such components;
   B. to test the system during its development and maintenance;
   C. to maintain records of system errors and defects;
   D. to determine specific system changes to be made to a system after the initial qualification of the system; and
   E. to make available any materials to the voter (such as notices, instructions, forms or paper ballots).

Id. § 21081(b). Thornapple errs: a system of conducting elections using paper ballots is a "practice[] . . . used" to make available certain "materials to the voter," including "paper ballots." *Id.* Thornapple's paper ballot voting system therefore fits squarely within Congress's definition of a "voting system."

This plain reading of the definition of "voting system" conforms to the structure and the text of the rest of Section 301, which sets out minimum requirements for voting systems used to conduct federal elections. Section 301, titled "Voting Systems Standards," sets out minimum standards for voting systems in several general categories, including, among other things, voter verification of the votes selected, notification of "over-votes," and accessibility for voters with disabilities. *Id.* § 21081(a)(1), (3). Section 301's definition of "voting system" applies to all of Section 301's voting system requirements. "A word or phrase in a statute should not be interpreted in a vacuum; rather, 'the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Loja v. Main St. Acquisition Corp.*, 906 F.3d 680, 683 (7th Cir. 2018) (citation omitted). Read as a whole, Section 301 uses the phrase "paper ballot voting system" three separate times, including in a subheading. 52 U.S.C. § 21081(a)(B),

(b)(2), (c)(2). If Congress intended to exclude such systems from HAVA's minimum requirements entirely, it would make no sense to name paper ballots as a type of voting system and protect their use in the context of Section 301's voter verification requirement. *Id.*; *see also Corley v. United States*, 556 U.S. 303, 314 (2009) (describing the canon against superfluity as "one of the most basic interpretive canons"); *Rubin v. Islamic Rep. of Iran*, 830 F.3d 470, 484 (7th Cir. 2016) (similar).

HAVA's purpose of setting "uniform" requirements for local units of government that administer federal elections would also be significantly undermined by interpreting the statute to allow municipalities to opt out of its minimum standards. Through Section 301, Congress sought to make voting systems "accessible for individuals with disabilities," including voters with disabilities that make reading, marking, or handling a paper ballot difficult or impossible. 52 U.S.C. § 21081(a)(3)(A). And Congress made the appropriate judgment that the right to "accessible" voting systems includes the right to enjoy the "privacy and independence" available to voters without disabilities. *Id.* Thornapple's references to the assistance available to voters with disabilities under Wisconsin state law is therefore beside the point; Congress determined that for states and sub-jurisdictions to satisfy their accessibility obligations, they must use "at least one direct recording electronic voting system or other voting system equipped for individuals with disabilities at each polling place." *Id.* § 21081(a)(3)(B); *see also Am. Ass'n of People with Disabilities v. Harris*, 647 F.3d 1093, 1096 & n.3 (11th Cir. 2011) (explaining that paper ballot-based voting systems do not "enable [voters with disabilities] to vote without the assistance of third parties" unless additional accessibility-related equipment is provided). If HAVA permitted municipalities to opt into paper ballot voting systems, and therefore opt *out of*

what Congress considered to be the floor for accessibility standards, HAVA's purpose would be weakened beyond recognition.

Finally, to the extent the Court determines that it is ambiguous whether Section 301's "voting systems standards" include "paper ballot voting system[s]"—the exact phrase used in the statute—HAVA's legislative history erases all doubt. That record consistently describes HAVA as establishing minimum standards for all voting systems used in federal elections, without reference to any method of conducting elections that might fall outside the definition of "voting system." For example, in describing Title III of HAVA, Senator Bond explained that Section 301 "concerns the voting system, which includes the type of voting machine or *method* used by a jurisdiction." 148 Cong. Rec. S10488-02 (2002) (statement of Sen. Bond) (emphasis added). Senator Bond also recognized that "certain technologies," such as "paper ballots," do not have the same ability to conform to these requirements as others and explained that states that use such systems need to have additional procedures in place to meet HAVA's minimum standards. *See id.* (explaining, for example, that paper ballots do not notify voters of overvotes, and therefore paper ballot-based jurisdictions are required to have certain voter education systems in place). Senator Dodd further recognized that paper ballot systems are voting systems governed by HAVA by defining "paper ballot systems" as "those systems where the individual votes a paper ballot that is tabulated by hand," and then distinguishing those systems from "other types of voting systems," including direct recording electronic systems and lever machines. *Id.* (statement of Sen. Dodd).

B. The Individual Thornapple Defendants

The United States named the Town of Thornapple and the members of the Thornapple Town Board in their official capacities to ensure complete relief in this action given the Town's

ongoing defiance of federal law. The United States is reviewing Thornapple's Motion to Dismiss the claims against the individual town officials and may reply more fully in a response to the motion to dismiss filed pursuant to the Court's briefing schedule. But given the need for immediate relief, including the need for the members of the Thornapple Town Board to vote to rescind the Board's June 2023 decision to withhold the Town's accessible voting machine from voters, the United States believes that no harm would flow from a preliminary order against all Thornapple Defendants should this Court find that relief is appropriate.

IV. Conclusion

For these reasons, the United States respectfully requests that the Court grant its motion for a preliminary injunction and enter the proposed Order.

Date: September 26, 2024

KRISTEN CLARKE
Assistant Attorney General
Civil Rights Division

TIMOTHY M. O'SHEA
United States Attorney
Western District of Wisconsin

/s/ Margaret M. Turner
R. TAMAR HAGLER
RICHARD A. DELLHEIM
MARGARET M. TURNER
BRIAN REMLINGER
Attorneys, Voting Section
Civil Rights Division
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530
brian.remlinger@usdoj.gov
202-717-4154

/s/ Barbara L. Oswald
LESLIE K. HERJE
BARBARA L. OSWALD
Assistant United States Attorneys
United States Attorney's Office
Western District of Wisconsin
222 West Washington Ave, Suite 700
Madison, WI 53703
barbara.oswald@usdoj.gov
608-250-5478